The University of the State of New York

The State Education Department
State Review Officer
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No. 24-409

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 Rory Bellantoni, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This State-level administrative review is being conducted pursuant to an order of remand issued by the United States District Court for the Southern District of New York for adjudication of petitioners' (the parents') appeal of an impartial hearing officer's (IHO's) decision issued after remand (see R.Z. v. Banks, 24-CV-4401 [S.D.N.Y. Sept. 25, 2024]). The parents appeal from an IHO decision issued after remand which clarified a pendency determination that respondent (the district) shall reimburse the parents for the costs related to providing transportation services to their son only for each school day that their son used the transportation services. The appeal must be dismissed.

II. Overview—Administrative Procedures

This proceeding initially arose under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law.

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

As briefly mentioned at the outset, this appeal arises from an order of remand issued by the District Court directing an SRO to adjudicate the parents' challenges to the IHO's decision issued after remand clarifying the transportation aspects of her pendency determination (see R.Z. v. Banks, 24-CV-4401 [S.D.N.Y. Sept. 25, 2024). The underlying procedural history of this matter

was previously set forth in Application of a Student with a Disability, Appeal No. 23-310 and will be briefly repeated as relevant here for ease of reference.

The parents filed a due process complaint notice dated July 6, 2022 seeking direct tuition payment for the student's attendance at the International Academy for the Brain (iBrain) and funding for the costs of private, special transportation to and from the student's home and iBrain for the 2022-23 school year (Parent Ex. A). The IHO issued an interim order on pendency dated August 24, 2022, which found that the student's pendency was based upon a prior IHO's order on pendency dated December 13, 2021, which was issued during an impartial hearing pertaining to the 2021-22 school year (Interim IHO Decision at p. 1; see Parent Pendency Ex. C). The IHO's pendency order in the present matter directed the district to fund tuition at iBrain, "door-to-door special transportation to and from [s]tudent's home and iBRAIN, and related services (including a 1:1 paraprofessional)" (Interim IHO Decision at p. 2).[1]

On September 27, 2022, the parents, along with nine other parents who had also obtained pendency orders for the district to pay for all or part of the costs associated with their children attending iBrain, commenced an action in the District Court for the Southern District of New York seeking enforcement of their respective pendency orders and subsequently filed a motion for summary judgment (see Davis v. Banks, 2023 WL 5917659 [S.D.N.Y. Sept. 11, 2023]). As relevant to this proceeding and the parents' enforcement of the IHO's August 24, 2022 pendency order, the remaining dispute before the Court was whether the district was obligated to pay all transportation costs that were incurred by the parents pursuant to a transportation contract that they had entered into with a private transportation provider or for only the costs of transporting the student on the days that he actually used the services (see id. at *1, *4-*5). The Court determined that the "sole source of the [district's] reimbursement obligations" depended on the language of the applicable administrative order (id. at *4). However, in reviewing the IHO's August 24, 2022 pendency order, the Court found that the IHO's language directing the district to fund transportation "to and from Student's home and iBRAIN" was unclear to resolve the parties' dispute because the IHO's language could be interpreted to support both parties' positions (id. at *5). Accordingly, on September 11, 2023, the Court issued an Opinion and Order remanding the matter to the IHO to interpret her own pendency order with respect to the scope of the district's obligation to fund transportation costs and conduct further fact finding if necessary (id. at *5-*6).

Upon remand from the District Court in Davis, the IHO conducted an administrative hearing on October 19, 2023 to clarify her pendency order with respect to the student's transportation to and from iBrain (Tr. pp. 31-39). By written decision after remand dated November 15, 2023, the IHO explained that, although the parents had submitted evidence of a transportation contract, it was the parents' burden to demonstrate the appropriateness of the transportation contract and prove that the district should be responsible for costs on days that the student did not use the transportation services (IHO Decision After Remand at pp. 3-4). The IHO

[1] In a final decision dated September 15, 2022, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year, that iBrain was an appropriate unilateral placement, and that there were no equitable considerations that would preclude or limit an award of tuition reimbursement (IHO Decision at pp. 6, 8-9). Among other relief, the IHO awarded the parents the costs "for transportation for the [s]tudent to and from the private school and the [s]tudent's home, of limited travel time of no more than 50 miles" (id. at p. 9).

determined that the parents failed to meet their burden and therefore equities supported a finding that the district did not have to pay for transportation when the student did not travel to or from iBrain (id. at p. 4). As such, the IHO clarified both her prior transportation orders by ordering the district to reimburse the parents for the student's transportation costs "for each round trip between the [p]arent's home and the iBRAIN School for each school day that the [s]tudent actually utilizes said transportation services" (id.).

As relevant here, the parents then appealed the IHO's November 15, 2023 decision after remand directly to the Office of State Review and argued that the IHO erred by clarifying that the district was responsible for only the costs of transportation when the student actually used the services rather than the full contractual amount the parents incurred pursuant to their third-party transportation contract.[2] In a decision dated February 7, 2024, the undersigned determined that the District Court had exclusive jurisdiction to adjudicate the parents' dispute over the enforcement of pendency as the parents initiated the enforcement action directly in the District Court and the District Court ordered the remand to the IHO solely for clarification of her transportation order; accordingly, the undersigned dismissed the parents' challenges to the November 15, 2023 decision after remand (Application of a Student with a Disability, Appeal No. 23-310). By Order dated September 25, 2024, the District Court remanded the matter to the SRO for adjudication of petitioners' challenges to the IHO's November 15, 2023 decision after remand (R.Z. v. Banks, 24-CV-4401 [S.D.N.Y. Sept. 25, 2024]). The District Court clarified that it did not retain exclusive jurisdiction over the matter (id.).

IV. Arguments on Remand

Upon remand, I have reexamined the hearing record of the impartial hearing proceedings, the IHO decisions, the prior State-level submissions, and the District Court's order of remand. Also, for consideration on remand, the Office of State Review, by letter dated September 27, 2024, offered both parties an opportunity to submit a written statement of their respective positions.

The parents did not submit an additional written statement for consideration on remand.

The district submitted a verified supplemental brief for consideration on remand. The district contends enforcement of the district's pendency obligations with respect to transportation costs is the only live issue at this juncture. The district argues that an SRO should not disturb the IHO's November 15, 2023 decision after remand that clarified the transportation award for purposes of pendency. According to the district, the IHO was in the best position to interpret her own pendency order and therefore her determination that "to and from" iBrain means that the district should only be responsible for the costs of transportation services actually used is entitled to due deference.

[2] In their request for review dated December 22, 2023, the parents also challenged the IHO's final decision dated September 15, 2022. The undersigned did not consider any allegations related to the IHO's September 15, 2022 final decision because the parents failed to timely initiate an appeal of such decision and were not aggrieved (Application of a Student with a Disability, Appeal No. 23-310).

V. Discussion

As explained in detail above, the parents commenced an enforcement action in the United States District Court for the Southern District of New York to compel the school district to reimburse the parents for the student's transportation costs pursuant to the IHO's August 24, 2022 pendency order and the District Court issued a limited remand to the IHO to clarify the scope of her pendency order with respect to transportation costs (see Davis, 2023 WL 5917659). The District Court's remand did not reopen the hearing on the merits or reopen the entirety of the pendency determination, as the remand was limited to clarification of the transportation aspects of the pendency order (id.). Upon remand, the IHO provided an opportunity for both parties to be heard and issued a decision after remand clarifying her pendency order that the district shall be responsible only for the costs of transportation services that the student used rather than the full contractual amount (IHO Decision After Remand). Moreover, the parents did not timely appeal and were not aggrieved by the IHO's final decision on the merits issued on September 15, 2022 (see Application of a Student with a Disability, Appeal No. 23-310), and the language of the IHO's final decision was not an issue before the District Court and was not before the IHO for clarification. Therefore, the September 15, 2022 IHO decision on the merits is final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). In accord with the September 25, 2024 District Court's Order that an SRO adjudicate the parents' appeal from the November 15, 2023 decision after remand and, given that the District Court only sought clarification regarding the transportation aspects of the pendency order and there is a final and binding decision on the merits, the sole issue to be resolved at this juncture is the parents' assertion that the IHO erred in clarifying that the pendency order was intended to reflect that the student's stay-put placement included district funding for transportation that the student used.

In reviewing language in an order that is ambiguous, the entire record and circumstances surrounding the formation of the order may be considered to ascertain its meaning (U.S. v. Spallone, 399 F.3d 415, 424 [2d. Cir. 2005]).

Here, since the parties' dispute is limited to clarification of the IHO's order of pendency, it is necessary to explain the purpose of pendency and emphasize that 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, the appropriateness of a private school that may form the basis of pendency, or equitable considerations that may be taken to account in awarding final relief. Rather pendency has the effect of an automatic injunction to prevent the disruption of a student's education during a due process hearing and the pendency inquiry is narrowly focused on identifying the student's then-current educational placement.

More specifically, 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]).[3] As noted, pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior

[3] 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).

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).

Upon reexamining the hearing record in this instance, on August 19, 2022, the IHO held a pendency hearing, at which the district did not appear (Tr. pp. 1-30). The parents submitted evidence to support their position that the student's pendency was based on a prior IHO's December 13, 2021 order of pendency issued in a proceeding concerning the 2021-22 school year (see Parent Pendency Exs. A-F). The parents' evidentiary submission included a proposed order of pendency (Parent Pendency Ex. F). The IHO agreed with the parents' position on pendency and issued an August 24, 2022 interim order of pendency that largely mirrored the parents' proposed order (compare Interim IHO Decision, with Parent Pendency Ex. F). The IHO's August 24, 2022 interim order of pendency included the same ordering clause that the parents proposed, as the IHO adopted verbatim the parents' language that the district shall fund "door-to-door special transportation to and from [s]tudent's home and iBRAIN" (id.). Thus, borrowing a rule of construction from contract law, it would seem that the ambiguity identified by the District Court with respect to the transportation language in the pendency order, particularly the term "door-to-door,", should be construed against the parents, who were represented by counsel and proposed the language included in the order (see).

Moreover, the parents' arguments previously raised in their request for State-level review that the IHO on remand improperly shifted the burden to the parents to establish that their third-party transportation contract was appropriate and that the IHO lacked any statutory authority to alter the terms of the transportation contract do not warrant modification of the IHO's clarification. The issues of appropriateness of the transportation services or the costs thereof go to the substance of the ultimate dispute between the parties, not pendency. As repeatedly emphasized in this decision, the parties' dispute involves the interpretation of the IHO's pendency order, which was meant to memorialize the student's "then-current placement." It is undisputed that the IHO found that pendency was based on the December 2021 order of pendency issued by an IHO in a prior proceeding (Interim IHO Decision; see Parent Pendency Ex. C). Moreover, this finding of the IHO is final and binding as neither party appealed the interim decision (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z., 2013 WL 1314992, at *6-*7, *10). The December 2021 order of pendency itself did not expressly identify transportation as part of pendency (Parent Pendency Ex. C). Further review of the December 2021 interim order of pendency reveals that it was, in turn, based on a November 9, 2021 final IHO decision from yet another prior matter (id. at p. 4). The parents did not submit the prior November 9, 2021 IHO decision into the hearing record at the time of the August 19, 2022 pendency hearing or when the parties reconvened on October 19, 2023 upon remand, and neither party has pointed to or produced this originating decision as a source for determining the terms of the student's pendency placement related to transportation. Without such evidence to resolve the ambiguity, it was within the IHO's purview to explain what she intended and I am in no better position to state the IHO's intended meaning.

Thus, as the District Court directed, the IHO clarified that her August 24, 2022 pendency order with respect to "door-to-door" special transportation was just intended to require the district to pay for actual use of the transportation services (IHO Decision After Remand). While it appears to some degree that, in the decision after remand, the IHO took into account considerations that exceeded the scope of pendency, the IHO nevertheless addressed the District Court's directive by offering a clarification of her original intent in issuing the pendency decision. Absent any contrary evidence or arguments from the parents, and upon my careful review of the hearing record, I find no reason to disturb the IHO's own interpretation of her pendency order (see Spallone, 399 F.3d at 424 [holding that substantial deference must be given to an issuing judge interpreting his own orders]; Blackwood Assocs., L.P., 153 F.3d 61, 66 [2d Cir. 1998] [explaining "the truism that the draftsman of a document is uniquely situated to understand the intended meaning of that document"]).

VI. Conclusion

Having found no reason to disturb the IHO's decision after remand dated November 15, 2023 clarifying her pendency order to require the district to pay for the transportation costs for only the days the student actually used the transportation services, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 25, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER