



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-289

**Application of a STUDENT WITH A DISABILITY, by her 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 Zack Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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), which determined that their daughter's pendency placement after remand to the IHO to determine whether the parents' unilateral placement of their daughter at the International Academy for the Brain (iBrain) for the 2022-23 school year was appropriate, and whether respondent (the district) was required to fund the cost of the student's attendance.<sup>1</sup> The 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];

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<sup>1</sup> As discussed more fully below, this matter was remanded by the undersigned SRO for issues unrelated to pendency on October 10, 2023 (*see Application of the New York City Dept. of Educ.*, Appeal No. 23-161).

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**

This appeal arises from an IHO's interim decision related to the student's pendency (stay-put) placement issued after remand by the United States District Court for the Southern District of New York (see Davis v. Banks, 2023 WL 5917659 at \*1, \*5-\*6 [S.D.N.Y. Sept. 11, 2023]). Additionally, the student has been the subject of prior State-level administrative appeals (see

Application of the New York City Dept. of Educ., Appeal No. 23-161; Application of a Student with a Disability, Appeal No. 22-002; Application of a Student with a Disability, Appeal No. 19-058; Application of a Student with a Disability, Appeal No. 18-122). Due to the procedural posture of this matter and the parties' familiarity with it, the student's educational history will not be recited in detail. Briefly, the CSE convened on March 3, 2022, to formulate the student's IEP for the 2022-23 school year (see generally Dist. Ex. 5).<sup>2</sup> The parents disagreed with the recommendations contained in the March 2022 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2022-23 school year and, as a result, on June 17, 2022, notified the district of their intent to unilaterally place the student at iBrain (see Parent Ex. G).

### **A. Due Process Complaint Notice**

In a due process complaint notice, dated July 6, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A).<sup>3</sup> More specifically, the parents' challenge included allegations related to the 12:1+(3:1) special class recommended in the March 2022 IEP, the lack of a recommendation for a 1:1 private nurse, the lack of a recommendation for music therapy, as well as assertions that the parents were unable to visit the assigned public school site and that the responses the parents received from the assigned public school site to their list of questions were vague and not specific enough to let the parents know if the school could address the student's needs (Parent Ex. A at pp. 3-4). In addition, the parents presented challenges to the district's evaluations and the evaluation process, as well as to the March 2022 IEP present levels of performance, the parents' participation in the CSE process, and predetermination of the student's programming (*id.* at pp. 5-7).

### **B. Impartial Hearing Officer Decision and Subsequent Events**

After a prehearing conference on August 1, 2022, a hearing related to pendency on August 8, 2022, and status conferences on October 6, 2022, November 10, 2022, and December 12, 2022, an impartial hearing convened on December 30, 2022 and concluded on May 25, 2023 after 12 total days of proceedings (Tr. pp. 1-317). In an August 8, 2022 interim decision, the IHO found that the student's placement for the pendency of this proceeding consisted of direct funding for the student's placement at iBrain, nursing services, and special transportation (Aug. 8, 2022 Interim IHO Decision at pp. 4-5). In a decision dated June 26, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year, that iBrain was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition funding (June 26, 2023 IHO Decision at pp. 11-15). In finding that the district

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<sup>2</sup> The citations in this decision correspond with the certified record submitted to the Office of State Review for Application of the New York City Dept. of Educ., Appeal No. 23-161. After remand from the District Court, the parents offered four additional exhibits into evidence at an October 30, 2023 pendency hearing, which were admitted as Parent Exhibits A-D. Unfortunately, the pendency exhibits differ from Parent exhibits A-D previously admitted into the hearing record. To avoid further confusion, the exhibits will be referred to as Pendency Parent Exhibits A-D.

<sup>3</sup> The due process complaint notice was dated July 6, 2022; however, it appears to have been filed on July 5, 2022 (compare Parent Ex. A at p. 1, with Parent Ex. A at p. 10).

failed to offer the student a FAPE, the IHO determined that the recommended class size was not appropriate, that the CSE relied on information provided by iBrain, and that the parents raised valid concerns related to the class size, the duration of the recommended related services, and the absence of a dedicated nurse for the student (id. at pp. 12-13). As relief, the IHO ordered the district to fund the costs of the student's tuition and transportation for the student's attendance at iBrain for the 2022-23 school year (id. at p. 15).

The parents appealed the IHO's August 8, 2022 interim decision on pendency to the United States District Court for the Southern District of New York (Davis, 2023 WL 5917659 at \*1, \*5-\*6). [S.D.N.Y. Sept. 11, 2023]. The district appealed the IHO's June 26, 2023 decision to the Office of State Review (Application of the New York City Dept. of Educ., Appeal No. 23-161). The appeal to District Court involved ten students and, as relevant to the student in this matter, the District Court found that both the parents and the district proffered "plausible interpretations of the relevant language" set forth in the August 8, 2022 interim decision on pendency and therefore "the proper course [wa]s to remand for further clarification" noting "IHOs are plainly in the best position to interpret their own orders" (Davis, 2023 WL 5917659 at \*5 [internal quotations omitted]). Based on the foregoing, the District Court remanded the matter to the IHO in a decision dated September 11, 2023 (see Davis, 2023 WL 5917659).

On September 29, 2023, the parents' attorneys and the IHO convened for a status conference (Tr. pp. 318-27).<sup>4</sup> The IHO referenced the correct student and case number, but then stated that she had rendered her final decision on "September 27th, based on [her] characterization of the remand order to qualify [her] pendency order" (Tr. p. 319).<sup>5</sup> The IHO began discussing the "remand order" and one of the parents' attorneys responded that he was at a disadvantage because he had not received the decision from the SRO (Tr. pp. 319-21).<sup>6</sup> The IHO then emailed the parents' attorneys copies of the District Court's decision (Tr. p. 322). A discussion followed that was interrupted by audio interference, which resulted in the IHO stating that she would schedule a pendency hearing (Tr. pp. 321- 24).

### **C. State Review Officer Decision and Interim Impartial Hearing Officer Decision**

By decision dated October 10, 2023, the undersigned SRO upheld the IHO's ultimate determination that the district failed to offer the student a FAPE for the 2022-23 school year, albeit on different grounds (Application of the New York City Dept. of Educ., Appeal No. 23-161). Next addressing the appropriateness of the parents' unilateral placement of the student at iBrain, the undersigned SRO found that the recommended plan developed by iBrain was appropriate; however, there was enough evidence of unimplemented related services at iBrain during the 2022-23 school year to justify the district's assertion that the parents had not demonstrated that iBrain

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<sup>4</sup> The district did not appear.

<sup>5</sup> As noted above, the IHO's interim decision on pendency was dated August 8, 2022 and the IHO's decision on the merits was rendered on June 26, 2023. September 27, 2022 was the date the parents filed their complaint in District Court (Answer ¶4).

<sup>6</sup> As noted below, the SRO Decision was issued, afterwards, on October 10, 2023 (Application of the New York City Dept. of Educ., Appeal No. 23-161).

had provided education instruction specially designed to meet the unique needs of the student during the 2022-23 school year. The undersigned SRO further found that there was insufficient evidence in the hearing record to determine the number of related service sessions that were missed, the number of related service sessions subsequently made up by iBrain, or whether the make-up services rectified the failure to deliver related services on a consistent basis during the school year. The evidence in the hearing record was simply not specific enough to make those determinations and without additional information it was not possible to render a determination with regard to the district's appeal of the IHO's decision. The undersigned SRO further noted that there was a dispute between the parties with respect to the student's progress during the 2022-23 school year. For all of those reasons, the undersigned SRO determined that there was insufficient information in the hearing record to render a decision as to the appropriateness of the parents' unilateral placement of the student at iBrain.

Due to the IHO's failure to properly develop the hearing record as to the issue of the appropriateness of iBrain, the undersigned SRO remanded the matter for a determination as to whether the program delivered to the student at iBrain for the 2022-23 school year was appropriate, rather than to deny the parents' request for funding of the student's tuition at iBrain due to a failure to present sufficient evidence as to the delivery of the student's related services. The undersigned SRO also noted that, upon remand, the IHO may consider additional evidence as to the student's progress during the 2022-23 school year and to consider the student's need for and funding of 1:1 nursing services at iBrain. The IHO was instructed to specifically address the question of direct funding or reimbursement as requested by the parents in their answer and cross-appeal in Application of the New York City Dept. of Educ., Appeal No. 23-161.

Notably, the parties did not appeal any aspect of the IHO's August 8, 2022 interim decision on pendency to the Office of State Review, nor did the undersigned SRO's decision in Application of the New York City Dept. of Educ., Appeal No. 23-161 address or remand any aspect of pendency.

The parties reconvened on October 30, 2023 for a pendency hearing (Tr. pp. 328-42). The IHO began the proceedings by stating that "this is a remanded continuation of the pendency hearing" (Tr. p. 329). The IHO further stated that "this case was remanded on two issue[s]. One, to clarify the pendency decision, and two, to clarify the student's need for nursing services and whether the private unilateral placement could adequately provide it. Today, we're just going to deal with issue one" (Tr. p. 330).<sup>7</sup> The parties proceeded to give their respective positions on pendency (Tr. pp. 330-39).

By interim decision dated October 30, 2023, the IHO determined that the student's pendency lay in a February 24, 2022 SRO Decision, Application of a Student with a Disability, Appeal No. 22-002 (Pendency Parent Ex. C; see also Parent Ex. B). The IHO ordered that the district "shall reimburse the transportation expenses outlined above retroactive to the filing of the

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<sup>7</sup> At this point in the proceedings, there may have been some confusion as to the two separate remands, one remand from District Court as to pendency, and one remand from this office as to the merits.

Complaint on July 7, 2022, through the subsequent [IHO Decision] issued on June 26, 2023" (Oct. 30, 2023 Interim IHO Decision at p. 5).<sup>8</sup>

#### **IV. Appeal for State-Level Review**

The parents appeal and seek review of the IHO's interim decision dated October 30, 2023 on the sole ground that the IHO erred by not specifying that the district should directly fund the transportation provider for the student's pendency services, rather than reimburse the transportation expenses. In an answer, the district agrees that the IHO erred in her use of the word reimburse and requests that the IHO's order be modified to state that the district shall fund the transportation expenses for the student's pendency. The district further asserts the additional language in the parents' request for review stating that the district was responsible for the funding of the student's placement at iBrain should be ignored or declined. In a reply, the parents clarify that the statement related solely to the request for modification of the interim decision on pendency and not an attempt to circumvent the subject of the pending remand to the IHO to determine the appropriateness of iBrain for the 2022-23 school year.

#### **V. Discussion**

At the outset, I note that neither party has asserted that an SRO lacks jurisdiction over the parents' appeal.<sup>9</sup> However, it is worth noting that having the proceeding pending simultaneously in two forums leaves the matter in an awkward posture. This comes about because, unlike most matters under the IDEA, some courts have indicated that a parent may bring an action for pendency without first exhausting administrative remedies, and, in this instance, the IHO's initial pendency decision was already being addressed in a pending District Court proceeding without having come before this office previously and the court was only seeking clarification of the IHO's initial pendency decision as part of the remand to the IHO (Davis, 2023 WL 5917659 at \*5-\*6; see Ventura de Paulino, 2020 WL 2516650, at \*8 [finding that "where 'an action alleg[es a] violation of the stay-put provision,' such action 'falls within one, if not more, of the enumerated exceptions' to the IDEA's exhaustion requirement"], quoting Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199 [2d Cir. 2002] [noting that the administrative process is inadequate given the time sensitive nature of stay-put rights]). Nevertheless, I have considered whether or not it is appropriate to abstain from making a decision on the student's pendency placement, as the remand related to pendency was issued by the District Court and pendency was never appealed to the Office of State Review in the first instance; however, given that the parties have not raised any

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<sup>8</sup> As noted above, the due process complaint notice was dated July 6, 2022, however the due process complaint notice was sent to the district by email dated July 5, 2022 (compare Parent Ex. A at p. 1, with Parent Ex. A at p. 10).

<sup>9</sup> Additionally, neither party has challenged the IHO's determination that the student's right to pendency ended with her June 26, 2023 decision (Oct. 30, 2023 Interim IHO Decision at p. 5). The IHO's October 30, 2023 interim decision also incorrectly lists the date of the due process complaint notice as July 7, 2022, rather than July 5, 2022 as noted above (Oct. 30, 2023 Interim IHO Decision at p. 5). Regardless of the IHO's use of incorrect dates, the student's right to pendency attached by operation of law as of the filing of the parents' due process complaint notice on July 5, 2022 and continues throughout the proceedings (see 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]).

jurisdictional challenges and appear to agree on the appropriate remedy, I will proceed with the parties' joint request.

Review of the parents' request for review and reply, as well as the district's answer reveals that the parties agree that the IHO erred in the phrasing of her ordering clause which stated that the district "shall reimburse the transportation expenses" during the pendency of this proceeding and the parties agree that the IHO should have awarded direct funding for the cost of the student's transportation from the date of the filing of the due process complaint notice through the date of her June 26, 2023 decision. Accordingly, I will modify the Interim IHO Decision based on the parties' agreement.

## **VI. Conclusion**

Based on the parties agreement as to pendency, the proper course is to direct the district to fund the cost of the student's pendency services, which includes the cost of the student's nursing services and transportation expenses from the date of the filing of the due process complaint notice on July 5, 2022 through the conclusion of the proceedings associated with this proceeding.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's interim decision on pendency dated October 30, 2023, is modified by striking the language "shall reimburse" and replacing it with "shall fund"; and

**IT IS FURTHER ORDERED** that the district shall fund the cost of the student's pendency services, which includes the cost of the student's nursing services and transportation expenses from the date of the filing of the due process complaint notice on July 5, 2022 through the conclusion of the proceedings associated with this proceeding.

**Dated:**            **Albany, New York**  
                         **February 15, 2024**

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**