The University of the State of New York

The State Education Department
State Review Officer
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No. 23-301

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:
The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. 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) determining her 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, 2022-23, and 2023-24 school years. 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

In a due process complaint notice dated September 7, 2023, the parent alleged that the district violated Section 504 of the Rehabilitation Act of 1973 (section 504), the IDEA, and Article 89 of the New York Education Law (Parent Ex. A). The parent asserted many procedural and substantive claims in support of her position that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22, 2022-23, and 2023-24 school years and sought, among other relief, compensatory education and services (id.).

The matter was appointed to an IHO from the Office of Administrative Trials and Hearings (OATH). A prehearing conference was held on October 20, 2023, where the parent requested that the IHO issue an interim order finding that the student's pendency placement lay in a February 1, 2023 IEP, which the parent asserted was the student's last-implemented IEP (Tr. pp. 1, 3-5). More specifically, the parent requested that the student's pendency program include three hours per week of 1:1 special education itinerant teacher (SEIT) services and two 30-minute sessions per week of 1:1 occupational therapy (OT) (Tr. pp. 3-5). The district opposed the parent's requested pendency program, arguing that the February 1, 2023 IEP could not form the basis of the student's pendency program because it was not an agreed-upon IEP as evidenced by the fact that the parent was challenging such IEP in the September 7, 2023 due process complaint notice (Tr. p. 3). Both parties submitted written briefs to support their respective positions on the student's pendency program (see IHO Ex. 1).

In an interim decision dated November 6, 2023, the IHO granted the parent's request for a pendency order and found that the student's pendency program was based upon the last implemented IEP, the February 1, 2023 IEP, and included three hours per week of 1:1 SEIT services and two 30-minute sessions per week of 1:1 OT (Interim IHO Decision at p. 4).[1] However, the IHO determined that SEIT services are only available for preschool children, and because the student aged out of preschool, he was no longer eligible for SEIT services as a school-aged student and the district would therefore have to provide comparable special education services to fulfill its pendency obligation (id.). The IHO next determined that special education teacher support services (SETSS) was comparable to SEIT services (id.). Accordingly, the IHO directed the district to fund three 60-minute sessions of 1:1 SETSS per week and two 30-minute sessions of 1:1 OT per week as the student's pendency program (id. at pp. 4-5).

IV. Appeal for State-Level Review

The parent appeals the IHO's interim decision on pendency only insofar as the IHO replaced SETSS for SEIT services. The parent contends that the IHO correctly determined that the February 1, 2023 IEP formed the basis of the student's pendency program and that the student was entitled to 1:1 OT services as part of his pendency. However, the parent alleges that the IHO erred in holding that SEIT services were not available to school-aged students and failing to develop the hearing record with respect to the availability of SEIT services to school-aged students. The parent further argues that SETSS and SEIT services are not the same services, not interchangeable, and not comparable and therefore the IHO erred in determining that SETSS is an appropriate substitute for individual SEIT services. The parent requests that an SRO reverse the IHO's change of the student's pendency from SEIT services to SETSS.

In its answer, the district avers that it does not contest the parent's allegation that the IHO erred in changing the student's pendency from SEIT services to SETSS. The district further submits additional evidence to show that it has taken steps to implement the student's pendency

[1] According to the parent, the recommendation for group SEIT services that was reflected on the February 1, 2023 IEP was a typographical error as the student's prior IEP recommended individual SEIT services, the February 1, 2023 CSE did not discuss changing the student's SEIT services from individual to group, and the student continued to receive individual SEIT services despite the change in the February 1, 2023 IEP (see Parent Exs. C at p. 16; F; see also IHO Ex. 1 at pp. 1-2).

program as requested by the parent. The district requests that since it has agreed to the relief the parent requested, an SRO should dismiss the case as moot.

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. 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]).[2] 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

[2] In Ventura de Paulino, 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).

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 v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

VI. Discussion

The parent only appeals the IHO's interim decision on pendency insofar as the IHO replaced SEIT services with SETSS and requests as relief that an SRO change the student's pendency from SEIT services to SETSS.[3] The district requests that the parent's appeal be dismissed as moot because it "no longer contests the Parent's request for SEIT services and has taken steps to implement the Student's pendency program as requested by the Parent" (Answer ¶ 5). The district submits additional evidence to support its argument that the matter has been resolved and there is no longer a live controversy. The district's additional evidence consists of a "Pendency Implementation Form" that indicates that it was submitted by the parent's attorney and signed by the district's attorney on February 9, 2024 (see SRO Ex. 1).[4] The district further submits

[3] The term SETSS is not defined in the State continuum of special education services (see NYCRR 200.6), and the manner in which those services are treated in a particular case is often in the eye of the beholder. As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

[4] Prior to the execution of this form, the district, with the consent of the parent's counsel, requested several extensions of time to serve and file its answer on the ground that the parties were engaged in settlement negotiations.

a "Declaration of Implementation of Pendency" by its attorney, indicating that the district agrees that the student's pendency includes three hours per week of SEIT services.

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).[5] Here, I will accept the "Pendency Implementation Form" dated February 9, 2024, which reflects that the basis for the student's pendency program is an "[a]greement between the parties" that the student's pendency includes 1:1 SEIT services three hours per week effective as of the date of the filing of the due process complaint notice, September 7, 2023 (see SRO Ex. 1).

Turning to the district's argument that the parent's appeal is now moot, the dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). However, a claim may not be moot, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Toth, 720 Fed. App'x at 51; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040). The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88).

Based on the additional evidence that the district submits with its answer, the parties now agree that the student's pendency program includes 1:1 SEIT services (see SRO Ex. 1). The district further submits a declaration from its attorney that the district provided the "Pendency Implementations Form" to the "Impartial Hearing Office" with direction to that office to upload the form "for implementations of the services outlined within that form." The parent has not submitted a reply or otherwise challenged the district's representation that the parties now agree that the student's pendency program includes 1:1 SEIT services. It is well-established that a student remains at his current educational placement during the pendency of an administrative proceeding unless the State or local educational agency and the parents or guardian otherwise agree (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]). The "Pendency Implementation Form" reflects the parties' agreement to the identified services

[5] The parent also submits additional evidence with her request for review (see SRO Exs. A-C). However, given the parties' February 9, 2024 agreement that the student's pendency program includes 1:1 SEIT services, it is not necessary to consider the parent's additional evidence.

constituting pendency from the date of the due process complaint notice (see SRO Ex. 1). Given the undisputed representation that the district and parent have reached an agreement that the student's pendency program includes 1:1 SEIT services, there is no longer a live controversy requiring SRO intervention. The parent only challenges the IHO's replacement of SEIT services with SETSS and the district now agrees to the relief sought by the parent in her request for review (i.e., the district agrees that SEIT services are part of the student's pendency) (see Req. for Review). There are no other remaining live issues between the parties with respect to pendency. When parties settle all their claims, a case generally becomes moot (see Hammond Clock Co. v. Schiff, 293 U.S. 529 [1934]). This is not one of those exceptional situations where the matter is "capable of repetition, yet evading review." Accordingly, the matter is moot as there is no live controversy between the parties and no further relief that may be granted.

VII. Conclusion

Given the parties' agreement that the student's pendency program includes 1:1 SEIT services and having determined that there is no further relief that may be granted, the necessary inquiry is at an end and no further analysis of issues is required.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 18, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER