The University of the State of New York

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

No. 24-492

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 Ezra Zonana, 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) appeal, 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) son's pendency placement during a due process proceeding. 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 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 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 § 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

Given the limited issues on appeal and the sparse hearing record—namely that no evidence was admitted into the hearing record—a detailed recitation of the student's educational history is

not possible.[1] Briefly, the CSE convened on March 15, 2024, determined the student was eligible for special education as a student with an other health-impairment, and developed an IESP with an implementation date of March 29, 2024 (SRO Ex. 1 at p. 1). The March 2024 CSE recommended that the student receive the following related services: two 30-minute sessions per week of individual speech-language therapy, one 45-minute session per week of individual physical therapy (PT), one 30-minute session per week of individual counseling services, one 30-minute session per week of group speech-language therapy, one 30-minute session per week of group counseling services, and two 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 11-12). The March 2024 CSE also recommended full-time, daily individual health paraprofessional services for "safe navigation" (id. at p. 12). According to the March 2024 IESP, the student was parentally placed in a nonpublic school (id. at p. 14).

In a due process complaint notice dated August 29, 2024, the parent alleged the district denied the student IESP services for the 2024-25 school year (see Due Process Compl. Not.).[2] The parent claimed the district denied the student services because of the parent's supposed failure to request services by June 1, 2024 pursuant to Education Law § 3602-c (id.). Further, the parent claimed the district had provided the student's services since 2020 without additional requests (Due Process Compl. Not. at p. 3). According to the parent, she had made her intentions known multiple times including at the March 2024 CSE annual review that she wanted the student's services to continue for the 2024-25 school year (id.). The parent further alleged that she was never notified that she failed to comply with district guidelines during the previous school years or that a change in procedure was occurring for the 2024-25 school year (id.). The parent claimed the district never provided her a request for special education services form pursuant to its own policy for any school year it provided services in the past and not for the 2024-25 school year (id. at p. 4). The parent also alleged that the district failed to provide various related services from September 2020 to June 2024 (see generally Due Process Compl. Not. at p. 4).[3]

On September 4, 2024, the parent emailed the IHO and district requesting for the student to be provided pendency services "in the same manner as they were provided on the last IESP during the 2023[-]24 school year" (SRO Ex. 2 at p. 5). The parent followed up again on September

[1] The district submitted two additional documents with the certified record which relate directly to the issue of pendency in this matter and consist of: (1) a copy of a March 15, 2024 IESP and (2) a copy of emails between the parties and the IHO from September 4, 2024 to September 20, 2024. State regulation provides that the hearing record includes copies of "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer," as well as "all written orders, rulings, or decisions issued in the case" (8 NYCRR 200.5[j][5][vi]; 279.9[a]). Since the emails contain the parent's request for a pendency hearing and the parties' arguments regarding whether the student was entitled to pendency, the emails are considered part of the hearing record, and it was proper for the district to include them. Regarding the IESP, the IHO's interim pendency order was based off the March 2024 IESP, and thus it was also proper for the district to include it. For clarity in this decision, the March 2024 IESP shall be referred and cited to as "SRO Exhibit 1" and paginated with numbers 1-15; the September 2024 emails shall be referred and cited to as "SRO Exhibit 2" and paginated with numbers 1-5 (see SRO Exs. 1 at pp. 1-15; 2 at pp. 1-5).

[2] The parent's due process complaint is not paginated; accordingly, it will be paginated with numbers 1-5 for the purposes of this decision.

[3] The parent's claims regarding implementation of services is not in dispute in this current appeal; accordingly a full description of the services the district failed to provide is unnecessary.

16, 2024 and September 19, 2024, regarding pendency and moving forward in the process (id. at p. 4). The district representative responded September 19, 2024, indicating that the district's position was that the case should be dismissed because State Education Law § 3602-c does not grant the parent the right to file a due process complaint notice to dispute the implementation of an IESP (id. at p. 3). The district also argued the student was not entitled to pendency services (id.). The district then indicated that the Enhanced Rate Equitable Services (ERES) unit may be able to assist the parent in this matter (id. at p. 2). On September 20, 2024, the parent responded that her matter does not involve enhanced rates therefore the ERES unit would be unable to assist her (id. at p. 1). The parent further argued that she disagreed with the district's argument that she had no right to file a due process complaint notice or that the student was not entitled to pendency services (id. at p. 2). The parent requested that the IHO schedule a hearing for pendency promptly (id.).

On September 20, 2024, the IHO responded, stating that the district had until September 25, 2024 to submit its position on pendency (SRO Ex. 2 at p. 1). The IHO noted he was unaware of any legal authority supporting the district's position that the student had no right to pendency (id.). The IHO also stated "[s]ince the dispute as to pendency [wa]s a matter of legal interpretation and not a factual dispute, there [wa]s no need for a pendency hearing" and that she would issue her order on the written submissions of the parties (id.).

