The University of the State of New York

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

No. 24-518

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

Liz Vladeck, General Counsel, attorneys for respondent, 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 parent) appeals from a decision of an impartial hearing officer (IHO) which, among other things, denied her request that respondent (the district) fund the costs of her son's private services delivered by providers of her choosing at specified rates for the 12-month 2024-25 school year. The district cross-appeals from the IHO's findings related to its obligation to provide services for the 2024-25 school year. The appeal must be sustained in part and the matter remanded for further proceedings. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the 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

A Committee on Preschool Special Education (CPSE) convened on October 15, 2020, to develop an individualized education program (IEP) for the student (Parent Ex. C at pp. 1, 2, 3).

The October 2020 CPSE found the student eligible for special education and related services as a preschool student with a disability and recommended that the student receive 12-month services consisting of nine hours per week of direct special education itinerant teacher (SEIT) services in a group of two, three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual occupational therapy (OT), and three 30-minute sessions per week of individual physical therapy (PT) (id. at pp. 1, 18-20).[1]

In preparation for the student's transition to school-age programming, a CSE convened on May 10, 2021, to develop an IESP for the student with an implementation date of September 6, 2021 (Parent Ex. D at pp. 1, 9-10, 12). The May 10, 2021 CSE found the student eligible for related services as a student with a speech or language impairment (id. at p. 1).[2] The May 2021 CSE recommended that the student receive three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, and three 30-minute sessions per week of individual PT (id. at pp. 9-10). The May 10, 2021 IESP further indicated that the student had been parentally placed at a nonpublic school (id. at p. 12).[3]

A CSE convened on January 16, 2024, to develop an IESP for the student with an implementation date of January 30, 2024 (IHO Ex. III at pp. 1, 5, 8). The January 2024 CSE continued to find the student eligible for related services as a student with a speech or language impairment (id. at p. 1). The January 2024 CSE recommended that the student receive three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of PT (id. at p. 5).

On May 8, 2024, the parent electronically signed a contract for the 12-month 2024-25 school year with Yes I Can Services (Yes I Can) to provide the student with nine hours per week of SEIT services (Parent Ex. G at p. 3). The contract was countersigned by a representative of Yes I Can on June 20, 2024, and according to the terms, the student's mother agreed that it was her "responsibility to pay any balance of any fee that [wa]s not covered by the [district] prospective

[1] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities). A list of New York State approved special education programs, including SEIS programs, can be accessed at: https://www.nysed.gov/special-education/approved-preschool-special-education-programs.

[2] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[3] The hearing record reflects that the parent challenged the May 2021 IESP in a prior proceeding related to the 2021-22 school year. The May 16, 2022 IHO decision issued in that proceeding was not included in the hearing record. In another proceeding, the parent also challenged the district's failure to convene a CSE and develop an IESP for the 2022-23 school year. The February 1, 2023 IHO decision issued in that proceeding was included in the hearing record and it recounted the findings in the May 2022 IHO decision related to the 2021-22 school year (Parent Ex. B at pp. 17-18). The February 1, 2023 IHO decision, the prior IHO found that the May 2021 IESP was substantively inappropriate and did not offer the student a FAPE for the 2021-22 school year (id. at p. 18). The district did not appeal either of the IHO decisions related to the 2021-22 and 2022-23 school years.

payment" and that she was "aware of the schedule of fees which [we]re incorporated by reference" (id. at pp. 2, 3). The rate schedule reflected that the cost of SEIT services was $200 per hour for the 2024-25 school year (id. at p. 4).

On May 31, 2024, the parent filed a request for services from the district for the 2024-25 school year together with a May 31, 2024 email showing transmission of the document to the district (Parent Ex. F at pp. 1, 3).

By letter dated June 27, 2024, the parent, through her attorneys, provided the district with 10-day written notice, advising the district that she disagreed with the recommendations of the CSE from the "IEP meeting" in May 2021 and intended to obtain providers to deliver services to the student at his nonpublic school (Parent Ex. E at pp. 2-3). The parent also indicated that she was seeking reimbursement or direct payment from the district for her privately obtained special education program and related services, but indicated that she was unsure if she would be able to obtain any providers (id. at p. 3).

On July 5, 2024, the parent signed a contract with Well Said Speech Services PLLC (Well Said Speech), for the provision of speech-language therapy for the 12-month 2024-25 school year at a rate of $300 per hour (Parent Ex. H at pp. 2, 3). The contract also referenced all of the services listed in the October 2020 CPSE IEP and stated that the parent was requesting that Well Said Speech "provide the recommended services mentioned-above to whatever extent possible for the 12[-month] 2024-25 school year" (id. at p. 1). In addition, the terms of the contract reflected that the parent "confirm[ed] that [she was] liable to pay Well Said Speech [] the full amount for all recommended services mentioned-above delivered by Well Said …for the 12[-month] 2024-25 school year in the event that [the parent wa]s unable to secure funding from the [district] or elsewhere" (id. at p. 2). In a nearly identically worded contract, the parent signed an agreement with Dana's Occupational Therapy Services, PLLC (Dana's OT) on July 5, 2024 (compare Parent Ex. I at pp. 1-3, with Parent Ex. H at pp. 1-3). The contract contained the same terms as the contract with Well Said Speech and provided that Dana's OT would provide OT services for the 12-month 2024-25 school year at a rate of $300 per hour (Parent Ex. I at p. 2).

The hearing record also included a June 28, 2024 Special Education Teacher progress report, a July 2024 Special Education Teacher plan of remediation, an August 20, 2024 OT progress report, an August 23, 2024 speech-language therapy progress report (Parent Exs. J at pp. 1-5; K at pp. 1-4; L at pp. 1-3; M at pp. 1-4).

A. Due Process Complaint Notice

In a due process complaint notice dated July 5, 2024, the parent alleged that the district failed to timely convene a CSE meeting for the 2024-25 school year and the failure to recommend continuation of SEIT services or placement in a "hybrid special education/general education program" was a denial of a free appropriate public education (FAPE) to the student for the 2024-25 school year (Parent Ex. A at pp. 1, 3).[4] The parent also argued that the district failed to recommend an appropriate placement for the 12-month 2024-25 school year and requested that the

[4] The parent also requested a finding that the May 2021 IESP was "a denial of a FAPE for the" 12-month 2024-25 school year.

district be ordered to fund the programming awarded as relief in the February 1, 2023 IHO decision for the complete 12-month 2024-25 school year and directly fund or reimburse the privately services obtained by the parent (id. at pp. 2-3). The parent invoked pendency based on the unappealed February 1, 2023 IHO decision and indicated that she may request a bank compensatory education at the rate listed in the providers' contracts for unimplemented pendency services if unable to obtain the privately contracted services (id. at pp. 2, 3).

In a July 16, 2024 response to the parent's due process complaint notice, the district denied the parent's claims, gave notice of its intention to challenge the appropriateness of the relief sought by the parent, pursue all applicable defenses and in a supplemental notice asserted that a January 16, 2024 CSE had convened and developed an IESP for the student for the 2024-25 school year (Due Process Response at pp. 1-2, 3).

B. Impartial Hearing Officer Decision

The parties convened for a prehearing conference before an IHO with the Office of Administrative Trials and Hearings (OATH) on August 5, 2024 (Tr. pp. 1-9). By written motion to dismiss dated August 26, 2024, the district alleged that the IHO lacked subject matter jurisdiction to review the parent's claims raised in her due process complaint notice and that the parent's claims were not ripe (IHO Ex. I at pp. 1-6). In a memorandum of law in opposition to the district's motion to dismiss dated September 12, 2024, the parent opposed the district's motion (IHO Ex. II at pp. 1-20). The parties reconvened for an impartial hearing on September 16, 2024 (Tr. pp. 10-69).[5]

In a decision dated October 2, 2024, the IHO found that the parent failed to state a claim upon which relief could be granted and that the student was not entitled to 12-month services (IHO Decision at p. 2). Initially, the IHO denied the district's motion to dismiss, finding that the parent's claims were ripe and that the parent's due process complaint notice was filed prior to the effective date of an emergency rulemaking (id. at p. 3).

Next, the IHO found that the parent's July 5, 2024 due process complaint notice asserted that the last IESP developed for the student was dated May 10, 2021, and that the assertion that there was a failure to convene a CSE meeting prior for the 2024-2025 school year was "demonstrably inaccurate" as the district provided the IHO with a copy of a January 16, 2024 IESP, which the IHO entered into evidence (IHO Decision at pp. 5-6). The IHO determined that "by not making any specific allegations regarding the operative program at the start of the 2024-2025 school year, [the p]arent did not put [the d]istrict on notice of what issues they had regarding the program" and that the parent was "essentially [] raising issues beyond the scope of the claims made" in the due process complaint notice (id. at p. 6). The IHO then stated that his analysis would "focus on [the d]istrict's obligation to implement the services ordered in the February 1, 2023" IHO decision (id.).

Turning to the parent's request for equitable services, the IHO stated that the district had not raised a defense regarding the parent's request for dual enrollment services for the 2024-25

[5] A prehearing conference was held on August 5, 2024 (Tr. pp. 1-9).

school year (IHO Decision at p. 7).[6] The IHO found the district had not challenged the student's entitlement to equitable services for the 2024-25 school year during the impartial hearing (id.). The IHO determined that the student was eligible to receive services for the 2024-25 school year (id.).

The IHO then found that it was undisputed that the district did not implement the programming ordered by the February 1, 2023 IHO decision for the 2024-25 school year (IHO Decision at p. 7). The IHO found that "given the development of the January 16, 2024 program, with which [the p]arent ha[d] not disagreed," the district "had no obligation to implement the services being requested" (id.). The IHO determined that the parent's allegation that the district failed to implement the program ordered by the February 1, 2023 IHO decision for the 2024-25 school year "was not a denial of FAPE on an equitable basis" (id.). The IHO further found that the services referenced in the February 1, 2023 IHO decision "were ordered to remedy a denial of FAPE from the 2022-2023 school year and that th[e] order was only applicable to that school year" (id.). The IHO also found that the parent had "not alleged a failure to implement, requested services pursuant to, or expressed disagreement with the January 16, 2024 program in" the due process complaint notice (id.). The IHO determined that "[g]iven the existence of [the January 2024 IESP], …neither the October 15, 2020 IEP, nor the May 10, 2021 IESP, nor the February 1, 2023 [IHO decision] were the operative program at the time during the 2024-2025 school year when [the d]istrict had an obligation to provide services" to the student (id.). Thus the IHO determined that the district "was under no obligation to implement the program [the p]arent claimed" in the due process complaint notice (id. at p. 8).

The IHO then discussed the student's risk of substantial regression to address the parent's request for funding of 12-month services (IHO Decision at p. 8). The IHO found that there was no evidence in the hearing record that demonstrated 12-month services were necessary or appropriate for the student (id.). The IHO determined that the statements from the parent, the educational supervisor and provider from Yes I Can "to be more conclusory than informative" and that the hearing record lacked data to support a finding that the student substantially regressed following a break in instruction (id. at p. 9). The IHO then found that "the unilateral placement during the summer months" was not appropriate to address the student's needs and that the parent "would not be entitled to their requested relief regarding the summer months of the 2024-2025 school year, even if Prong I had been satisfied" (id.).

Based on his determinations, the IHO denied the parent's request for funding of the program ordered by the February 1, 2023 IHO decision and dismissed the matter with prejudice (IHO Decision at p. 10).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in failing to address the parent's request for pendency. The parent asserts that the district did not present any evidence or witnesses to defend

[6] The IHO acknowledged that the district's representative stated that the district would assert a June 1 defense during the prehearing conference, however the district did not reassert the defense during the impartial hearing (IHO Decision at p. 7 n.9). The district also raised the June 1 defense in its response to the parent's due process complaint notice (Due Process Response at p. 1).

its program or recommendation to remove 12-month services and all academic support from the student's IESP.[7] The parent also contends that her unilaterally obtained services were appropriate. As relief, the parent requests a finding that the removal of 12-month services and SEIT services from the May 10, 2021 IESP and the January 16, 2024 IESP constituted a denial of a FAPE. The parent also requests funding for the program ordered by the February 1, 2023 IHO decision at the contracted rates of the parent's providers, a bank of hours for any missed pendency, and a pendency order.

In an answer with cross-appeal, the district argues that the IHO correctly determined that the parent failed to preserve a valid claim of a denial of a FAPE for the 2024-25 school year. The district alleges that it was not required to implement the October 2020 CPSE IEP, the May 2021 IESP or the February 1, 2023 IHO decision, which were the only program recommendations raised in the due process complaint notice. The district argues that the IHO correctly dismissed the due process complaint notice because it failed to preserve a claim against the operative 2024 IESP and that the claims raised in the due process complaint notice were refuted by the hearing record. The district also alleges that the parent is not entitled to pendency based on the unappealed February 1, 2023 IHO decision because it was superseded by the January 2024 IESP, which the parent failed to dispute. The district contends that the parent is not entitled to compensatory education for missed pendency services and that the matter should be remanded if pendency is still at issue. The district further asserts that the IHO correctly found that the parent did not demonstrate the appropriateness of 12-month services and failed to meet her burden of demonstrating the appropriateness of her unilaterally obtained services, specifically pointing to the lack of attendance records and session notes. The district also asserts that the January 2024 IESP represents the district's view of FAPE and the nine hours of SEIT provided by the parent was in excess of FAPE.

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]).[8] "Boards of education of all school districts of the state

[7] The parent incorrectly asserts that the district did not identify the January 2024 IESP in its response to the parent's due process complaint notice.

[8] State law provides that "services" includes "education for students with disabilities," which means "special

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.).[9] 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 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. Scope of the Impartial Hearing

Turning to the IHO's determinations regarding the scope of the impartial hearing, generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per

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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]).

[9] 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.

permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

In his discussion of the parent's due process complaint notice, the IHO found that the parent did not specifically challenge the January 2024 IESP, and that the parent's due process complaint notice "did not put [the d]istrict on notice of what issues [the parent] had regarding the program" (IHO Decision at p. 6). The IHO also noted that the parent's representative was unable to respond to his questions about the January 2024 IESP during the prehearing conference and that neither party offered the January 2024 IESP into evidence during the impartial hearing (IHO Decision at p. 5; see Tr. pp. 4-6). Accordingly, the IHO requested a copy of the January 2024 IESP after the impartial hearing and found that by "its mere existence," the parent's claim that the district failed to convene a CSE for the 2024-25 school year "to be demonstrably inaccurate" (IHO Decision at pp. 5-6). The IHO further found that the parent had failed to raise any claims related to the January 2024 IESP in her due process complaint notice and that the January 2024 IESP was outside the scope of the impartial hearing (id. at p. 6). The present levels of performance listed therein were developed while the student was attending first grade at the nonpublic school and the student's father attended that meeting, providing information and input into the development of the IESP (IHO Ex. III at pp. 1-3, 8) and, thus, the IHO appropriately developed the evidentiary record regarding the parent's claim that no CSE meeting had been convened. The parent's claims in the July 2024 due process complaint notice that the student's services as listed in the February 2023 IHO decision, which in turn were rooted in an IEP that the student had while in preschool, were properly dismissed because those matters had run their course and were superseded by a subsequently created ISEP in January 2024 that has gone unchallenged. The parent cannot simply ignore those subsequent events and actions taken by the CSE.

Neither party has challenged the IHO's findings related to the scope of the impartial hearing. In addition, the district has not cross-appealed from the IHO's denial of their motion to dismiss for ripeness and subject matter jurisdiction (see IHO Decision at p. 3). Therefore, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Bd. of Educ. of the Harrison Cent. Sch. Dist. v. C.S. et al., 2024 WL 4252499, at *12-*15 [S.D.N.Y. Sept. 20, 2024]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. Pendency

The parent appeals from the IHO's failure to address pendency. As relief, the parent requests funding for the programming as ordered by the unappealed February 1, 2023 IHO decision, but to be delivered at the contracted rates of the parent's providers in this case, as well as a bank of hours for any missed pendency, and a pendency order. The district argues that the parent is not entitled to pendency based on the unappealed February 1, 2023 IHO decision because it was superseded by the January 2024 IESP, which the parent failed to dispute. The district contends that the parent is not entitled to compensatory education for missed pendency services and that the matter should be remanded, if pendency is still at issue.

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, 959 F.3d at 531; 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]).[10] 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 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. 46,709 [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.

[10] In Ventura de Paulino v. New York City Department of Education, 959 F.3d 519 (2d Cir. 2020), 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).

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 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).

With regard to the provision of services to the student, in this case the hearing record contains little information about what transpired upon the issuance of the February 2023 IHO decision and July 2024 when the due process complaint notice was filed, other than the fact that the IHO discovered that a new unchallenged IESP had been created during this intervening period of time. The direct testimony by affidavit of the parent's providers from Yes I Can, Well Said Speech, and Dana's OT all indicate that the parent has unilaterally obtained private services from those companies for the 2024-25 school year (Parent Exs. O-Q). However, there is inadequate information in the hearing record to determine what occurred after the IHO issued the February 2023 decision with regard to whether the district implemented services for the remainder to of the 2022-23 school year as the IHO envisioned, what transpired in preparation for the 2023-24 school year, or whether private services were obtained from the same three companies —Yes I Can, Well Said Speech, and Dana's OT— in order to carry out the terms of the IHO's February 2023 decision, which services the parent is now seeking but under an alternative theory that they should be funded as pendency services.[11]

Thus, the dispute between the parties, as it arises in the pendency context, is: whether the district was required fund the services from Yes I Can, Well Said Speech, and Dana's OT as pendency. The substance of this inquiry was addressed by the Second Circuit; the Court found that the district had the authority "to determine how to provide the most-recently-agreed-upon educational program" (Ventura de Paulino, 959 F.3d at 534). More specifically, the Second Circuit held that if a parent disagrees with a district's decision on how to provide a student's educational program, the parent could either argue that the district's decision unilaterally modifies the student's pendency placement and invoke the stay-put provision, seek to persuade the district to agree to pay for the student's program in the parent's chosen school placement, or enroll the student in the new school and seek retroactive reimbursement from the district after the IEP dispute is resolved (id.). According to the Court, "what the parent cannot do is determine that the child's pendency placement would be better provided somewhere else, enroll the child in a new school, and then invoke the stay-put provision to force the school district to pay for the new school's services on a

[11] The bank of compensatory services ordered in the IHO's February 2023 unappealed decision as remediation for past deprivation were distinct from the programming that the IHO ordered going forward for the remainder of the 2022-23 school year (Parent Ex. B at pp. 24, 26).

pendency basis" (id. [emphasis added]).[12] Thus in this case, whether the parent can recover the costs of services from the district under a pendency argument turns on whether the parent obtained the services from the same companies previously at district expense to carry out the terms of the IHO's February 2023 decision. However, the hearing record is inadequate to answer that question. Accordingly remand to the IHO is appropriate in order to allow the parties to develop the record on these points.

VII. Conclusion

In summary, neither party has alleged that IHO's determination that the CSE convened or that the January 2024 IESP went unchallenged and was outside the scope of the impartial hearing. Nevertheless, the IHO erred in failing to issue an order on pendency, and the matter must be remanded to develop the record to determine whether the district may have an obligation to fund any of the special education services that the parent unilaterally obtained from Yes I Can, Well Said Speech, and Dana's OT under pendency.

I have considered the parties' remaining contentions and find they are unnecessary to address in light of the findings above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the matter is remanded to the IHO who issued the October 2, 2024 decision to develop the hearing record to determine whether the student is entitled to pendency services from Yes I Can, Well Said Speech, and Dana's OT for the duration of these proceedings in accordance with the body of this decision.

Dated: **Albany, New York**
January 7, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER

[12] Whether the unilaterally obtained services are from a school like the one discussed in Ventura de Paulino, or a collection of LLCs, PLLCs and other companies as in this case, makes little difference. The February 2023 decision did not even name any private companies, but that decision left a small amount of room for the fact that the companies could have become involved shortly thereafter in the implementation of that unappealed decision, thus I will remand the matter to allow the parent to take a position on that point and allow the parties an opportunity to be heard.