The University of the State of New York

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

No. 23-068

Application of a STUDENT WITH A DISABILITY, by her 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:
Liz Vladeck, General Counsel, attorneys for respondent, by Gail Eckstein, 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 that portion of an interim decision of an impartial hearing officer (IHO) determining her daughter's pendency placement during a due process proceeding challenging the appropriateness of the respondent's (the district's) recommended educational program for the student for the 2022-23 school year that limited the rate to be paid for pendency services. The district cross-appeals from the IHO's determination that the student is entitled to pendency. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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 §§ 3602-c; 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 related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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

Given the limited information provided in the hearing record, a full recitation of the student's educational history is not possible.

The hearing record shows that a CSE convened on June 11, 2019 to create an IESP for the student for the 2019-20 school year (Parent Ex. B). According to the June 2019 IESP, the student attended a nonpublic school, Beth Jacob of Boro Park, and would be attending first grade starting in September 2019 (Parent Ex. B at p. 1). The CSE found the student eligible for special education services as a student with a speech or language impairment (id. at p. 1). The June 2019 IESP included recommendations that the student receive the support of direct, group special education teacher support services (SETSS) for four periods per week, two 30-minute sessions of individual speech-language therapy per week, and two 30-minute sessions of individual counseling services per week (id. at p. 5).[1]

A. Due Process Complaint Notice

In a due process complaint notice dated January 5, 2023, the parent alleged that the district denied the student equitable special education services for the 2022-23 school year (Parent Ex. A). Relevant to this appeal, the parent requested district funding for the student's pendency placement as set forth in the June 2019 IESP (id. at p. 2). As to the substance of the parent's complaint, the parent asserted that the student continued to attend Beth Jacob of Boro Park and that the district failed to offer the student a program for the 2022-23 school year or implement the student's recommended services including SETSS and related services for the 2022-23 school year (id. at p. 1). For relief, the parent requested a finding that the district failed to offer the student a free appropriate public education (FAPE) and provide equitable services under all relevant laws for the 2022-23 school year; an order directing the district to fund the student's SETSS program and related services at an enhanced market rate; and an order directing the district to provide a bank of compensatory education services for any services not provided during the 2022-23 school year (id. at p. 2).

B. Impartial Hearing Officer Decision

On March 14, 2023, the parties appeared before the IHO and discussed the parent's request for pendency (Tr. pp. 1-8). During the appearance, the IHO stated that he "do[es] not give out blank check[s] for SETSS" and that he found $115 per hour to be an appropriate rate for SETSS (Tr. p. 4). The IHO also noted that the parent would have the right to appeal from an order and the right to an expedited hearing on pendency if requested (Tr. p. 4). In response the parent's advocate noted she did not agree to the rate but that "if that's what is being ordered, then we'll take it" and she did not want an expedited hearing (Tr. p. 5). The district representative stated on the record the district's position that "pendency is not applicable" in matters involving IESPs (Tr. p. 7).

[1] "SETSS" is not defined in the State continuum of special education services (see 8 NYCRR 200.6), a problem within this district that has been discussed in numerous State level review decisions (see e.g., Application of a Student with a Disability, Appeal No. 17-034; Application of a Student with a Disability, Appeal No. 16-056).

In an interim decision on pendency dated March 15, 2023, the IHO found that the district's "claim is not persuasive either rationally or legally" and granted pendency, retroactive to the filing of the due process complaint notice on January 5, 2023, based on the June 2019 IESP (Interim IHO Decision at p. 2). Thus, the IHO ordered the district to fund four periods of SETSS per week at a rate not to exceed $115 an hour and to provide the student with two 30-minute sessions per week of both speech-language therapy and counseling services during the pendency of this matter (id.).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred by ordering pendency with a capped rate of $115 per hour for SETSS. According to the parent, the IHO should have only addressed the student's placement for pendency and "order[ed] the [d]istrict to provide the services that the child is entitled to under [p]endency." The parent argues that by placing a cap on the rate of SETSS for pendency, the IHO in effect abrogated the district's "absolute and uncontroverted obligation to provide services" under pendency. The parent further argues that the IHO erred by placing a cap on the rate for SETSS under pendency absent any evidence in the hearing record. The parent asserts that there was no evidence in the hearing record to support any rate for SETSS. For relief, the parent requests that the IHO's decision be modified to remove the rate cap for SETSS under pendency.

In an answer and cross-appeal, the district responds to the parent's allegations and generally argues to uphold the IHO's decision to set a cap on the rate for SETSS under pendency. As for its cross-appeal, the district argues that the parent's due process complaint notice asserted that the district failed to find providers to implement the June 2019 IESP and that there is no right to due process and therefore pendency for a claim challenging implementation of an IESP. More specifically, the district argues that federal law carves out an exception to due process rights for those students who are parentally placed. In addition, the district asserts that State law related to IESPs does not reference or provide a mechanism for securing pendency. According to the district, State law limits due process for an IESP to a "'review of recommendations' or compliance with child find obligations." By extension, the district claims that, since there is no right to file a due process complaint notice for the implementation of equitable services, there is no right to pendency. Further, the district alleges that the State Legislature never intended for IESPs to be treated similar to individualized education programs (IEPs) as demonstrated by the fact that the State Legislature separated IEPs from IESPs within the Education Law, placed limitations concerning due process, and did not include cross-references in the Education Law to allow for pendency for matters concerning IESPs. As relief, the district seeks dismissal of the parent's appeal and reversal of the IHO's pendency decision.

In a reply and answer to the district's cross-appeal, the parent asserts that the district is incorrect in its interpretation of the relevant State laws and further argues that the State Legislature was attempting to expand services to nonpublic schools and intended that review of both the development and implementation of the student's program be available under the catch-all term "recommendation." Further, the parent notes that, in prior cases, the SRO has implicitly affirmed the right to due process for claims related to implementation of an IESP and the district's argument ignores significant precedent.

In a reply to the parent's answer to the cross-appeal, the district alleges that that parent failed to properly verify her answer and thus it should be rejected.[2]

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] cert. denied sub nom. Paulino v. NYC Dep't of Educ., 2021 WL 78218 (U.S. Jan. 11, 2021); T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). 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

[2] The parent's non-attorney advocate originally verified the reply and answer to the district cross-appeal, instead of the parent. After the district raised the issue of the verification in its reply, the parent filed an affidavit of verification of the reply and answer. State regulations provide that all pleadings shall be verified by a party (8 NYCRR 279.7[b]). However, as a matter within my discretion, I decline to reject the reply and answer despite the original lack of proper verification, particularly as the sole irregularity with the pleading was based on the mistaken belief that a parent advocate could verify a responsive pleading on behalf of a party, the parent has properly verified the request for review initiating this appeal, and the parent subsequently submitted a verification of the reply and answer, albeit untimely (see Application of a Student with a Disability, Appeal No. 20-049; Application of the Dep't of Educ., Appeal No. 20-027; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 17-015; see also J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015] [noting that "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored"]).

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

A. Implementation of Equitable Services and Pendency

The district argues that the student does not have a right to due process or pendency under federal or State law.

Initially, the district asserts that federal regulations provide that, except for child find obligations, the procedures governing the procedural safeguards notice, mediation, and due process rights, do not apply to complaints that a district failed to meet the requirements regarding the provision of equitable services for students parentally-placed in nonpublic schools (Answer and Cross-Appeal at ¶ 6; see 34 CFR 300.132-300.139; 300.140[a][1]; 300.504-300.519).

The district further references Education Law § 3602-c, stating that the State law "contains no reference or mechanism for securing a pendency hearing or order" and further that it "limits due process for disputes regarding IESPs under [Education] Law § 4404 to the 'review of recommendations' or compliance with child find obligations" (Answer and Cross-Appeal at ¶ 7). The district argues that Education Law § 3602-c does not contain any language relating to disputes concerning the implementation of an IESP (id.). By extension, the district argues that the State

Legislature did not intend for IESPs to be treated similarly to IEPs and that Education Law § 3602-c precludes a parent seeking pendency in a dispute relating to implementation of an IESP (id.).

In reviewing the district's arguments, the differences between federal and State law must be acknowledged. Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR § 300.137 [a]). Additionally, as noted by the district, the due process procedures, other than child-find, are not applicable for complaints related to a services plan developed pursuant to federal law.

Accordingly, the district's argument under federal law is correct; however, the student did not have a services plan developed pursuant to the federal law and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to the federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). For requests pursuant to § 3602-c, the CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.).[3] Thus, the State law dual enrollment option confers an individual right to have the CSE design a plan to address the student's individual needs (see Educ. Law § 3602-c[2][b][1]; Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K, 14 N.Y.3d 289, 293 [2010]). This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the

[3] State guidance explains that providing services on an on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007 – Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

The district alleges that the State Legislature intended to place limits within Education Law § 3602-c concerning the availability of due process mechanisms (Answer and Cross-Appeal at ¶ 7). However, a review of Education Law § 3602-c and § 4404 and the legislative history behind the adoption and amendment of those statutes highlights the true intent of the State Legislature.

Initially, § 4404 of the Education Law concerning appeal procedures for students with disabilities, and consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4410[1][a]; see 20 U.S.C. § 1415[b][6]). Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]). The district argues that the language omits disputes concerning implementation of IESPs.

In 2004, the State Legislature amended subdivision two of the Education Law § 3602-c, to take effect June 1, 2005 (see L. 2004, ch. 474 § 2 [Sept. 21, 2004]). Prior to such date, the subdivision read in part:

> Review of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter. Such school district shall contract with the school district in which the nonpublic school attended by the pupil is located, for the provision of services pursuant to this section. The failure or refusal of a board of education to provide such services in accordance with a proper request shall be reviewable only by the commissioner upon an appeal brought pursuant to the provisions of section three hundred ten of this chapter.

(L. 1990, ch. 53 § 49 [June 6, 1990] [emphasis added]). The amendments that became effective on June 1, 2005, removed the last sentence of subdivision two relating to the review of a board of education's failure or refusal to provide equitable services by the Commissioner (L. 2004, ch. 474 § 2).

A review of the statute's history and the New York State Assembly Memorandum in Support of Legislation shows that the Legislature intended to remove the language that an appeal to the Commissioner of Education under Education Law § 310 was the exclusive vehicle for review of the refusal or failure of a board of education to provide services in accordance with Education

Law § 3602-c, given that the earlier sentence in subdivision two of such section authorized review by an SRO from a district CSE's determination in accordance with Education Law § 4404 (Sponsor's Memo., Bill Jacket, L. 2004, ch. 474). The Memorandum explains further:

> The language providing for review of a school district's failure or refusal to provide services ONLY in an appeal to the Commissioner of Education under Education Law § 310 is unnecessary, confusing and in conflict with the earlier language authorizing review by a State review officer pursuant to § 4404(2) of the Education Law of a committee on special education's determination on review of a request for services by the parent of a nonpublic school student. At the time it was enacted, the Commissioner of Education conducted State-level review of an impartial hearing officer's decision under § 4404(2) of the Education Law in an appeal brought under § 310 of the Education Law, but that is no longer the case. The Commissioner has jurisdiction under Education Law § 310 to review the actions or omissions of school district officials generally, so it is unnecessary to provide for such review in § 3602-c and, now that a State review officer conducts reviews under section 4404 (2), it is misleading to have the statute assert that an appeal to the Commissioner is the exclusive remedy.

(Sponsor's Memo., Bill Jacket, L. 2004, ch. 474).

Thus, the amendments made by the State Legislature were intended to clarify the forum where disputes could be brought, not to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404.

In addition, as noted by the parent in her reply to the district's answer with cross-appeal, the State Department of Education issued guidance on Education Law § 3602-c after legislative amendments in 2007 took effect, which provides that "[a] parent of a student who is a [New York State] resident who disagrees with the individual evaluation, eligibility determination, recommendations of the CSE on the IESP and/or the provision of special education services may submit a Due Process Complaint Notice to the school district of location" ("Chapter 378 of the Laws of 2007 – Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3206-c," Attachment 1 at p. 5, VESID Mem. [Sept. 2007] [emphasis added], available at http://www.p12.nysed.gov/specialed/publications/policy/documents/chapter-378-laws-2007-guidance-on-nonpublic-placements.pdf; see Reply & Answer at p. 5). The State guidance further supports the conclusion that disputes about implementation of IESPs are intended to be reviewed similarly to disputes about development of and recommendations contained within IESPs.

Additionally, the district argues that statutory provisions relating to IEPs and IESPs are in separate titles and articles of the Education Law and contain no cross-references to each other (see generally Educ. Law. §§ 3602-c, 4404). However, as discussed throughout this decision, § 3602-

does contain cross-references to § 4404 (Educ. Law § 3602-c[2][b][1], [c]; [2-b]). Additionally, in 2021 the State Legislature added a new subdivision to Education Law § 4044, that took effect on March 29, 2022, and included a cross-reference to § 3602-c (Educ. Law § 4044[1-a]; L. 2021, ch. 812 § 1 [Dec. 29, 2001]).

Based on the above, I am unpersuaded by the district's argument that a student who has an IESP pursuant to New York state's dual enrollment statute has no right to due process—and thus pendency—when seeking to challenge the district's implementation of the plan. As indicated above, in 2004 the State Legislature removed the requirement that the Commissioner of Education had to review claims regarding the refusal or failure of a board of education to provide services in accordance with Education Law § 3602-c and, instead, left a cross-reference to Education Law § 4404 as the vessel for review for such claims (see L. 2004, ch. 474 § 2). Section 3602-c provides for review of IESPs pursuant to § 4404, and Education Law § 4404 provides that a student shall remain in his or her then-current educational placement "[d]uring the pendency of any proceedings conducted pursuant to" Education Law § 4404 (Educ. Law § 4404[4][a]; Application of a Student with a Disability, Appeal No. 17-034).[4]

The district has not presented any other evidence or arguments in support of its position that a parent does not have a right to file for due process to challenge implementation of a student's IESP and to maintain a student's placement for the purpose of pendency under State law. Based on the discussion above, a student who received an IESP pursuant to Education Law section 3602-c has a right to file a due process complaint notice pursuant to Education Law section 4404 (see generally Educ. Law §§ 3602-c, 4404).

Accordingly, in this matter, when the due process complaint notice was filed, by operation of the pendency provision, the student was entitled to remain in her pendency placement for the duration of this proceeding. The IHO determined that the student's pendency placement was based on the July 2019 IESP and consisted of four periods per week of SETSS and two 30-minute periods of both individual speech-language therapy and individual OT (Interim IHO Decision at p. 2; see Parent Ex. B at p. 5). Since I have determined that the student is entitled pendency and there are no additional disputes raised by either party which relate to the student's pendency program other than the parent's allegations relating to the IHO's cap on the rate for SETSS, which I will address next, the IHO's finding that the student's pendency program was based on her prior June 2019 IESP is final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. Rate for SETSS

Having rejected the district's cross-appeal, I turn now to the parent's claim that the IHO erred by placing a cap on the rate for SETSS awarded to the student during the pendency of this matter.

[4] The district put forth an argument that Education Law § 4404(4) limits pendency to proceedings commenced under that section of the Education Law; however, the cross-references to section 4404 contained within section 3602-c indicate that a proceeding regarding an IESP is brought pursuant to Education Law section 4404 and, therefore, pendency is applicable to such a proceeding (Educ. Law § 3602-c[2][b][1], [c]).

As discussed above, the IHO agreed with the parent that the student's placement during the pendency of the proceeding should be based on the June 2019 IESP which consisted of four periods of SETSS per week, two 30-minute sessions of speech-language therapy per week, and two 30-minute sessions of counseling services per week (Interim IHO Decision at p. 2). However, while the IHO directed the district to "provide" related services, the IHO ordered the district "to pay" for four periods of SETSS per week at a rate not to exceed $115 per hour (id.).

Pendency in the first instance is a matter of identifying "the general type of educational program in which the child is placed," and does not guarantee a particular provider or, by extension, a particular rate (Concerned Parents, 629 F.2d at 753, 756; see T.M., 752 F.3d at 171). Accordingly, the IHO erred in specifying the rate for pendency services.

Moreover, this is not an instance where pendency consisted of privately obtained services. There is no evidence in the hearing record as to who delivered the student's services when the last agreed upon IESP was implemented. Although the parent alleged in her due process complaint notice that she had been "forced to implement" the student's IESP services "on her own by utilizing the services of an agency at enhanced rates" (Parent Ex. A at p. 2), this describes the ultimate relief she sought to remedy the district's alleged failure to deliver the student's services during the 2022-23 school year.[5]

The parent requested a finding that the student's pendency was based on the June 2019 IESP, and it was the district that was bound to deliver the services in the IESP (Educ. Law § 3602-c[2][a] [providing that "[b]oards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon written request of the parent"]). Likewise, the district is obligated by State law to provide the student's then-current educational placement during the pendency of this proceeding (see 20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 8 NYCRR 200.5[m]; Ventura, 959 F.3d at 533-36 [finding that the district is authorized to decide how a student's pendency placement should be provided and that parents may not unilaterally make such a determination]). While parties may, under certain circumstances, agree that the district may satisfy its pendency obligation by paying providers identified and secured by the parent, there is no evidence of such an agreement in the present matter.

Thus, to implement the pendency services, the district should undertake to schedule the services as envisioned under the pendency IESP and, in essence, inform the parent where and when the services would be available, and at that time the parent would have the responsibility to produce the student in order to receive the services. To be sure, if the parent's allegations in the due process complaint notice have merit and the district failed to implement services that it was obligated to deliver for the 2022-23 school year, there would be reason for the parent to question whether the

[5] "Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura, 959 F.3d at 526 [internal quotations and citations omitted]; see Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] ["Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

district would follow through on its obligation to implement the same services through pendency. However, if that came to fruition, the parent would be entitled to seek compensatory education for missed pendency services. The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]). As compensatory education is an equitable remedy, it may be appropriate to order the district to fund compensatory services to be delivered by private providers and take into account the rates for such services based upon evidence in the hearing record. However, the anticipation of the district's failure to implement pendency, does not warrant defining the student's pendency placement with the features of relief (i.e., by specifying that the district must fund services through private providers).

To the extent the evidence bears out that the district has failed and/or, during the continued pendency of this matter, fails to deliver the student's pendency services as called for in the July 2019 IESP, the IHO may consider awarding compensatory educational services to make up for any missed pendency services as part of his final decision in this matter.

VII. Conclusion

Based on the above, I find that the student is entitled to pendency under State law and that the IHO erred in ordering the district to fund SETSS for pendency at a maximum rate. The student's pendency placement includes four periods per week of SETSS, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual counseling, to be provided by the district.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's interim decision on pendency, dated March 15, 2023, is modified by vacating that portion that ordered the district to fund SETSS as part of the student's pendency placement with a rate cap of $115 per hour; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall be required to provide the student with four periods per week of individual SETSS, two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of

individual counseling as the student's placement until a final adjudication of the underlying cause of action in this proceeding is realized.

Dated: **Albany, New York**
June 30, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER