



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-028

**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** [REDACTED]

### **Appearances:**

Hodgson Russ LLP, attorneys for respondent, Emina Poricanin, Esq., of counsel

## **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 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 the parent's son's pendency (stay put) placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2011-12 school year. The IHO found that the student's pendency placement for that school year did not include a second daily resource room period. The 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, at least one psychologist, and school district representatives (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, 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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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). State regulations also authorize an interlocutory appeal to an SRO by a party who has been aggrieved by an IHO's interim decision regarding a student's pendency placement during the impartial hearing (8 NYCRR 279.10[d]). 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 300.514[c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

As relevant to the issues in this appeal, the CSE convened on July 15, 2010 to develop the student's IEP for his eighth grade (2010-11) school year (Dist. Statement of Pendency Ex. 3

at p.1). Among other recommendations, the CSE recommended that the student receive one period daily of resource room services (id.). By letter to the district dated October 21, 2010, the parent expressed concerns about her son's education program and noted that one period daily of resource room for the student may not be sufficient (id. at Ex. 4 at pp. 1-2). Thereafter, by letter to the district dated October 29, 2010, the parent requested that the student no longer participate in French class and instead be assigned to an additional resource room period (id. at Ex. 4 at p. 4). Pursuant to the parent's request, the district removed the student from French class and assigned him to a second resource room period for the remainder of his eighth grade school year (Dist. Statement of Pendency at p. 4; Pet. Ex. H at p. 2). The CSE reconvened on April 7, 2011 (Dist. Statement of Pendency Ex. 6).<sup>1</sup> The student's IEP for the 2010-11 school year was not amended to reflect the additional resource room periods (id.; see Dist. Statement of Pendency at p. 4; Pet. Ex. H at p. 2).

On June 9, 2011, the CSE convened to develop the student's IEP for the 2011-12 school year when the student would be in ninth grade (Dist. Statement of Pendency Ex. 7 at p. 1). The June 2011 CSE recommended, among other things, that the student receive a resource room period five times per week (id. at pp. 2, 22). According to the June 2011 IEP, the student's resource room services would be implemented beginning on September 7, 2011 (id. at p.22).

#### **A. Due Process Complaint Notice**

In a due process complaint notice dated November 27, 2011, the parent requested an impartial hearing with respect to certain recommendations of the June 2011 CSE (Pet. Ex. A). Among other things, the parent requested an immediate pendency hearing "[d]ue to the district's failure to implement pendency" (id. at p. 4). The parent asserted that the district had failed to implement two daily resource room periods as part of the student's pendency placement for the 2011-12 school year (id. at p. 3).

#### **B. Impartial Hearing Officer Decision**

Thereafter, the IHO acknowledged the parent's request for pendency and requested that the parties provide him with their respective positions on the student's pendency placement with supporting documentation (see Interim IHO Decision at pp. 1-2; Pet. Exs. F; G). In response, the district submitted a statement of pendency dated December 28, 2011, which included an affidavit of its director of special education along with a number of other attachments (see Dist. Statement of Pendency). The district contended that the student's pendency placement was based on the student's July 2010 IEP, which included a single daily resource room period (see id. at Ex. 3 at p. 1).

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<sup>1</sup> As indicated above, the student's program of special education and related services for the 2010-11 school year are set forth in IEPs dated July 15, 2010 and April 7, 2010 (see Dist. Statement of Pendency Exs. 3; 6). Upon review, I note that the special education programs; related services; program modifications, accommodations, and supplemental aids and services; assistive technology devices and services; school personnel supports; audiological services; testing accommodations; and recommendations relating to special education transportation in both IEPs are identical (see id. at Exs. 3 at pp. 1-3; 6 at pp. 1-3).

In a letter dated December 29, 2011, which included a facsimile cover sheet and a number of attachments, the parent advised the IHO of her position with respect to the student's pendency placement (Pet. Ex. H). The parent asserted that the student's pendency placement was based on the implementation of the student's July 2010 IEP and included an additional "agreed upon" second daily resource room period (id. at p. 2).

In an interim decision dated January 9, 2012, the IHO ordered that the student's pendency placement was what was set forth in the student's 2010-11 IEP (Interim IHO Decision at p. 4). The IHO found that the district and the parent agreed that the student's 2010-11 IEP was "to be looked to regarding pendency," with the exception that the parent contended that the student's pendency also included a second daily resource room period (id. at p. 2). The IHO rejected the parent's contention that the student's pendency placement included "an agreed upon" second daily resource room period because the IHO found that the student's 2010-11 IEP had not been amended to reflect a second daily resource room period (id. at p. 3; see 34 CFR 300.324[a][6]; 8 NYCRR 200.4[g]).

#### **IV. Appeal for State-Level Review**

The parent appeals that part of the interim IHO decision which found that the student's pendency placement did not include a second daily resource room period and requests that the student's pendency placement be the educational services and placement in the 2010-11 IEP plus an additional daily resource room period. The parent asserts that the district had agreed to provide the student with a second daily resource room period after the parent's October 2010 letters to the district and that the student had received this additional daily resource room service until the end of the 2010-11 school year. The parent asserts that the CSE reconvened in April 2011 to amend the IEP, but the 2010-11 IEP was not changed to reflect the additional daily resource room services the student was receiving. The parent further contends that the State regulatory provisions relating to the amendment of an IEP are not mandatory procedures, but are procedures that "may" be followed. Additionally, the parent asserts that the IEP amendment regulations do not require that changes in a student's educational programming be committed to writing in order to be reflected in a student's pendency placement. The parent further alleges that there is no legal requirement that "agreed upon" changes to an IEP be actually placed on an IEP in order to be reflected in the student's pendency placement. Additionally, the parent contends that the IHO erred when he made a pendency decision without taking testimony and evidence, notwithstanding that the parent had requested a pendency hearing.

The district submitted an answer, which requested that the IHO's decision be affirmed and that the petition be dismissed. The district agrees that the 2010-11 IEP is the relevant IEP for pendency purposes with respect to the 2011-12 school year and that the student began to receive a second daily resource room period for the 2010-11 school year. The district additionally asserts that the student is receiving all of the services he is entitled to under the 2010-11 IEP. Further, the district denies the parent's allegation that the CSE met in April 2011 for the purpose of revising the student's IEP to include a second daily resource room period. It also denies any contention that the April 2011 CSE did anything improper in not amending the

student's 2010-11 IEP to include a second daily resource room period. The district also asserts that the April 2011 CSE had no reason to change the 2010-11 IEP because no consensus was reached with respect to it. With respect to the parent's assertion that the IHO erred by not holding a hearing to receive evidence and testimony, the district contends that the parent is estopped from raising this issue as she did not make such an objection to the IHO. The district further asserts that a hearing was not necessary as the dispositive facts regarding the parties' dispute were contained in the submissions to the IHO.

## **V. Applicable Standards -- Pendency**

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], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see 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. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). 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. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 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]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a

Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean the current education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelle, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at \*23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

The Second Circuit has described three variations on the definition of "then current educational placement:" (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked; and (3) the placement at the time of the previously implemented IEP (Mackey, 386 F.3d at 163, citing Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 [6th Cir. 1990] [emphasis added]; see Application of a Student with a Disability, Appeal No. 09-125; Application of the Bd. of Educ., Appeal No. 08-126; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 05-006).

## **VI. Discussion**

The disputed issue in this matter is limited to whether the student's pendency placement for the 2011-12 school year includes a second daily resource room period. The parent states that she agrees with the IHO's finding that the student's pendency placement is defined by the 2010-11 IEP, with the exception of her assertion that pendency includes a second daily resource room period (see Pet. ¶¶ 12, 14; see also Interim IHO Decision at p. 2). I note further that the district has not filed a cross-appeal of the IHO's interim decision. As a consequence, the IHO's finding that, with the exception of the question of a second daily resource room period, the parties agree that the student's pendency placement for the 2011-12 school year is otherwise determined by the 2010-11 IEP is final and binding upon the parties unless the parties mutually agree to alter the student's placement for purposes of pendency (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

I now consider the parent's contention that the IHO erred in finding that the student's pendency placement for the 2011-12 school year does not include a second daily resource room period. In this case, I find that the IHO correctly determined that the student's pendency placement included only one daily resource room period.

Initially, I note that the record on review does not show that the parties entered into any settlement agreement such that the student's pendency placement for the 2011-12 school year would include anything but a single daily resource room period. Nor does the record on review show any adjudication by a previous IHO; by an SRO, which was not appealed; or by a Court on appeal; finding that the student's pendency placement includes a second daily resource room period. Additionally, the record on review does not show or otherwise reflect that the parties agreed during the pendency of these proceedings that the student's placement for the 2011-12 school year should include two daily resource room periods.

Both the student's IEPs for the 2010-11 school year unambiguously set forth that the student was to receive one daily resource room period and not two such periods (see Dist. Statement of Pendency Exs. 3 at p. 1; 6 at p. 1). I note also that the student's placement at the time the parent filed her November 27, 2011 due process complaint notice and invoked the student's pendency rights relating to the 2011-12 school year included one and not two daily resource room periods (see id. at Ex. 10). Furthermore, the parent asserted in the due process complaint notice that the district had "failed to implement" two daily resource room periods (Pet. Ex. A at p. 4), and repeated this assertion in a December 9, 2011 correspondence to the IHO, a copy of which she also sent to counsel for the district (see id. at Ex. E). Moreover, as noted in a prior SRO decision involving the same student, Application of a Student with a Disability, Appeal No. 11-111, when that appeal was commenced on September 9, 2011, the parent also asserted that the student had not been receiving two daily resource room periods at that time. Additionally, the parent has not pointed to any legal authority, nor have I found any after conducting my own search, that would support the conclusion that a student's pendency placement includes services that were provided in excess of those listed on a student's IEP, particularly under the factual circumstances in this case in which the provision of excess services lapsed and a number of months passed thereafter before the due process proceeding commenced.<sup>2</sup> Based on the foregoing, I can find no reason to disturb the IHO's determination that the student's pendency placement does not include a second resource room period under the particular facts of this case.

I now turn to the parent's assertion that the IHO erred by not hearing testimony and taking evidence before rendering a pendency determination. I disagree. The IHO provided the parties with multiple opportunities to present him with their positions with respect to the student's pendency (see Interim IHO Decision at pp. 1-2; Pet. Exs. F; G). I further note that the IHO specifically asked and invited the parties to provide him with "supporting documentation" relating to their positions and that both parties provided documentary evidence to the IHO (see id.; Dist. Statement of Pendency; Pet. Ex. H). Moreover, there is no indication that further testimony in this instance would result in greater illumination of the factual underpinnings related to the parties' pendency dispute. Finally, as indicated above, I find that the record on

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<sup>2</sup> If a particular IEP serves as the basis of the student's pendency placement, the Seventh Circuit has explained that "[e]ven if a school has provided a particular service in the past, it need not be provided in a stay-put situation if it was not within the governing IEP (John M. v. Board of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 715 [7th Cir. 2007]). The Court in that case further indicated that under usual circumstances it should not be necessary to go beyond the "four corners" of the IEP (id.).

review is sufficient to support the IHO's interim decision and that a hearing was not necessary under the circumstances of this case.

## **VII. Conclusion**

In conclusion, I find that the IHO correctly determined that the student's pendency placement for the 2011-12 school year did not include a second daily resource room period.

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

**THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
March 7, 2012



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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**