The University of the State of New York

The State Education Department
State Review Officer
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No. 23-069

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, 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 district) 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 respondent's (the parent's) daughter's pendency placement during a due process proceeding challenging the provision of the district's recommended educational program to the student for the 2022-23 school year. The IHO found that the student's pendency placement was based on the last agreed upon individualized education services program (IESP) developed on March 1, 2022. The 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 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 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 this is an appeal from an interim IHO decision and the limited information provided in the hearing record, a full recitation of the student's educational history is not possible.

Briefly, on March 1, 2022, a CSE convened for the purpose of an annual review, found the student remained eligible for special education as a student with a speech or language impairment, and developed an IESP for the student (see Parent Ex. B). At the time of the March 2022 CSE meeting the student was in eighth grade and was attending a nonpublic school (id. at p. 1). The March 2022 CSE recommended a program of direct, group special education teacher support services (SETSS) six periods per week (id. at p. 10).[1] In addition, the March 2022 CSE recommended one 30-minute session per week of individual occupational therapy (OT); one 30-minute session per week of group OT; and two 30-minute sessions per week of individual speech-language therapy (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated February 8, 2023, the parent alleged that the district failed to furnish and implement the student's recommended program and services for the 2022-23 school year (see Parent Ex. A). More specifically, the parent alleged that the district failed to implement the recommended SETSS and related services and instead expected the parent to locate providers (id. at p. 1). The parent alleged that she was unable to find SETSS and related service providers at the district's standard rates and, therefore, "was forced to implement the services on her own by utilizing the services of an agency at enhanced rates" (id. at pp. 1-2).

The parent sought pendency in the last agreed upon program, which she alleged was the March 2022 IESP, which included six periods of SETSS per week, with related services of OT and speech-language therapy (Parent Ex. A at p. 2). As relief, the parent requested a finding that the district failed to offer the student a free appropriate public education (FAPE) and equitable services for the 2022-23 school year (id.). The parent also sought an order compelling the district to fund the student's program of SETSS and related services "at enhanced market rates" (id.). Lastly, the parent requested a bank of compensatory education services for those services not provided by the district during the 2022-23 school year (id.).

B. Impartial Hearing Officer Decision

On March 17, 2023, the parties appeared before the IHO and discussed the parent's request for pendency (Tr. pp. 1-9; Interim IHO Decision at p. 3). During the appearance, the parent asserted that pendency was based on the March 2022 IESP (Tr. p. 3). The district objected to the parent's request for pendency, alleging that the student was not entitled to pendency under Education Law § 3602-c (Tr. pp. 4-6). The district argued that, since the parent's claim related to implementation of equitable services, the parent did not have the right to due process and, therefore, to pendency (Tr. pp. 4-5). Further, the district argued that the district was being requested "to fund equitable services to supplement the parent-provided current educational placement" (Tr. p. 5). The district asserted that parentally placed students "are not automatically

[1] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6).

entitled to a continuation of equitable services from year to year" as parents are required to request equitable services each year no later than June 1st of the preceding school year (id.). Accordingly, the district claimed that the student was not entitled to pendency (id.). During the appearance, the IHO overruled the district's objection to pendency (id. at p. 6).

In an interim decision on pendency dated March 17, 2023, the IHO granted pendency, retroactive to the filing of the due process complaint notice dated February 8, 2023, based on the March 2022 IESP as follows: direct, group SETSS six periods per week; one 30-minute session per week of individual OT; one 30-minute session per week of group OT; and two 30-minute sessions per week of individual speech-language therapy (Interim IHO Decision at p. 6).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in finding that the student was entitled to a pendency placement.

Initially, the district argues that there is no right to due process or pendency for equitable services under federal law. More specifically, the district argues that federal law carves out an exception to due process rights for those students who are parentally placed and receiving services through a services plan. In addition, the district asserts that there is no entitlement to pendency during a proceeding challenging implementation of equitable services under State law. The district contends that although the Education Law permits parents the right to seek due process "for some equitable services questions, there is no such right to due process regarding the implementation of equitable services." 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. The district also argues that parentally placed students are not automatically entitled to continue equitable services each year as parents are required to request equitable services each school year "no later than June 1 of the preceding school year" pursuant to Education Law § 3602-c(2)(a)(1). The district contends that there is no evidence in the hearing record that the parent filed the request for equitable services prior to June 1st and the failure to do so precludes a right to pendency.

Further, the district asserts that the non-attorney advocate who filed the due process complaint notice lacked standing to do so on behalf of the parent and student. The district references a series of emails from March 8, 2023, wherein the parent stated she was unaware of the due process complaint notice being filed. The district also references an April 2023 status conference, at which time the representation of the parent was discussed. The district requests that additional evidence be considered on the issue of the parent's representation by the advocate. Ultimately, the district seeks a reversal of the IHO's pendency order.

In an answer, the parent responds to the district's allegations and argues that the IHO's interim decision on pendency should be affirmed. The parent asserts that combined, Education Law § 3602-c and § 4404, provide due process for students enrolled in a nonpublic school challenging implementation of services under an IESP. The parent contends that the district's "argument that nonpublic school students have no entitlement to due process is contrary to the letter and spirit of the law." The parent also argues that guidance issued by New York State authorizes the parent of a student that disagrees with an IESP to file a due process complaint notice

with the "district of location." The parent argues that prior decisions issued by the Office of State Review authorized pendency in cases involving dually enrolled students and implementation of IESPs. As for the district's argument that the parent is required to file a request for services by June 1st of the preceding school year, the parent asserts that this issue should be reserved for an impartial hearing on the merits and not determined with respect to an appeal of pendency.

Next, the parent addresses the issue of standing and states that a hearing was held on May 22, 2023 and the parent confirmed that the advocate represented her in the filing of the due process complaint notice and, therefore, this issue is moot. The parent seeks the acceptance of the May 22, 2023 hearing transcript as additional evidence as it was not available at the time of the pendency hearing and is relevant to the district's assertion that the advocate lacked standing.

In a reply, the district alleges that the answer failed to comply with practice regulations as it was verified by the parent advocate and not the parent herself.[2] The district also argues that the parent failed to address the allegations in the request for review and instead raised "systemic violations" which are irrelevant to the issue of pendency. Lastly, the district seeks to preclude the May 22, 2023 hearing transcript from the hearing record as it is unrelated to the issue of pendency.

V. Applicable Standards

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, 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 (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. of the 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 to "strip

[2] The parent's non-attorney advocate originally verified the answer, instead of the parent. After the district raised the issue of the verification in its answer, the parent filed an affidavit of verification of the answer. State regulation provides 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 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 and the parent subsequently submitted a verification of the 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"]).

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).

VI. Discussion

A. Scope of Review—Interlocutory Appeal

Regarding the district's argument on appeal about the advocate's authority to represent the parent, at the outset, by the district's own admission, after the date of the IHO's interim decision on pendency, which is the subject of this appeal, the IHO held hearing dates during which the parties addressed the issue of the advocate's representation (Req. for Rev. ¶ 18; Reply ¶ 11). There has been no final decision from the IHO on the issue of the advocate's representation and, therefore, there is no IHO determination on this issue from which to appeal.

Additionally, State regulations governing the practice of appeals for students with disabilities limit appeals from an IHO's interim determination to those involving pendency (stay-put) disputes (8 NYCRR 279.10[d]; see Educ. Law § 4404[4]). Therefore, even if the IHO had

ruled on the issue of the advocate's representation as of the date of the district's appeal, State regulation does not allow for an interlocutory appeal on issues other than pendency disputes, and that portion of the district's appeal must be dismissed as premature (see Application of a Student with a Disability, Appeal No. 11-138). However, while consideration of the district's allegation about the advocate's standing is premature at this juncture, State regulation also provides that a "party may seek review of any interim ruling, decision, or failure or refusal to decide an issue" in an appeal from an IHO's final determination (8 NYCRR 279.10[d]). Thus, if necessary, the district may appeal from any IHO decision pertaining to standing after the IHO closes the hearing record and issues his final determination on all the remaining issues in the proceeding.[3]

B. Implementation of Equitable Services and Pendency

The district asserts 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 (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 State law limits due process for disputes regarding IESPs under Education Law § 4404, in that it does not contain any language relating to disputes concerning the implementation of an IESP. 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 from seeking pendency in a dispute relating to implementation of an IESP.

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.

[3] As noted above, both parties offer additional evidence relating to the issue of the advocate's authority to act on the parent's behalf. 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]). As the issue of the advocate's authority is not addressed as it is raised prematurely, the additional evidence offered by the parties is not necessary in order to render a decision and will not be considered.

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.).[4] 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 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. 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

[4] State guidance explains that providing services 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.).

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 Section 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 answer, 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 Answer ¶ 4). 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.

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).

Lastly, the district contends that parentally placed students are not entitled to a continuation of equitable services from year to year. The district argues that parents must request IESP services from the district "no later than June 1 of the preceding school year" (Req. for Rev. ¶ 13; see Education Law § 3602-c [2][a][1]). The district asserts that there was no evidence in the hearing record that the parent requested services before June 1st. However, as this is an interim appeal, the hearing process is not complete and the district's defense may be addressed at a future hearing date. Additionally, the issue of whether the parent complied with the June 1st deadline is not an appropriate issue for an interim appeal and is to be decided on the merits of the case and not in the context of this appeal.

Accordingly, the student is entitled to pendency during the proceeding challenging the implementation of equitable services under Education Law § 3602-c. The IHO determined that the student's pendency placement was based on the March 2022 IESP and consisted of six periods per week of SETSS, one 30-minute session per week of individual OT, one 30-minute session per week of group OT, and two 30-minute sessions per week of individual speech-language therapy (Interim IHO Decision at p. 6; Parent Ex. B at p. 10). Since I have determined that the student is entitled to pendency and there are no additional disputes raised by either party which relate to the student's pendency program, the IHO's finding that the student's pendency program was based on the March 2022 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]).

VII. Conclusion

Based on the discussion above, there is no basis to overturn the IHO's finding that the student is entitled to pendency pursuant to the March 2022 IESP for the duration of this proceeding.

I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 14 , 2023

STEVEN KROLAK
STATE REVIEW OFFICER