On September 26, 2024, the IHO issued an order on pendency, which indicated the student's pendency program was based on the March 15, 2024 IESP consisting of related services of speech-language therapy, OT, PT and counseling services in addition to health paraprofessional services (see Interim IHO Decision; SRO Ex. 1). In the pendency order the IHO stated:

> The [district] was given an opportunity to respond. They did not contest the substance of the student[']s last agreed upon program. They merely argued that the student's educational placement only involves the school placement, which [wa]s a parental placement, rather than the supplemental related services. Thus, there was no entitlement to pendency as a parentally placed student. Their position has no basis in the law. The term "educational placement" refers to the "general educational program-such as the classes, individualized attention and additional services a child will receive-rather than the 'bricks and mortar' of the specific school." C.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68, 79 (2d Cir. 2014)…; see also Application of a Student with a Disability, Appeal Nos. 23-068; 23-065 (both finding that parentally placed students [sic] have a right to due process and pendency). As the [district] did not challenge the substance of the pendency program, it is uncontroverted that the [March 15, 2024] IESP [wa]s the student's pendency program

(Interim IHO Decision at p. 1).

On September 27, 2024, the district filed a response to the parent's due process complaint notice generally denying all the parent's allegations and indicated it intended to challenge the appropriateness of the relief sought by the parent (Due Process Response). The district also

indicated it was raising various defenses; specifically, a defense against any claims or requested relief alleged pursuant to New York State Education Law § 3602-c on the basis that the parent failed to timely send a written request for equitable services by the first of June (id.).

IV. Appeal for State-Level Review

The district appeals. The parent appeared pro se and filed an answer to the district's appeal generally denying the district's allegations. The crux of the parties' dispute is whether the IHO erred in determining the student was entitled to pendency and then issuing an order on pendency.

V. Applicable Standards

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[4] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

[4] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

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

VI. Discussion

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

As an initial matter, the district argues the IHO lacked subject matter jurisdiction over the parent's claims and thus the student was not entitled to pendency services. The district argues neither New York State Education Law nor federal law gave the parent a 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 notice with respect 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, 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 (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 specifically asserts that "there is not, and never has been, a right to bring a complaint for implementation of IESP claims or enhanced rate services" and that the State Education Department has stated its position that this is the case in a memorandum in support of a proposed amendment to 8 NYCRR 200.5 and in a recent guidance document.

Section 4404 of the Education Law concerning appeal procedures for students with disabilities, 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 2023-24 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.

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf). Ultimately, however, the proposed regulation was not adopted. Instead, 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.).[5] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed 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:

> 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).[6]

The district acknowledges the limitation on applicability of the amendments to the State regulation relating to the date of the due process complaint notice and also acknowledges the injunction but contends that parents never had the right to file a due process complaint to request "enhanced rates for equitable services'" and that the injunction had no effect whatsoever on their core argument regarding subject matter jurisdiction.

Consistent with the district's position, State guidance issued in August 2024 noted that the State Education Department had "conveyed" to the district 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.

[5] The due process complaint in this matter was filed with the district on July 1, 2024 (Parent Ex. A), prior to the July 16, 2024 date set forth in the emergency regulation, which regulation has since lapsed.

[6] 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 (Order, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24 [Sup. Ct., Albany County, Nov. 1, 2024]).

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[7]

However, acknowledging that the question has 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 issuance of the temporary restraining order suspending application of the regulatory amendment, the amendments to the regulation may not be deemed to apply to the present matter regardless of the guidance document. Accordingly, the district's appeal seeking to reverse the IHO's pendency order on the ground that the IHO and SRO lack subject matter jurisdiction to determine the merits of the parent's claims must be denied.

Lastly, the district argues that parents must request IESP services from the district "on or before the first day of June preceding the school year for which the request for services was made" (Req. for Rev. ¶ 8; see Education Law § 3602-c[2][a][1]). The district asserts the parent essentially conceded she did not send a timely June 1st notice to the CSE in her due process complaint notice. 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 2024 IESP and consisted of two 30-minute sessions per week of individual speech-language therapy, one 45-minute session per week of individual PT, one 30-minute session per week of individual counseling services, one 30-minute session per week of group speech-language therapy, one 30-minute session per week of group counseling services, two 30-minute sessions per week of individual OT, and full-time daily health paraprofessional services (Interim IHO Decision; SRO Ex. 1 at pp. 11-12). 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 2024 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]).

[7] Neither the guidance nor the district indicated if this jurisdictional viewpoint was conveyed publicly or only privately to the district, when it was communicated, or to whom. There was no public expression of these points that the undersigned was aware of until policymakers began rulemaking activities in May 2024; however, as the number of allegations began to mount that the district's CSEs had not been convening and services were not being delivered, at that point the district began to respond by making unsuccessful jurisdictional arguments to SRO's in the past, which decisions were subject to judicial review but went unchallenged (see e.g., Application of a Student with a Disability, 23-068; Application of a Student with a Disability, 23-069; Application of a Student with a Disability, 23-121). The guidance document is no longer available on the State's website; thus a copy of the August 2024 rate dispute guidance has been added to the administrative hearing record.

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 2024 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**
November 29, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER