The University of the State of New York

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

No. 24-579

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 Lindsay R. VanFleet, 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 the decision of an impartial hearing officer (IHO) which did not rule on her request for pendency services for her son during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2024-25 school year. The district cross-appeals from the IHO's decision asserting that the IHO lacked subject matter jurisdiction over the parent's claims. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to 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]). In addition, 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 (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 evidence in the hearing record regarding the student's educational history is sparse. Briefly, a CSE convened on April 14, 2024, found the student eligible for special education as a student with a speech or language impairment, and recommended that the student receive five periods per week of direct group special education teacher support services (SETSS) in Yiddish, two 30-minute sessions per week of group speech-language therapy in Yiddish, and two 30-minute sessions per week of group occupational therapy (OT) in English (see generally Dist. Ex. 2).[1, 2] The April 2024 IESP noted that the student was "[p]arentally [p]laced in a [n]on-[p]ublic [s]chool" (id. at p. 11).

The student was the subject of a prior impartial hearing, and, in a decision dated March 21, 2024, the IHO in that matter (prior IHO) found that the district denied the student a FAPE for the 2023-24 school year (Parent Ex. B at p. 17). The prior IHO found that the private SETSS and speech-language therapy delivered to the student for the 2023-24 school year were appropriate and ordered relief (id. at p. 14, 18).

On June 18, 2024, the parent, through her attorney, notified the district of her disagreement with a May 12, 2022 IEP, which, according to the parent, removed the recommendation for a "summer program," and of her intent to seek reimbursement/direct payment for the student's private special education program and services for the 2024-25 school year (Parent Ex. C at p. 2).[3]

On June 30, 2024, the parent electronically signed a parent service contract with Binyan Inc. (Binyan) for the required "[s]pecial [e]ducation and related services program" for the 2024-25 school year (Parent Ex. F at p. 1). The parent agreed to be held financially responsible for the amount of the program and related services provided by Binyan for the 2024-25 school year if funding was not obtained from the district (id.). Next, on July 1, 2024, the parent signed a service contract with SpeechLearn, PC (SpeechLearn) for speech-language therapy at a specified hourly rate (see Parent Ex. G).[4] The parent remained financially responsible for the costs of the speech-language therapy should she not secure funding from the district (id. at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated July 5, 2024, the parent alleged that the district denied the student a FAPE for the 2024-25 school year (see Parent Ex. A). The parent requested

[1] 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]).

[2] 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.

[3] In an apparent typographical error, the parent's letter was dated June 18, 2023, but the email delivering the letter to the district was sent on June 18, 2024 (Parent Ex. C).

[4] Neither Binyan nor SpeechLearn has not been approved by the Commissioner of Education as a school or agency with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

pendency in the unappealed March 21, 2024 IHO decision to include five 60-minute sessions per week of SEIT in Yiddish, two 30-minute sessions per week of individual speech-language therapy in Yiddish, and two 30-minute sessions per week of individual OT all on a 12-month basis (Parent Ex. A at p. 2).

In her due process complaint notice, the parent alleged that the presenting problem was that the April 2024 IESP failed to recommend 12-month services (Parent Ex. A at p. 2). Accordingly, the parent asserted she was "left with no choice but to implement the 12-month [s]pecial [e]ducation program independently and seek reimbursement from the [district]" (id. at p. 3). As relief, the parent requested a finding that the April 2024 IESP failed to offer the student a FAPE for the 12-month 2024-25 school year. Also, the parent requested a finding that the district's failure to continue SEIT services or recommend an appropriate placement and services was also a denial of FAPE for the 12-month 2024-25 school year. The parent requested that the program and services in the March 21, 2024 decision be funded at the "contracted rate" for the 12-month 2024-25 school year (id.). Finally, the parent requested that, in the event she was unable to locate services that the student was entitled to under pendency, that the district be ordered to fund a bank of compensatory services for those services missed (id.).

In a due process response, the district generally denied the allegations contained in the due process complaint notice.

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 23, 2024 (Tr. pp. 1-42).[5] In a decision dated October 21, 2024, the IHO found that the parent "did not request a ruling on pendency at the hearing or request that a pendency order be included in the final relief" and concluded that pendency was "not at issue" and would not be addressed in the decision (IHO Decision at p. 4).

Next, the IHO stated there the district did not deny the student a FAPE for failing to recommend 12-month services for the 2024-25 school year (IHO Decision at p. 16). The IHO found a lack of evidence in the hearing record that the student experienced substantial regression to qualify for extended school year services (id.). In addition, the IHO found that the district had not recommended 12-month services for the last three years and there was no evidence that the student qualified for such services (id.). In connection with the program set forth in the April 2024 IESP for the 10-month school year, the IHO found that the parent did not challenge either procedurally or substantively the IESP (id.). Further the IHO found that, to the extent the parent's due process complaint notice set forth a claim relating to the 10-month portion of the school yar, such claim would not be ripe as that portion of the school year had not yet begun (id.).

Although the IHO found no denial of FAPE, the IHO offered alternative findings on the appropriateness of the unilaterally obtained services and equitable considerations (IHO Decision at p. 17). The IHO stated that there was limited information in the hearing record with respect to SETSS and that speech-language therapy was not provided during the summer; therefore, the IHO

[5] In a prehearing order dated July 15, 2024, issued by a different IHO, the expectations and deadlines for the parties were established.

found that the parent did not meet her burden to prove that the unilaterally obtained services were appropriate (id.). With respect to equitable considerations, the IHO stated that, if relief was warranted, the rate for the SETSS would have been at a reduced rate (id.).

Ultimately, the IHO dismissed the parent's claims with respect to 12-month services with prejudice, and claims with respect to implementation of the April 2024 IESP for the 10-month 2024-25 school year were dismissed without prejudice (IHO Decision at p. 18).

IV. Appeal for State-Level Review

The parent's appeal is limited to the fact that the IHO failed to render a pendency decision. The parent argues that pendency is "automatic" upon filing a due process complaint notice. The parent also argues that, contrary to the findings of the IHO, the parent clearly labeled "Pendency Request" in the due process complaint notice and that pendency "cannot be waived by failing to make multiple requests" for the same. As relief, the parent seeks pendency in the prior unappealed IHO decision dated March 21, 2024, as follows: eight hours per week of SEIT services at a rate of $215 per hour; three 30-minute session per week of speech-language therapy at a rate of $295 per hour; and three 30-minute sessions per week of OT at a rate of $295 per hour.

In an answer and cross-appeal, the district generally denied the material allegations contained in the request for review. The district argues that pendency should be denied as the IHO and SRO do not have subject matter jurisdiction over the parent's claims. In addition, the district argues that, because the parent did not request a pendency determination at the hearing, the parent "effectively abandoned" her request for pendency. Next, the district asserts that, if there is subject matter jurisdiction as to the parent's pendency claim, any rate awarded should be reduced.

In an answer to the cross-appeal, the parent states that she did not abandon her pendency request and that there is subject matter jurisdiction to hear her claims.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley,

458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general

education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

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]).[7] "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.).[8] Thus, under State law an eligible New York State resident student may

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

[7] 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]).

[8] 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.

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.

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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., 694 F.3d at 184-85).

VI. Discussion

The parent does not appeal the findings of the IHO that the district did not deny the student a FAPE for failing to recommend 12-month services for the 2024-25 school year; that there was no evidence that the student experienced substantial regression; that the parent did not challenge the April 2024 IESP; that any claims pertaining to the 10-month portion of the 2024-25 school year were not ripe; that the parent failed to meet her burden to prove that the unilaterally obtained services were appropriate; or, if relief was awarded, that an award of SETSS would be at a reduced rate based on equitable considerations. Therefore, these unappealed 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., 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]).

Accordingly, the issue to be addressed is whether there is subject matter jurisdiction to determine the parent's pendency claim, and, if so, whether the student is entitled to pendency. However, first, I note that, with respect to the parent's claims in this matter pertaining to the district's failure to recommend 12-month services, State guidance has indicated that Education Law § 3602-c does not require school districts to provide dual enrollment services to students with disabilities during the summer, unlike a district's obligation during the course of the regular school year, within an IESP (see "Chapter 378 of the Laws of 2007 – Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3206-c," at p. 14, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf). However, State guidance also

directs that for such dually enrolled (that is parentally placed) nonpublic school students who qualify for 12-month services (also known as extended school year services [ESY]) there is a need for an IESP for the regular school year and an IEP for 12-month services programming, resulting in a 10-month IESP and a 6-week IEP ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at pp. 38-39, Office of Special Ed. [updated Oct. 2023], available at https://www.nysed.gov/sites/default/files/programs/special-education/questions-answers-iep-development_0.pdf).

The parent's claims addressed by the IHO pertained to the educational planning that took place for the student by the CSE and the lack of a recommendation for 12-month services, which based on the foregoing guidance, would have been set forth in an IEP if recommended.

A. Subject Matter Jurisdiction

Regarding subject matter jurisdiction, the district argues that there is no federal right to file a due process claim regarding services recommended in an IESP and that, under State law, parents never had the right to file a due process complaint with respect to implementation of "an IESP." However, as noted, the parent's claims included an allegation relating to the lack of summer programming (which, if required, would have been set forth in an IEP, not an IESP). This is not an instance where the parent's claim is solely, if at all, related to implementation of an IESP. Therefore, there can be no dispute that the IHO and SRO have jurisdiction to address the claims set forth in the parent's due process complaint notice.

Moreover, even if this matter solely related to implementation of an IESP, recently in several decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related to implementation of equitable services under State law (see, e.g., Application of a Student with a Disability, Appeal No. 24-602; Application of a Student with a Disability, Appeal No. 24-595; Application of a Student with a Disability, Appeal No. 24-594; Application of a Student with a Disability, Appeal No. 24-589; Application of a Student with a Disability, Appeal No. 24-584; Application of a Student with a Disability, Appeal No. 24-572; Application of a Student with a Disability, Appeal No. 24-564; Application of a Student with a Disability, Appeal No. 24-558; Application of a Student with a Disability, Appeal No. 24-547; Application of a Student with a Disability, Appeal No. 24-528; Application of a Student with a Disability, Appeal No. 24-525; Application of a Student with a Disability, Appeal No. 24-512; Application of a Student with a Disability, Appeal No. 24-507; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498; Application of a Student with a Disability, Appeal No. 24-464; Application of a Student with a Disability, Appeal No. 24-461; Application of a Student with a Disability, Appeal No. 24-460; Application of a Student with a Disability, Appeal No. 24-441; Application of a Student with a Disability, Appeal No. 24-436; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability, Appeal No. 24-391; Application of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386).

As the district's jurisdictional argument is without merit, its related contention that the student was not entitled to pendency services because the IHO also lacked subject matter jurisdiction to order the district to maintain the student's pendency services is also without merit.

B. Pendency

The parent contends that pendency was an automatic right upon the filing of the due process complaint notice, whereas the district argues that, since the parent did not raise the issue of pendency at the impartial hearing, and the parent "effectively abandoned" her pendency request.

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]). 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).

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).

With respect to the IHO's finding that the parent did not raise an issue with pendency, the controlling law in this circuit requires the district to provide the student with stay put services, assuming the parents are willing to avail themselves of those services, whether or not the parent explicitly requests them in the due process complaint notice. As the Second Circuit has explained "[t]his provision is, in effect, an automatic preliminary injunction" (Zvi D., 694 F.2d at 906), and the position that parents must dispute pendency in the very due process complaint notice that gives rise to the right to pendency is baseless (E. Lyme, 962 F.3d at 659 ["To that end, we again emphasize that once a party has filed an administrative due process complaint, the IDEA's stay-put provision provides that 'during the pendency of any proceedings conducted pursuant to [20 U.S.C. § 1415] . . . the child shall remain in the then-current educational placement of the child.'"]).

Moreover, even if required, here, in the July 5, 2024 due process complaint notice, the parent requested that the student be provided with pendency services pursuant to a March 21, 2024 IHO decision (Parent Ex. A at p. 2). Included with the due process complaint notice was a "[p]endency [p]rogram" form asserting that pendency lay in the March 21, 2024 decision (id. at pp. 5-6). During the August 23, 2024 hearing date, pendency was not discussed (Tr. pp. 1-42).

Accordingly, the district was obligated in this instance to deliver the student's pendency services during the course of the proceeding and through the current appeal. As noted, an unappealed IHO decision may form the basis of pendency (see Student X, 2008 WL 4890440, at *23). The district has not pointed to a different source for determining the student's last agreed upon placement and the evidence in the hearing record supports the parent's position that the student's pendency lay in the unappealed March 21, 2024 IHO decision. Accordingly, the student was entitled to pendency services based on the unappealed March 21, 2024 IHO decision from the date of the due process complaint notice, July 5, 2024, through the date of this decision.

VII. Conclusion

As set forth above, the IHO had subject matter jurisdiction to hear the parent's claims, including pendency. The student is entitled to pendency services pursuant to the unappealed IHO decision dated March 21, 2024, from July 5, 2024, the date of the due process complaint notice, until the conclusion of these proceedings.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated October 21, 2024, is modified by reversing that portion which found that the parent had not requested pendency for the student; and

IT IS FURTHER ORDERED that, for purposes of pendency, the student is entitled to the program and services set forth in the March 21, 2024 decision, from July 5, 2024 until the conclusion of these proceedings.

Dated: **Albany, New York**
March 12, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER