



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 16-017

### **Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Charity Guerra, Acting Special Assistant Corporation Counsel, attorneys for petitioner, Alexander M. Fong, Esq., of counsel

Weil, Gotshal & Manges, LLP, attorneys for respondent, David J. Lender, Esq., Jared R. Friedmann, Esq., Gaspard Curioni, Esq., and Lauren Engelmyer, 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 district) appeals, pursuant to 8 NYCRR 279.10(d), from an interim decision of an impartial hearing officer (IHO) determining respondent's (the parent's) son's placement during the pendency of a due process proceeding challenging the appropriateness of petitioner's recommended educational program for the student for the 2015-16 school year. The IHO found that the student's pendency placement was at the Cooke Center School (Cooke). The appeal must be sustained.

#### **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]). 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]; 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**

According to the due process complaint notice, the student attended district public school placements from the 2009-10 through 2011-12 school years (Due Process Complaint Notice at p. 2). The student has attended Cooke since the 2012-13 school year (Parent Exs. A; B; F; G; H). It is undisputed that the district has paid for the student's tuition at Cooke for the 2012-13, 2013-

14, and 2014-15 school years pursuant to stipulations of settlement (Due Process Complaint Notice at pp. 2-3).

On February 10, 2015, a CSE convened to develop the student's program for the 2015-16 school year (Due Process Complaint Notice at p. 3). By due process complaint notice dated December 28, 2015, the parent requested an impartial hearing, asserting that the district did not offer the student an appropriate educational placement for the 2015-16 school year and, as relevant to this appeal, asserted that the student's pendency (stay-put) placement was at Cooke (id. at pp. 1-4).

After a prehearing conference held on January 21, 2016, a hearing on pendency was convened on January 29, 2016 (Tr. pp. 1-26). Counsel for the parent asserted that the student's pendency placement was at Cooke by virtue of the district having paid the student's tuition there for the 2014-15 school year (Tr. pp. 13-14; see Parent Exs. C; D; E). Counsel for the district countered that the district had paid the student's tuition at Cooke as a result of stipulations which by their own terms did not establish pendency (Tr. pp. 14-15). Counsel for the parent replied that the stipulations did not affect the student's pendency placement, that the stipulations were inadmissible, and that the student's attendance at Cooke at district expense for the prior three school years evidenced the district's agreement to pay for the costs of his tuition (Tr. pp. 15-21). Counsel for the parent further asserted that the student made no academic progress in the last public school placement he attended (Tr. p. 16). In an interim decision issued by the IHO with respect to the pendency issue, dated February 17, 2016, the IHO found that Cooke was the student's then-current educational placement based upon the language in 20 U.S.C. § 1415(j) and ordered the district to continue to fund the costs of the student's placement at Cooke during the pendency of this proceeding (Interim IHO Decision at p. 2).

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

The district appeals the IHO's interim decision, asserting that evidence the district paid the costs of the student's tuition at Cooke was insufficient to establish an agreement between the parent and the district with regard to the student's educational placement for purposes of the pendency provision. The district seeks to submit the stipulations of settlement for the 2012-12, 2013-14, and 2014-15 school years as additional evidence (Pet. Exs. 1-3). The district alleges that these documents are necessary for an SRO to render a decision regarding the student's pendency placement. The district concedes that the stipulations were not submitted before the IHO and asserts that this was because there was "confusion" as to their admissibility and the IHO refused to admit them into evidence. The district alleges that the IHO improperly determined that the student's attendance at Cooke for the previous three school years and the district's payment of tuition for those school years established pendency. The district argues that the student's attendance at Cooke was pursuant to stipulations of settlement containing language explicitly limiting the settlements to a specific school year and explicitly prohibiting the parent from using the stipulations as a basis for pendency. The district advances that payment of tuition is insufficient to establish an agreement regarding the student's educational placement for purposes of pendency. The district also argues that the IHO effectively granted through pendency the majority of the relief the parent sought in the due process complaint notice.

The parent answers the petition, asserting that the IHO's order on pendency was well-founded and based on the admissible evidence presented at the hearing. The parent argues that the SRO should deny the district's application to consider additional evidence because the district conceded at the hearing the stipulations of settlement were not admissible, the district did not follow the required procedures for admission of additional evidence, and the stipulations are inadmissible by their own terms. The parent further contends that, rather than relying on the stipulations to establish the student's pendency placement, she established the student's pendency at Cooke with evidence that the district paid the student's tuition at Cooke for the 2014-15 school year, demonstrating the district's agreement that the student attend Cooke at district expense.

## **V. Applicable Standards**

The IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. §1415[j]; Educ. Law §§4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ., 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, 246-48 [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. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief (Zvi D., 694 F.2d at 906; 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] [emphasis in original]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996]; Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not require 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, 753, 756 [2d Cir. 1980]).

Although not defined by statute, the phrase "then-current educational placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (M.G., 982 F. Supp. 2d at 246-48; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2002]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015]). The United States Department of Education has opined that a student's then-current educational placement would "generally be taken to mean current special 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. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]).

Once a proceeding commences, a student's pendency placement can be changed in one of three ways: (1) agreement between the parties; (2) a state-level administrative decision that agrees with the parents that a change in placement is appropriate (which is treated as an

agreement between the parties); or (3) an unappealed IHO or Court decision in favor of the parents (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; see Bd. of Educ. v. Schutz, 290 F.3d 476, 484-85 [2d Cir. 2002]; A.W. v Bd. of Educ., 2015 WL 3397936, at \*6 [N.D.N.Y. May 26, 2015]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at \*1 [S.D.N.Y. Mar. 17, 2010]; Arlington Cent. School Dist. v. L.P., 421 F. Supp. 2d 692, 696-97 [S.D.N.Y. 2006]; Murphy, 86 F. Supp. 2d at 366). An agreement between the parties on placement (or a state-level decision in the parents' favor) need not be reduced to a new IEP, and may 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, 90-91 [N.D.N.Y. 2001], aff'd, 290 F.3d 476 [2d Cir. 2002]; Murphy, 86 F. Supp. 2d at 360-61; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

## **VI. Discussion**

### **A. Additional Evidence**

Prior to addressing the issue of the student's pendency placement, it is necessary to first address the preliminary matter of the additional evidence proffered by the district. The district seeks to submit the stipulations of settlement for the 2012-13, 2013-14, and 2014-15 as additional evidence pursuant to 8 NYCRR 279.10(b).<sup>1</sup> Although these documents were available at the time of the hearing on pendency, the district contends that these documents were not submitted due to "some confusion" as to their admissibility and the IHO's refusal to admit them into evidence. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if the evidence is necessary in order to render a decision (see 34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist.,

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<sup>1</sup> The parent contends that the district was required to submit an application explaining why the stipulations were necessary (see 8 NYCRR 276.5). The regulations governing practice before the Office of State Review provide that Part 276 of the regulations of the Commissioner apply "except as provided in [Part 279]" (8 NYCRR 279.1[a]). Because Part 279 and federal law contain explicit authorization for SROs to receive additional evidence when necessary, the district was not required to comply with the procedures for submitting additional evidence in a proceeding before the Commissioner (8 NYCRR 279.10[b]; see 34 CFR 300.514[b][2][iii]). In any event, and contrary to the parent's contention, the district explained that it submitted the stipulations to enforce the terms of the settlements. While the parent argues the district did not specify which terms it sought to enforce, it is abundantly clear that the district explicitly seeks to enforce the portions of the stipulations limiting payment of the student's tuition at Cooke to specific school years and precluding the agreements from establishing the student's pendency placement.

932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).<sup>2</sup>

Despite the district's assertions, there did not appear to be any confusion during the impartial hearing as to the admissibility of the stipulations of settlement; nor did the IHO refuse to admit it (see Tr. pp. 1-26). To the contrary, the district agreed with the parent on the record that the stipulation of settlement for the 2014-15 school year was not admissible (Tr. pp. 14-15, 20-23), and now, after the fact, essentially admits it was mistaken regarding its initial position regarding an evidentiary rule regarding admissibility.<sup>3</sup> However, notwithstanding the district's disjointed advocacy before the IHO and the availability of the documents at the time of the impartial hearing, the district intensely maintained its position that it did not agree to allow Cooke to become the student's pendency position and the stipulations are highly probative of that central issue, which continues to be disputed in this appeal. Both parties discussed elements of the written stipulations on the record when making their case to the IHO. Faced with the record at hand, the conclusion becomes inescapable that the stipulations themselves are necessary to resolve the dispute. Consequently, I will accept the district's additional evidence due to the necessity of reviewing the stipulations of settlement in order to determine whether they establish the student's then-current educational placement. In particular, it is critical to examine the language of the settlement stipulations to determine if any of the agreements covering the 2012-13, 2013-14 and 2014-15 school years indicated the parties' intent to establish Cooke as the student's pendency placement, or to otherwise limit the effect of the student's placement at Cooke with regard to the IDEA's pendency provisions (Pet. Exs. 1; 2; 3).<sup>4</sup> Furthermore, as noted above federal and State regulations expressly give SROs authority to seek additional evidence if necessary to render a decision (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]). If the district had not submitted the stipulations of settlement as additional evidence, I would have very likely

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<sup>2</sup> SROs have also considered the factor of whether the additional evidence was available or could have been offered at the time of the impartial hearing (Application of a Student with a Disability, Appeal No. 08-030). This requirement serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at \*2-\*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ., 2015 WL 1579186, at \*2-\*4 [N.D.N.Y. Apr. 9, 2015]). That factor is of less weight in this instance, where both parties were aware of the existence of the stipulations and, spent considerable time discussing their terms in some detail during the impartial hearing (Tr. pp. 14-16, 20-24). Furthermore, as noted herein, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

<sup>3</sup> The parent incorrectly asserts that the district referenced only the stipulation relating to the 2012-13 school year.

<sup>4</sup> As noted above, the pendency provision is in the nature of an automatic injunction and requires no particular showing on the part of the moving party and no balancing of the equities; thus, to base a determination of a student's stay-put placement on evidentiary technicalities would undermine this automatic and absolute nature (see Zvi D., 694 F.2d at 906; Arlington, 421 F. Supp. 2d at 696).

found it necessary to request them in any event due to the fact that the parties do not, in this instance, agree upon the effect of the stipulations upon the student's pendency placement (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; see, e.g., E.T. v. Bureau of Special Educ. Appeals, 2016 WL 1048863, at \*12-\*13 [D. Mass. Mar. 11, 2016] [considering additional evidence regarding a purported settlement agreement not accepted by the IHO]).

Having determined that it is necessary to accept the stipulations of settlement as additional evidence, the parent argues that the stipulations are inadmissible in accordance with confidentiality provisions contained in the three stipulations of settlement. Initially, the formal rules of evidence applicable in civil proceedings generally do not apply in impartial hearings (Council Rock Sch. Dist. v. M.W., 2012 WL 3055686, at \*6 [E.D. Pa. July 26, 2012]; see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 68 [2d Cir. June 24, 2013]; Cowan v. Mills, 34 A.D.3d 1166, 1167 [3d Dep't 2006]; Tonette E. v. New York State Office of Children and Family Servs., 25 A.D.3d 994, 995-96 [3d Dep't 2006]; Matos v. Hove, 940 F. Supp. 67, 72 [S.D.N.Y. Sept. 25, 1996], citing Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 [7th Cir. 1977]). In any event, the confidentiality provisions of the stipulations at hand do not, as the parents suggest, preclude their consideration in this proceeding.

The confidentiality provision in the May 3, 2013 stipulation, regarding the 2012-13 school year, stated: "[e]xcept with respect to the enforcement of any of the matters stated herein, this [s]tipulation shall not be admissible in, and is no related to, any other proceedings, litigation or settlement negotiations, whether between the parties or otherwise" (Pet. Ex. 1 at p. 6 ¶ 21).

With respect to the 2013-14 school year, paragraph 20 of the October 17, 2014 stipulation of settlement agreement provided: "[e]xcept with respect to the enforcement of any of the matters stated herein, or as provided in this paragraph, this stipulation shall not be admissible in, and is not related to, any other proceedings, litigation or settlement negotiations, whether between the parties or otherwise" (Pet. Ex. 2 at p. 6 ¶ 20[a]). It further provided:

Notwithstanding subparagraph 20(a), the agreements, understandings and representations made by the [p]arent, either individually or mutually, . . . shall expressly survive and . . . the [p]arent's failure to comply with such agreements and representations shall apply, and may be asserted by [the district] as an element of proof as against the [p]arent's interest . . . in any subsequent due process proceedings brought by the [p]arent.

(Pet. Ex. 2 at p. 6 ¶ 20[b][II]).

The stipulation of settlement for the 2014-15 school year, dated July 1, 2015, provided: "[t]his stipulation is confidential and shall not be admissible in, nor is it related to any other

litigation, proceeding, or settlement negotiation, except in a subsequent action, brought by either party, to enforce the terms of this stipulation" (Pet. Ex. 3 at p. 4 ¶ 12).<sup>5</sup>

Notwithstanding the confidentiality provisions of the stipulations of settlement, there are broader public policy concerns to be considered where an agreement between the parties can be used to interfere with the fact-findings obligations of the IHO and SRO in a proceeding relating to the identification, evaluation, or placement of a student with a disability (8 NYCRR 200.5[j][3][vii]; see 34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). While public policy does not have a precise definition, agreements which tend to injure the public good as determined through consideration of statutes or regulations are violative of public policy (Educ. v. Stamford Educ. Ass'n, 697 F.2d 70, 73 [2d Cir. 1982]; see Conoshenti v. Public Service Elec. & Gas Co., 364 F.3d 135, 149 [3d Cir. 2004]). Courts have stricken overreaching confidentiality provisions that violate public policy (see Lopez v. Ploy Dee, Inc., 2016 WL 1626631, at \*3 [S.D.N.Y. Apr. 20, 2016]; Souza v. 65 St. Marks Bistro, 2015 WL 7271747, at \*4 [S.D.N.Y. 2015 Nov. 6, 2015]). The conduct of impartial hearings under the IDEA serve important state interests (Does v. Mills, 2005 WL 900620, at \*6 [S.D.N.Y. Apr. 18, 2005]; Blackwelder v. Safnauer, 689 F. Supp. 106, 117 [N.D.N.Y. 1988]).

With respect to the question of the student's pendency placement, an important consideration is whether the parties came to an agreement as to the student's pendency placement superseding the last agreed upon IEP (Arlington Cent. School Dist., 421 F. Supp. 2d at 696-97). Where there is evidence available regarding the parties' intention as to the student's pendency placement, it is incumbent upon the IHO and SRO to receive and analyze any agreement regarding the establishment or non-establishment of a pendency placement in order make a determination regarding the student's then-current educational placement. A confidentiality agreement that is interpreted as withholding such information from an IHO or SRO and thus impeding the due process provisions of the IDEA is overbroad and violative of public policy in that it serves as an obstacle to the administrative hearing officer's fact-finding obligations and prevents the officer from making a correct and informed determination under federal and State law. Accordingly, I will consider the district's submissions, notwithstanding the parent's belief that the stipulations of settlement should have been withheld from the administrative hearing officers. To allow the confidentiality provisions of these stipulations to potentially be used as a means to hide important information regarding the circumstances of the student's placement from administrative hearing officers would interfere with the IHO's and SRO's duties to complete the hearing record and gather information necessary to render a decision.

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<sup>5</sup> Generally, IHOs and SROs are vested with the authority to make findings of noncompliance in matters within their jurisdiction but are not granted "enforcement" or contempt powers beyond those implied powers to dictate the orderly conduct of the proceedings over which they preside. They do not, for instance, impose punitive sanctions for failure to comply with orders flowing out of other proceedings and other legal obligations such as violating stipulations of settlement. However, they are often called upon to determine whether an agreement has been reached by parties with respect to pendency and, to that extent only, are called upon to "enforce" or interpret documents with legal significance. Another example is that an IHO or SRO would be required to give effect to a resolution agreement reached between the parties in accordance with the IDEA and would not allow a due process hearing to proceed on a matter that was purportedly resolved in the resolution agreement, but, on the other hand, the same administrative hearing officer would not be permitted to impose sanctions upon a party because the party failed to adhere to the terms of a resolution agreement since the statute requires that kind of enforcement action to be conducted before a court of competent jurisdiction.

Upon review of the record, it was also noted that the hearing record did not contain evidence regarding the student's educational placement prior to Cooke, such that it would be impossible to determine the student's pendency placement if it was not Cooke. By letter dated March 31, 2016, the district was directed to submit the student's last agreed upon IEP from the 2011-12 school year (Letter from OSR to Alexander M. Fong, Esq. [Mar. 31, 2016]). In response, the district submitted an IEP dated May 23, 2011 (*see* Pet. Ex. 4). In her memorandum of law, the parent asserts that it was improper for an SRO to request this evidence without holding an evidentiary hearing to determine its admissibility or relevance (8 NYCRR 279.10[b]). The parent misapprehends the scope of the cited regulation. As noted above, the formal rules of evidence applicable in civil proceedings do not apply strictly to administrative proceedings held under the IDEA (*Council Rock Sch. Dist.*, 2012 WL 3055686, at \*6; *see H.C.*, 528 Fed. App'x at 68; *Cowan v. Mills*, 34 A.D.3d at 1167; *Tonette E.*, 25 A.D.3d at 995-96; *Matos v. Hove*, 940 F. Supp. at 72, *citing Silverman*, 549 F.2d at 33 [7th Cir. 1977]). Instead, parties are generally given the right to present evidence and examine and cross-examine witnesses, and IHOs are required to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii]; *see* 34 CFR 300.512[a][2]). Furthermore, both federal and State regulations provide that SROs may seek additional evidence if the SRO determines such evidence is necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; *L.K.*, 932 F. Supp. 2d at 488-89). The regulations do not require the SRO to hold a hearing for the purpose of receiving additional documentary evidence; rather, if the SRO chooses to hold a hearing to receive testimonial evidence, all of the rights appurtenant to the impartial hearing process apply (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]). However, cognizant of the fact that the parent should have an opportunity to respond, the letter directing the district to submit the student's IEP for the 2011-12 school year expressly provided that the parent would be heard if she wished to assert that the IEP should not be considered relevant or dispositive in my determination regarding the student's stay-put placement, or, the parent could seek to submit additional relevant evidence of her own (Letter from OSR to Alexander M. Fong, Esq. [Mar. 31, 2016]).<sup>6</sup> After due consideration of the parent's objections, I will consider the May 2011 IEP.

## **B. The Student's Pendency Placement**

Turning to the merits of the parties' pendency dispute, the district argues that the IHO erred in finding that the Cooke is the student's pendency placement. The district contends that the student's attendance at Cooke was funded pursuant to a stipulation of settlement with specific language that limited the settlement to a particular school year and prohibited the parent from using the agreement to establish pendency. The parent argues that the parties' agreement that the student attend Cooke is evidenced by the payments the district made to Cooke.

The hearing record reflects that the district paid for the student's tuition at Cooke for the 2012-13, 2013-14, and 2014-15 school years pursuant to stipulations of settlement (Pet. Exs. 1;

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<sup>6</sup> Although, as discussed below, the parent raises substantive objections to the program set forth in the May 2011 IEP constituting the student's pendency placement, the parent does not challenge the authenticity of the May 2011 IEP or assert that any other placement was the student's educational placement prior to his initial enrollment at Cooke for the 2012-13 school year.

2; 3). Without citing supporting case law, it is the parent's position that the district's agreement to pay the student's tuition at Cooke for the 2014-15 school year alone evidences the agreement between the parties for Cooke to be the student's educational placement. Payment may be some evidence of an agreement (see In re Starr, 2015 WL 9239024, at \* 2 [Bankr. S.D.N.Y. Dec. 16, 2015]). However, it would be a leap to conclude that payment alone evidences an agreement to change the student's then-current educational placement for the purposes of pendency because placement and payment are two separate matters in the context of a settlement agreement (see Zvi D., 694 F.2d at 908; cf. E. Lyme Bd. of Educ., 790 F.3d at 453 n.12; Schutz, 290 F.3d at 483 n.7). Instead, the best evidence of the parties' intent to change the student's then-current educational placement is the agreements themselves (see Gary Friedrich Enterprises, LLC v. Marvel Characters, Inc., 716 F.3d 302, 313 [2d Cir. 2013]); Schron v. Troutman Sanders LLP, 20 N.Y.3d 430, 436 [2013]).<sup>7</sup> State law requires that in examining the language of the stipulations, care must be taken to not add or excise terms or distort the meaning of the terms used so as to make a new contract in the process of interpreting the agreement (Vermont Teddy Bear v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 [2004]). Furthermore, an agreement should not be interpreted to implicitly state something which the parties have specifically neglected to include (id.).

Among its terms, the stipulation of settlement for the 2012-13 school year included language concerning the agreement's effect on the student's pendency which set forth:

This [s]tipulation shall not be relied upon by any party to indicate, establish or support the position that [Cooke] is, or should be considered as, the "then current placement" for the 2012-2013 school year or any subsequent school year nor shall this [s]tipulation entitle the [p]arent or the [s]tudent to receive, or require the [district] to provide, reimbursement of or funding for any costs associated with the [s]tudent's attendance, if any, at [Cooke] during any subsequent school year. Further, it is explicitly understood by and between the parties that the terms set forth in this stipulation regarding the [district's] agreement to reimburse the [p]arent for tuition in connection with the [s]tudent's enrollment at [Cooke] and/or any other related expenses shall not . . . (a) constitute a private school placement of the [s]tudent by the [district] . . . and/or (b) constitute an admission by the [district] that the [district] failed to provide the [s]tudent with a free appropriate public education nor that [Cooke] is an appropriate placement for the [s]tudent.

(Pet. Ex. 1 at pp. 5-6 ¶ 17).

According to the stipulation of settlement concerning the 2013-14 school year, the parties agreed:

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<sup>7</sup> Lest there be any confusion, "best evidence" as used by the courts in this context means the most weighty or most relevant evidence and not the evidentiary rule regarding the reliability of original documents versus copies.

This [s]tipulation shall not be relied upon by any party to indicate, establish or support the position that [Cooke] is, or should be considered as, the "then current placement" for the 2013-14 school year or any subsequent school year. Further, this [s]tipulation shall not entitle the [p]arent or the [s]tudent to receive, or require the [district] to provide, reimbursement of or funding for any costs associated with the [s]tudent's attendance, if any, at [Cooke] during any subsequent school year.

(Pet. Ex. 2 at p. 5 ¶ 15).

With respect to pendency, the stipulation concerning the 2014-15 school year provided: "[t]his [a]greement shall not be relied upon by any party to indicate, establish, or support the position that [Cooke] was, or comprises in whole or in part, the [s]tudent's educational program for purposes of the [p]endency [p]rovisions" (Pet. Ex. 3 at p. 4 ¶ 7). The stipulation further provided that the settlement was limited to the 2014-15 school year and Cooke was not intended to be the student's "then current educational placement" (*id.* at p. 4 ¶¶ 7-8).

Each of the stipulations of settlement contains specific language that the stipulation is not to be used by any party to establish the student's "then current educational placement" (Pet. Exs. 1 at pp. 5-6 ¶ 17; 2 at p. 5 ¶ 15; 3 at p. 4 ¶¶ 7-8). A plain reading of the stipulations prevents the agreements from being employed to establish Cooke as the student's pendency placement under relevant case law<sup>8</sup> (see Zvi D., 694 F.2d at 906-08 [holding that a stipulation limited to a single school year did not constitute district placement of the student or establish that the placement stipulated to was the student's "current educational placement"]; Arlington Cent. Sch. Dist., 421 F. Supp. 2d at 696-97 [noting that "[a]n agreement in which a board of education agrees to pay tuition to a private school makes that school the child's pendency placement unless the stipulation is explicitly limited to a specific school year or definite time period"], citing Zvi D., 694 F.2d at 908; Evans, 921 F. Supp. at 1187-89 [holding that an agreement to fund the student's attendance at a private school was not bound by a definite time limitation and therefore established pendency in the nonpublic school]; see also K.D. v. Dep't of Educ., 665 F.3d 1110, 1118-21 [9th Cir. 2011] [distinguishing a district's agreement to fund a student's nonpublic school tuition for a limited period of time from an affirmative agreement by the district to place the student at the nonpublic school]; Stanley C. v. M.S.D. of Southwest Allen County Schs., 2008 WL 2228648, at \*7-\*8 [N.D. Ind. May 27, 2008]; K.G. v. Plainville Bd. of Educ., 2007 WL 80671, at \*2 [D. Conn. Jan. 9, 2007]; but see Gabel v. Bd. of Educ., 368 F. Supp. 2d 313, 324-26 [S.D.N.Y. 2005] [determining that a settlement agreement that was limited to a single school year nonetheless established the student's pendency in the nonpublic school, distinguishing its facts from those in Zvi D. and declining to follow its result]).<sup>9</sup> In light of the

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<sup>8</sup> Each of the agreements use the term "the school," but expressly define that term to mean Cooke.

<sup>9</sup> The court in Gabel found that there was "no other possible pendency" but that at the nonpublic school (368 F. Supp. 2d at 325-26). In this case, as discussed below, there is a pendency placement and, to the extent the parent urges reliance on Gabel, it is distinguishable factually from the matter at hand.

above, the IHO's interim decision, finding that Cooke was the student's pendency placement based solely on the statutory language in 20 U.S.C. § 1415(j), must be reversed.

Having found that the parties agreed through stipulations that Cooke is not the student's pendency placement, it remains necessary to determine the student's pendency placement.<sup>10</sup> The parent contends that the placement recommended in the May 2011 IEP is not appropriate and cannot be the student's pendency placement because the IEP does not address the student's special needs and the student has aged out of the school he attended during the 2011-12 school year. The May 2011 CSE recommended a 12:1+1 special class for 60 percent of the school day and a general education program with integrated co-teaching (ICT) services for 40 percent of the school day along with related services (Pet. Ex. 4 at pp. 1-2, 11-13).

The parent's argument that the student has aged out of the school location he attended during the 2011-12 school year is not persuasive. Initially, the May 2011 IEP does not recommend a specific public school (see Pet. Ex. 4). Further, the pendency provision does not dictate that a student must remain in a particular site or location; rather, "it guarantees only the same general level and type of services that the disabled child was receiving" (T.M., 752 F.3d at 171, citing Concerned Parents, 629 F.2d at 756; see G.R. v. New York City Dep't of Educ., 2012 WL 310947, at \*6 [S.D.N.Y. Jan. 31, 2012]; 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"]). The district did not take a position that affirmatively identified a pendency placement for the student at the hearing or offer a public school pendency placement in lieu of Cooke, and instead essentially argued that it was not Cooke. I understand that the parent may have legitimate concerns regarding the student's needs being adequately addressed by services provided in accordance with the May 2011 IEP, and she would have far more confidence in placing the student at Cooke during the pendency of the impartial hearing. However, the law is very clear that a student's pendency placement is determined independently from the appropriateness of the program (Mackey, 386 F.3d at 160; O'Shea, 353 F. Supp. 2d at 459). Instead, the pendency provision of IDEA operates as "an automatic preliminary injunction," without regard to the merits of the parent's claims (Zvi D., 694 F.2d at 906; see Mackey, 386 F.3d at 160-61, quoting Susquenita Sch. Dist., 96 F.3d at 83), and the parties' arguments regarding the appropriateness of the public and private placements is left to the merits portion of the impartial hearing..<sup>11</sup>

Where parents reject a proposed IEP and unilaterally enroll a student in a private school in contravention of the stay-put provision, they take responsibility for the costs of the student's tuition and run the risk that they will not receive reimbursement therefor (T.M., 752 F.3d at 172; Murphy, 86 F. Supp. 2d at 357; see New York City Dep't of Educ. v. S.S., 2010 WL 983719, at \*6 [S.D.N.Y. Mar. 17, 2010] [holding that if a student's pendency is in the public school when the due process proceeding commences, a parent who unilaterally places the child in a private

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<sup>10</sup> My resolution regarding the stipulations further supports requiring the district to submit the May 2011 IEP, which the parties concede was the student's last implemented IEP, as no placement other than Cooke was proposed by the parties as the student's pendency placement.

<sup>11</sup> For this reason, the district's complaint that the IHO awarded the parent the relief she sought at the impartial hearing through her pendency decision is equally without merit.

school setting pending the completion of an appeal does so at his or her own financial risk]). While I am sympathetic to the parent's concerns that no other placement than Cooke can provide the student the stability that the pendency provision was intended to ensure, this is the unfortunate consequence of entering into multiple one-year settlements that do not constitute agreements for purposes of pendency. The courts have long allowed parties in IDEA litigation to negotiate settlements that would govern when pendency provision would apply to particular placements and time periods. In this case, the parent negotiated away the right to have Cooke become the student's pendency placement, but in exchange for the parent's concession she received the benefit of avoiding protracted litigation over three years of educational programming and she received three concessions to publicly fund a private school of her own choosing, Cooke. Regardless of the parent's understandable reluctance for the student to be educated under a now five-year-old IEP, which may no longer appropriately address his needs, the parent is not entitled to depart from the effects of the settlement agreements and demand public funding for her unilateral placement of the student at Cooke under the pendency provision of the IDEA. .

## **VII. Conclusion**

Having accepted the district's additional evidence demonstrating that parties expressly did not intend to establish Cooke as a the student's then current educational placement or for Cooke to become the student's pendency placement, the IHO's interim decision on pendency must be reversed and the district's appeal must be sustained.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the interim decision of the IHO, dated February 17, 2016, is modified, by reversing that portion that determined Cooke was the student's then-current educational placement during the pendency of this proceeding; and

**IT IS FURTHER ORDERED** that, unless the parties reach a different agreement, the student's stay-put placement is the educational placement set forth in the May 2011 IEP.

**Dated:**            **Albany, New York**  
                         **May 19, 2016**

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