The University of the State of New York

The State Education Department
State Review Officer
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No. 21-234

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:
Brain Injury Rights Group, Ltd., attorneys for petitioners, by John Henry Olthoff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Hae Jin Liu, 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 the interim decision of an impartial hearing officer (IHO) determining 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 2021-22 school year. 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

At this point in the proceeding, no evidence has been admitted and no witnesses have testified. Accordingly, there is little information regarding the student's educational history and the primary focus is on the procedural history of this matter leading up to this appeal.

A. Due Process Complaint Notice

In a July 6, 2021 due process complaint notice the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (Due Proc. Compl. Not. at p. 1). According to the parents, the student had previously attended Adaptive Solutions for preschool and on that date was attending the International Institute for the Brain

(iBrain) (id. at pp. 1, 3).[1] As relevant to this appeal, the parents requested a pendency placement for the student and asserted that the student's placement for the pendency of this proceeding consisted of "the direct payment of tuition and costs for related services at iBRAIN" along with transportation (id. at pp. 1-2). According to the parents, "[t]he legal basis for pendency and the specific program that should be funded for [the student] as his operative placement is the educational program [the student] is receiving at iBRAIN for the 2021/2022 ESY" (id. at p. 2).

B. Impartial Hearing Officer Decision

The parties appeared for a hearing on pendency on September 9, 2021 (Tr. pp. 1-20). During the hearing, counsel for the parents acknowledged that "the student does not have basis or a pendency in the iBRAIN program" (Tr. p. 5). The parties agreed that a September 2019 IEP constituted the student's last agreed upon placement for the purpose of pendency (Tr. pp. 6-8).[2] The IHO then asked the parties if they had a placement to implement the September 2019 IEP; counsel for the district indicated the September 2019 IEP had called for placement in an approved preschool program and the student has since aged out of that program; counsel for the parents indicated that iBrain could implement the September 2019 IEP, but on further questioning conceded that iBrain did not offer a 12:1+2 special class which was recommended in the September 2019 IEP (Tr. pp. 8-15). Counsel for the district then indicated that he could investigate whether the district had a placement available that could implement the September 2019 IEP (Tr. pp. 15-16). Based on the information provided, the IHO determined that there was no pendency placement for the student (Tr. p. 16).[3]

The parents submitted a memorandum of law in support of their application for an order directing that the district fund the student's placement at iBrain for the pendency of this proceeding (see Parent Mem. of Law in Support of an Order on Pendency). In the parents' written submission, the parents conceded that under the Second Circuit's holding in Ventura de Paulino v. New York

[1] The parents refer to the preschool the student attended as either "ADAPT," "Adaptive Solutions," or "UCP Adapt" (compare Due Proc. Compl. Not. at p. 3; with Parent Mem. of Law in Support of an Order on Pendency at pp. 2, 3, 7, and Req. for Rev. ¶2). Accordingly, it is unclear based on the documents submitted by the parents as to what school the student actually attended for preschool. However, in order to maintain consistency with the IHO Decision, the student's preschool will be referred to as Adaptive Solutions in this decision.

[2] The hearing record contains no documentary evidence whatsoever, and pursuant to 8 NYCRR 200.5[j][5][vi] and 279.9[a], the district was required to submit the due process complaint notice to the Office of State Review as it is deemed by State regulation to be part of the administrative record when a party fails to offer it as an exhibit. The September 2019 IEP was marked for identification but was never submitted into evidence (Tr. p. 3). The parents made allegations regarding an April 2021 preschool IEP in their due process complaint notice, but no mention is made regard what transpired during the 2020-21 school year when the student was a preschool student, but as further described below, the parties agreed to the September 2019 IEP as pendency, so it is of little consequence at this juncture.

[3] The parties thereafter appeared for a prehearing conference on September 17, 2019 (Tr. pp. 21-33). The parents moved for the IHO's recusal by submitting a memorandum of law dated September 28, 2021 in which the parents presented their position as to how the matter was proceeding and indicated they believed the IHO violated their rights to have the matter completed within the statutory timeframe (Parent Motion for Recusal). The hearing record does not include a written decision by the IHO as to the recusal request; however, the parties convened on October 12, 2021 for the limited purpose of the IHO reading his decision as to recusal into the hearing record; the IHO denied the parents' request (Tr. pp. 34-39).

City Department of Education, 959 F.3d 519 (2d Cir. 2020), parents "are not entitled to receive public funding under the stay-put provision for a new school under the basis of its purported substantial similarity to the last agreed-upon placement" (Parent Mem. of Law in Support of an Order on Pendency at p. 6). However, the parents argued that a footnote in the Ventura de Paulino decision applied, which permitted the IHO to award the parents pendency at their preferred location, iBrain, because the student's last agreed upon placement was no longer available to the student (id. at pp. 6-7). As an alternative, the parents argued that they should be entitled to receive payment to iBrain equal to what the district would have paid to Adaptive Solutions, including tuition, related services, special transportation, and a 1:1 nurse (id. at p. 7).

The district opposed the parents' motion (Reply Brief and Memorandum of Law). The district argued that the hearing record did not indicate that Adaptive Solutions was unavailable as a placement for the student and that evidence had not been submitted as to whether the district could implement the student's September 2019 IEP (id. at pp. 2-3). Among other things, the district asserted that the IHO lacked jurisdiction to place the student in a new school due to the unavailability of the school that was previously implementing the student's IEP; according to the district, the parents' only options in that situation are to either come to an agreement with the district as to placement or to file for an injunction in court (id. at pp. 5-6).

In an interim decision dated October 19, 2021, the IHO determined that both parties agreed that the September 2019 IEP set forth the student's pendency and was last implemented at Adaptive Solutions, the student's preschool placement (IHO Decision at p. 2). The IHO also noted that the parents bear the burden of proving that the student's then-current placement is unavailable and then found that "[b]ecause Parent did not present any evidence for the threshold that Adaptive Solutions declined to enroll Student for 2021/22 SY, there is no need to address whether the Department has refused or failed to fund a placement at Adaptive Solutions" (id.). The IHO went on to find that the parents cannot enroll the student in a new school and then invoke the stay-put provision to force the district to pay for the cost of the student's attendance at the new school on a pendency basis (id. at pp. 2-3).

IV. Appeal for State-Level Review

The parents appeal from the IHO's interim decision, asserting that the IHO erred in failing to find that iBrain was the student's pendency placement and in failing to award funding for the student's placement at iBrain for the pendency of this proceeding. According to the parents, this matter falls within a footnote to the Ventura de Paulino decision, discussing what happens when the school providing pendency services is no longer available and the district either refuses or fails to provide pendency services. The parents assert that the IHO erred in not finding that Adaptive Solutions was unavailable to the student and in placing the burden for proving that Adaptive Solutions was unavailable on the parents. According to the parents, the IHO disregarded her own factual findings that Adaptive Solutions was unavailable and that the district failed to offer any placement as pendency for the student. The parents argued that the IHO erred in failing to make any determination as to what constitutes pendency for the student and also allege that the IHO erred in finding that she lacked equitable authority to order pendency at iBrain. The parents request a finding that the student is entitled to pendency at iBrain for the remainder of this proceeding, or, in the alternative, that the student is entitled to funding for iBrain for the pendency of this

proceeding up to the amount that the district would have been obligated to pay for the student's placement at Adaptive Solutions.

In an answer, the district denies each of the allegations set forth in the request for review. Initially, the district contends that the IHO's interim decision should be upheld. More specifically, the district asserts that the IHO correctly found that the September 2019 IEP was the student's last-agreed upon placement and constitutes the student's pendency placement. According to the district, once the parents unilaterally placed the student at iBrain, they rejected the pendency program; the district contends that once the parents moved the student it had no further obligations regarding pendency. The district further asserts that under Ventura de Paulino, the parents cannot enroll the student in a new school and then invoke the pendency provision. Regarding the parents' allegation that Adaptive Solutions was unavailable, the district asserts, first that the parents did not raise this argument in the due process complaint notice as a basis for pendency and that the parents bear the burden of showing that the placement was unavailable, and second that as footnoted in Ventura de Paulino, if the program was unavailable the parents' options would have been to either seek an agreement with the district or seek a preliminary injunction in court.[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 Ventura de Paulino, 959 F.3d at 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; 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

[4] The parents submitted a reply to the district's answer. State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the parents' reply merely reasserts many of the same allegations as raised in the request for review and does not appear to address any of the issues permitted in a reply; accordingly, the parents' reply will be disregarded.

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

Initially, to the extent that the parents assert that the IHO did not make a determination as to what constitutes pendency for the student, that assertion is misplaced. The IHO determined that the student's pendency placement is the programming set forth in the student's September 2019 IEP (IHO Decision at p. 2). The remaining dispute between the parties, as it arises in the pendency aspects of this proceeding, is whether the district is required to locate a school to implement the pendency program after the parents have already unilaterally placed the student at a new school and then whether the district is required to fund the student's placement at the school selected by the parents if the district is unable or unwilling to locate a school to implement the student's pendency programming.

The substance of this inquiry was directly addressed by the Second Circuit; the Court found that the district had the authority "to determine how to provide the most-recently-agreed-upon educational program" (Ventura de Paulino, 959 F.3d at 534). More specifically, the Second Circuit held that if a parent disagrees with a district's decision on how to provide a student's educational program, the parent could either argue that the district's decision unilaterally modifies the student's pendency placement and invoke the stay-put provision, seek to persuade the district to agree to pay for the student's program in the parent's chosen school placement, or enroll the student in the new school and seek retroactive reimbursement from the district after the IEP dispute is resolved (id.). According to the Court, "what the parent cannot do is determine that the child's pendency placement would be better provided somewhere else, enroll the child in a new school, and then invoke the stay-put provision to force the school district to pay for the new school's services on a pendency basis" (id.).

Although the hearing record lacks evidence as to the student's current educational programming, the parents own allegations doomed their arguments. Based on the parents' due process complaint notice the parents unilaterally placed the student at iBrain for the 2021-22 school year, then subsequent to placing the student at iBrain, the parents filed for due process on July 6, 2021 and explicitly requested that the district fund the student's placement at iBrain during pendency as iBrain was the student's "operative placement" for the 2021-22 school year (Due Proc. Compl. Not. at p. 2). Accordingly, the parents appear to have done exactly what the Second Circuit determined was not permissible, i.e., enrolled the student at iBrain and the immediately invoked the stay-put provision to force the district to pay for the student's placement at iBrain on a pendency basis.

Much of the discussion during the limited hearing speculated on what would happen if the district were to be unable or became unwilling to locate a school to implement the student's pendency programming (see Tr. pp. 8-16). The parents' argument on appeal, and during the pendency hearing, focuses on a footnote contained in the Second Circuit's decision in Ventura de Paulino. In that footnote, the Second Circuit noted:

> We do not consider here, much less resolve, any question presented where the school providing the child's pendency services is no longer available and the school district either refuses or fails to provide pendency services to the child. Those circumstances are not present here. We note, however, that at least one of our sister Circuits has acknowledged that, under certain extraordinary circumstances not presented here, a parent may seek injunctive relief to modify a student's placement pursuant to the equitable authority provided in 20 U.S.C. § 1415[i][2][B][iii]. See Wagner v. Bd. of Educ. of Montgomery Cty., 335 F.3d 297, 302–03 (4th Cir. 2003) (involving a situation in which the pendency placement was no longer available, and the school district had failed to propose an alternative, equivalent placement)

(Ventura de Paulino, 959 F.3d 519, 534).

This is not the first time that counsel for the parents have raised this argument at this level, and counsel for the parents have been advised on previous occasions that "[t]o the extent that the parents cite to footnote 65 in Ventura de Paulino and argue[] that 'a parent may exercise self-help and seek an injunction to modify the student's pendency placement,' the parent should have pursued that argument in District Court because an administrative hearing officer does not have authority to issue a traditional injunction like a District Court to order a change in a student's stay-put placement" (Application of a Student with a Disability, Appeal No. 20-199; Application of a Student with a Disability, Appeal No. 20-198; Application of a Student with a Disability, Appeal No. 21-006; Application of a Student with a Disability, Appeal No. 20-196; Application of a Student with a Disability, Appeal No. 20-194; Application of a Student with a Disability, Appeal No. 20-201; Application of a Student with a Disability, Appeal No. 20-184). Additionally, at this point, the parents have not pointed to any cases in District Court where they have had any success with this argument, in fact, at least one District Court decision has advised counsel for the parents that "[i]f [their clients'] issue is that no timely pendency determination has been made, then they can move to obtain such relief. However, under Ventura, they may not unilaterally alter students' enrollments and then claim pendency funding on that basis" (Araujo v. New York City Dep't of Educ., 2020 WL 5701828, at *4 [Sept. 24, 2020]).

Considering the above, without the necessity of delving into the parties' arguments as to whether placement at Adaptive Solutions was available to the student to implement pendency at the start of the 2021-22 school year, the parents cannot obtain the relief they are seeking—the district funding the cost of the student's attendance at iBrain on a pendency basis. Rather, if the parents are interested in having the district provide for the student's pendency programming, they may remove the student from iBrain, return the student to the public programming,[5] and request to have the district implement the services described in the September 2019 IEP during the pendency of this proceeding. Alternatively, should the parents continue to seek funding for the student's attendance at iBrain for the pendency of this proceeding, the parents may seek a preliminary injunction requesting a change in the student's educational placement, an injunction for which the parents "bear[] the burden of demonstrating entitlement to such relief under the standards generally governing requests for preliminary injunctive relief" (Wagner v. Bd. of Educ. of Montgomery Cty., 335 F.3d 297, 302 [4th Cir. 2003]).

Finally, turning to the parents' request to receive funding for the student's placement at iBrain up to the amount of money the district would have spent in order to provide the student with a pendency program at his preschool placement under the Second Circuit's decision in T.M., the Second Circuit decision addressed reimbursement for private related service providers who were providing the same services the district was offering to provide as pendency (T.M., 752 F.3d at 172). In this instance, even if the holding in T.M. could be stretched to include reimbursement for private school tuition instead of just providers of related services, the parents conceded that iBrain was not offering a program that could implement the student's September 2019 IEP (Tr. pp. 14-15). Accordingly, any comparison to T.M. is misplaced and the parents' argument does not merit further consideration.

[5] If the parent were to return the student to public programing, it bears repeating that the pendency provision does not require that a student remain in a particular site or location (see Ventura de Paulino, 959 F.3d at 532).

VII. Conclusion

Having determined that the parents' request for funding for the student's placement at iBrain on a pendency basis is not permissible under the arguments presented by the parents, the necessary inquiry is at an end and the IHO's decision is upheld in its entirety.

I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 29, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER