The University of the State of New York

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

No. 24-448

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 from that part of a decision of an impartial hearing officer (IHO) determining her son's pendency placement during a due process proceeding challenging the implementation of respondent's (the district's) recommended educational program for the student for the 2024-25 school year. The district cross-appeals asserting that the IHO lacked subject matter jurisdiction and further cross-appeals from that portion of the IHO decision which dismissed the due process complaint without prejudice and ordered the Committee on Special Education (CSE) to reconvene and develop an individualized education services program (IESP) for the 2024-25 school. The appeal must be sustained in part. 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 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 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 § 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, 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 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

The parties' familiarity with this matter is presumed, and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, a CSE convened on February 4, 2021, found the student eligible for special education as a student with a speech or language impairment, and formulated an IESP for the student with a projected implementation date of March 2, 2021 (see Parent Ex. D). The CSE recommended that the student receive 10 periods per week of direct, group special education teacher support services (SETSS) in Yiddish, two 30-minute sessions per week of individual speech language therapy in Yiddish, two 30-minute sessions per week of individual occupational therapy (OT) in Yiddish, and one 30-minute session per week of individual counseling in Yiddish (id. at p. 15).[1] Thereafter, on July 21, 2021 the CSE convened and formulated an individualized education program (IEP) for the student with a projected implementation date of July 29, 2021 through August 13, 2021 (see Parent Ex. C). The CSE recommended the student receive three periods per week of direct, group SETSS for English language arts (ELA) in Yiddish, and two periods per week of direct, group SETSS for math on a 12-month basis (id. at pp. 7-8).

The student has been the subject of a prior administrative hearing, where that presiding IHO, in a decision dated November 16, 2023 (2023 IHO Decision), directed the district to fund or reimburse the parent at a reasonable market rate for the following services during the 10-month 2023-24 school year: 10 periods per week of direct, group SETSS, two 30-minute sessions per week of individual speech-language therapy in Yiddish, two 30-minute sessions per week of OT in Yiddish, and one 30-minute session per week of individual counseling in Yiddish (Parent Ex. B at p. 12). In addition, during the summer months of July and August, the district was directed to fund or reimburse the parent at a reasonable market rate for three periods per week of direct, group SETSS for ELA in Yiddish, and two periods per week of direct, group SETSS for math in Yiddish (id. at pp. 12-13).

On June 6, 2024 the parent signed a contract with Alpha Student Support (Alpha) for the provision of SETSS and related services to the student for the "extended 2024-25 school year" (Parent Ex. G at p. 2). The parent confirmed that she was liable to Alpha for the costs of the full amount of services delivered by Alpha if she was unable to secure funding from the district or elsewhere (id. at p. 3).

In a due process complaint notice dated July 4, 2024, the parent alleged that the district failed to provide the student a FAPE for the 2024-25 school year by failing to convene a CSE meeting and develop an updated IESP and by failing to implement the services set forth in the student's 2021 IESP and IEP (Parent Ex. A at pp. 1-2). The parent requested an order that the district fund 12 months of SETSS and related services as set forth in the 2021 IESP and IEP at the providers' contracted rates (id. at p. 3). The parent also requested an order directing the district to fund a bank of compensatory periods of SETSS and related services for the entire 2024-25 school

[1] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

year or parts of which were not serviced, including entitlement to pendency at the providers' contracted rates (id.).

An impartial hearing before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) convened and concluded on August 19, 2024 (Tr. pp. 1-37). At the hearing, the parent limited her request for the 2024-25 school year to 10 periods per week of direct, group SETSS in Yiddish for the 10-month school year and five periods per week of direct, group SETSS in Yiddish for the months of July and August at an enhanced hourly rate of $195.00 (Tr. pp. 12-13). She also sought a 12-month pendency award based on the equitable services awarded in the 2023 IHO Decision (Tr. pp. 6-10; see Parent Ex. B).

In a final decision dated September 6, 2024, the IHO denied the parent's request for services in July and August 2024 upon finding that the parent failed to properly request such summer services from the district and a lack of evidence that the student would substantially regress (IHO Decision at pp. 8-9). The IHO next determined that the district failed to offer the student a FAPE for the 2024-25 school year as the district presented no evidence nor called any witnesses at the impartial hearing and the last IESP and IEP developed for the student was in 2021 (id. at pp. 9-10). The IHO further found that there was insufficient evidence to support the parent's request for a SETSS award, particularly given her prior determination that the 2021 IESP and IEP were outdated which the parent was relying upon to substantiate a SETSS award for the 2024-25 school year (id. at pp. 10-12). Accordingly, the IHO dismissed the parent's due process complaint notice without prejudice and directed the district to reconvene a CSE within 30 days of the IHO decision to develop an appropriate IESP for the student for the 2024-25 school year (id. at p. 12). For purposes of pendency, the IHO ordered the district to reimburse the parent or directly fund the costs of 10 periods per week of direct, group SETSS in Yiddish, two 30-minute sessions per week of individual speech-language therapy in Yiddish, two 30-minute sessions per week of individual OT in Yiddish, and one 30-minute session per week of individual counseling in Yiddish from the date of the due process complaint notice (July 4, 2024) to the date of the IHO decision (September 6, 2024) at the contracted providers' rates upon the parent's submission to the district of a valid contract and invoices (id.). The IHO further ordered that to the extent that any pendency services were not implemented, the district shall establish a bank of those same pendency services (id. at p. 13).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer and cross-appeal is also presumed, and therefore, the allegations will not be recited herein. Briefly, the parent asserts that the IHO incorrectly limited the pendency award to 10 months instead of 12 months (Req. for Rev. at p. 2). The district cross-appeals, asserting that the IHO lacked subject matter jurisdiction to adjudicate the parent's claims, and that, to the extent that the IHO had subject matter jurisdiction, she should have dismissed the parent's due process complaint notice with prejudice (see Answer & Cr.-Appeal).

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[2] "Boards 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 the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for 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]). 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, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual

[2] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[3] 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 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). 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.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Subject Matter Jurisdiction

At the outset it is necessary to address the issue of subject matter jurisdiction raised by the district for the first time on this appeal (Answer & Cr.-Appeal at ¶¶ 4-16). Subject matter jurisdiction refers to "the courts' statutory or constitutional power to adjudicate the case" (Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 [1998]). Although the district did not raise the argument during the impartial hearing, it is permitted to raise subject matter jurisdiction at any time in proceedings, including on appeal (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]; Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 733 [2d Cir. 2007][ordering supplemental briefing on appeal and vacating a district court decision addressing an Education Law § 3602-c state law dispute for lack of subject matter jurisdiction]). Indeed, a lack of jurisdiction "can never be forfeited or waived" (Cotton, 535 U.S. at 630). The district raised the issue of subject matter jurisdiction in its answer and cross appeal and the issue of subject matter jurisdiction may be raised at this level.

Turning to the district's argument as it is now presented on appeal, the district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and that parents never had the right to file a due process complaint with respect to implementation of "an IESP" (Answer & Cr.-Appeal at ¶ 5).

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, 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 merely have a services plan developed pursuant to 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 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.). Thus, the State law dual enrollment option confers an individual right to have the CSE design a plan to address the individual needs of a student who attends a nonpublic school (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]).

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]).

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confers IHOs with jurisdiction to consider enhanced rates claims from parents seeking implementation of equitable services and that the State Education Department (SED) made this "carve-out" of jurisdiction explicit by adopting, by emergency rulemaking, an amendment of 8 NYCRR 200.5 (Answer & Cr.-Appeal at ¶¶ 5-6).

Section 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]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend 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 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). When faced with the question of the status of students attending nonpublic schools and seeking special education services under § 3602-c, the New York Court of Appeals has already explained that:

> [w]e conclude that section 3602–c authorizes services to private school handicapped children and affords them an option of dual enrollment in public schools, so that they may enjoy equal access to the full array of specialized public school programs; if they become part-time public school students, for the purpose of receiving the special services, the statute directs that they be integrated with other public school students, not isolated from them. The statute does not limit the right and responsibility of educational authorities in the first instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school. Such placements may well be in regular public school classes and programs, in the interests of mainstreaming or otherwise (see, Education Law § 4401–a), but that is not a matter of statutory compulsion under section 3602–c.

(Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988] [emphasis added]). Thus, according to the New York Court of Appeals, the student in this proceeding, at least for the 2024-25 school year, was considered a part-time public school student under State law. It stands to reason then, that the part-time public school student is entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

However, I am mindful that the number of due process cases involving the dual enrollment statute statewide, which were minuscule in number until only a handful of years ago, have now increased to tens of thousands of due process proceedings per year within certain regions of this school district in the last several years. That increase in due process cases almost entirely concerns services under the dual enrollment statute, and public agencies are attempting to grapple with how to address this colossal change in circumstances, which is a matter of great significance in terms of State policy. Policy makers have attempted to address the issue.

Recently in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5 which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[4] Second, since its adoption, the amendment has been enjoined and suspended in an Order Show Cause dated October 4, 2024 (Agudath Israel of America v. New York State Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

[4] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963-69 [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (see People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint notice in the present matter is dated July 4, 2024, prior to the July 16, 2024 effective date of the emergency regulation (see Parent Ex. A), which regulation has since lapsed.

> pending the hearing and determination of Petitioners' application for a preliminary injunction, the Revised Regulation is hereby stayed and suspended, and Respondents, their agents, servants, employees, officers, attorneys, and all other persons in active concert or participation with them, are temporarily enjoined and restrained from taking any steps to (a) implement the Revised Regulation, or (b) enforce it as against any person or entity

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589).[5]

The district acknowledges the present injunction notice but contends that there never has been a right under the Education Law to bring a complaint for the implementation of IESPs or to seek enhanced rates for equitable services (Answer & Cr.-Appeal at ¶ 8). Consistent with the district's position, State guidance issued in August 2024 noted that:

> parents have never had the right to file a due process complaint to request an enhanced rate for equitable services or dispute whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services. Therefore, such claims should be dismissed on jurisdictional grounds, whether they were filed before or after the date of the regulatory amendment.

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[6]

However, acknowledging that the question has publicly received new attention from State policymakers as well as at least one court at this juncture and appears to be an evolving situation, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the amendment to the regulation may not be deemed to apply to the present matter regardless of the guidance document. Accordingly, the district's cross-appeal seeking dismissal of the appeal on the ground that the IHO lacked subject matter jurisdiction to determine the merits of the parent's claims must be denied.

B. Pendency

Next, I turn to the parent's assertion that the IHO erred by limiting pendency to a 10-month program.

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[5] On November 1, 2024, Supreme Court issued a second order clarifying that the temporary restraining order applied to both emergency actions and activities involving permanent adoption of the rule until the petition was decided.

[6] For reasons that are not apparent, the guidance document is no longer available on the State's website. A copy is, however, included in the hearing record as an exhibit to the district's motion to dismiss.

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 T.M., 752 F.3d at 170-71; 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 "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 (T.M., 752 F.3d at 170-71; Concerned Parents and 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 (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. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 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 [OSEP 2007]).

Based on the foregoing and a review of the record, I find that the IHO correctly determined that pendency was based on the equitable services ordered in the unappealed 2023 IHO Decision (IHO Decision at p. 12).[7] It is well-settled that a student's entitlement to pendency shall be automatic and begin at the date of the filing of the due process complaint notice and shall continue until the conclusion of the matter (20 U.S.C. § 1415[j]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; Zvi D., 694 F.2d 904, 906). The parent maintains in her request for review that the IHO erred in adopting a 10-month school year rather than a 12-month school year as referenced in the 2023 IHO Decision and consequently excluded pendency during the summer months (Req. for Rev. at pp. 2-3). Here, the IHO did award pendency during July and August 2024 as pendency began at the time of filing of the due process complaint notice; however, the IHO incorrectly applied the terms of the 2023 IHO Decision in the award of pendency (compare Parent Ex. B at pp. 12-13, with IHO Decision at p 12). Therefore, I will modify the decision to reflect the summer services set forth in the unappealed 2023 IHO Decision that formed the basis for pendency. Pendency during the summer months of July and August for 2024 should consist of three periods per week of direct, group SETSS for ELA in Yiddish, and two periods per week of direct, group SETSS for math in Yiddish. From September 1, 2024 to the conclusion of this matter, pendency should consist of ten periods of direct group SETSS in Yiddish, two 30-minute sessions of individual speech language therapy in Yiddish, two 30-minute sessions of individual OT in Yiddish, and one 30-minute session of counseling in Yiddish (Parent Ex. B at pp. 12-13).

C. Reconvene CSE

Finally, the district cross-appeals from the IHO's decision to dismiss the parent's due process complaint notice without prejudice. According to the district, the IHO should have dismissed the parent's claims with prejudice because the IHO found that the parent failed to sustain her burden with respect to the unilaterally-obtained services. As more fully explained below, the district's argument is unpersuasive and constitutes a strained interpretation of the IHO's decision.

As identified by the IHO, it is undisputed that the district failed to develop an IESP or IEP for the student for the 2024-25 school year (IHO Decision at p. 10). In addition, the district failed to implement the services set forth in the 2021 IESP and the 2021 IEP for the student for the 2024-25 school year (id.). The IHO noted that the district failed to present any evidence or argument that the 2021 IESP and 2021 IEP remained "suitable or relevant" for the student for the 2024-25

[7] The district does not challenge the IHO's finding that the 2023 IHO Decision constitutes the student's pendency program, rather the district asserts that the IHO erred in finding the student was entitled to a pendency placement because the IHO lacked subject matter jurisdiction. As explained above, the district's argument that the IHO lacked subject matter jurisdiction is without merit and accordingly, the student is entitled to remain in his stay-put placement during the pendency of the proceeding.

school year (id.). The IHO concurred with the parent's assertion in her due process complaint notice that the 2021 IESP and 2021 IEP were outdated, and the IHO determined that the 2021 IESP and 2021 IEP provide "limited information relevant to [the s]tudent's current needs" (id. at p. 11). In reviewing the appropriateness of the unilaterally-obtained services, the IHO determined she needed more information about the student's needs to determine if the parent's requested relief was warranted for the 2024-25 school year (id. at p.12). Therefore, the IHO dismissed the parent's claim without prejudice and directed the CSE to reconvene and develop an appropriate IEP and/or IESP for the 2024-25 school year (id.). The parent does not appeal the IHO's dismissal without prejudice and order directing the CSE to reconvene (Req. for Rev. at p. 1).

An IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]). A CSE is obligated to conduct an annual review for the student (34 CFR 300.303[b][1]-[2]; 8 NYCRR 200.4[b][4]) and there is evidence that as of the filing of the due process complaint notice in this matter that the CSE had not conducted such review since its July 2021 meeting. Notably, the district's argument on cross-appeal lacks any assertion, much less evidence, showing that a CSE has convened to address the student's needs since July 2021. Having found that the district failed to offer the student a FAPE for the 2024-25 school year, it was within the IHO's broad authority to order that the district fulfill its obligation to convene a CSE meeting as a form of appropriate equitable relief. Thus, I find no reason to disturb the IHO's order that the district convene a CSE meeting within 30 days to develop the student's educational program for the 2024-25 school year and, therefore, also find that it was appropriate for the IHO to dismiss the parent's claims without prejudice.

VII. Conclusion

As discussed above, the IHO had subject matter jurisdiction over the parent's claims and the student is entitled to pendency based on the unappealed 2023 IHO decision. I further find no reason to disturb the IHO's decision to dismiss the matter without prejudice and order that the district convene a CSE meeting within 30 days. I have considered the parties' remaining contentions and find it unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated September 6, 2024 is modified with respect to pendency to reflect that pendency in July and August consists of three periods per week of group SETSS for ELA in Yiddish and two periods per week of group SETSS for math in Yiddish.

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

CAROL H. HAUGE
STATE REVIEW OFFICER