The University of the State of New York

The State Education Department
State Review Officer
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No. 13-126

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Ellenville Central School District

Appearances:
Family Advocates, Inc., attorneys for petitioner, RosaLee Charpentier, Esq., of counsel

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, Neelanjan Choudhury, 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 (a local department of social services [DSS])[1] appeals pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education from the interim decision of an impartial hearing officer (IHO) which denied the local DSS's request for a determination regarding the student's stay-put (pendency) placement during the 2012-13 school year. The district cross-appeals from the part of the interim decision denying the district's motion to dismiss the parent's due process complaint notice. The appeal must be sustained in part. The cross-appeal must be dismissed.

[1] The student proceeds through her legal guardian—a county department of social services—as the "parent" for purposes of these proceedings (IHO Ex. 7-B; see 20 U.S.C. §1401[23][B]; 34 CFR 300.30[a][3]; 8 NYCRR 200.1[ii][1]). Although the student's guardian is treated as the parent for the purposes of this proceeding, the attendance sheet attached to the April 2012 IEP indicates that the student's mother attended the student's last CSE meeting and there is no evidence in the hearing record that her parental rights have been terminated (IHO Ex. 6A at p. 18).

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

Because of the procedural posture of this case, a detailed factual recitation is unnecessary at this juncture. Briefly, the CSE convened on April 18, 2012 to develop the student's IEP for the 2012-13 school year (IHO Ex. 6A). At the time of the CSE meeting, the student was 20 years old and would be turning 21 during the 2012-13 school year (id. at p. 1). The CSE found that the student remained eligible to receive special education services as a student with multiple disabilities and recommended placement in a 6:1+1 special classroom at the Devereux Center (Devereux), a State-approved nonpublic residential school, on a twelve-month basis (id. at pp. 1-3, 12-13). Although the student attended Devereux from 2008 through the 2011-12 school year, due to reasons that are not clear from the hearing record presented for review, the student left Devereux in June 2012 and was thereafter not permitted to return for the 2012-13 school year (IHO Exs. 1 at pp. 2-3; 6D at p. 2).[2]

Devereux initiated a special proceeding in Supreme Court pursuant to Article 81 of the Mental Hygiene Law, which resulted in the court appointing the local DSS as the temporary guardian of the person and property of the student by order to show cause dated July 5, 2012 (IHO Ex. 6B at pp. 1, 5).[3] The local DSS sent a letter dated July 13, 2012 to the district advising the district of its appointment as the student's guardian and indicating that Devereux had refused to readmit the student, and also requesting that the district schedule a CSE meeting to identify an appropriate placement for the student (IHO Ex. 6C). From July through October 2012, the district and the local DSS worked together to find an appropriate placement, and those efforts resulted in the student's acceptance to the Hillcrest Educational Centers (Hillcrest), a State-approved out-of-state nonpublic residential school (IHO Exs. 7D-7L). The student attended Hillcrest for the 2012-13 school year, beginning in October 2012 (see IHO Exs. 6E; 7P).

The local DSS sent a letter to the district dated April 22, 2013, requesting that the district pay the student's tuition costs at Hillcrest (IHO Ex. 6F at p. 1). The district responded by letter dated April 26, 2013, informing the local DSS of the district's position that the local DSS was the public agency responsible for the student's tuition as the guardian of the student (IHO Ex. 6G).

A. Due Process Complaint Notice

In a due process complaint notice dated April 26, 2013, the local DSS alleged that the district denied the student a free appropriate public education (FAPE) for the 2012-13 school year (IHO Ex. 1 at pp. 1-7).[4] Essentially, the local DSS alleged that the district failed to convene a CSE

[2] While the parent variously asserted that the student left Devereux with the school's consent, was "discharge[d]" from Devereux, or "was released from" Devereux, the district asserted that the student voluntarily left Devereux (IHO Ex. 1 at pp. 2-3, 5; 8 at pp. 1, 3). Regardless of how the student left Devereux, Devereux informed the district by letter dated August 7, 2012 that Devereux could not offer the student an appropriate program at that time (IHO Ex. 6D).

[3] By order and judgment dated September 26, 2012 and entered October 11, 2012, Supreme Court appointed the parent as the permanent guardian over the person and the property of the student (IHO Ex. 7B).

[4] Although the first page of the due process complaint notice references summer 2012 and the 2013-14 school year, it appears from the rest of the due process complaint notice that the parent's claims are all in regard to the 2012-13 school year (IHO Ex. 1 at pp. 1-7).

meeting to develop an appropriate placement for the student after she left Devereux and failed to implement the student's April 2012 IEP (id. at pp. 1-6). The local DSS sought compensatory education for the period she was without a placement from July through September 2012 and reimbursement for the cost of the student's tuition at Hillcrest for the 2012-13 school year (id. at pp. 5-6). The local DSS also sought an "emergency hearing" to determine the student's placement during the pendency of the impartial hearing (id. at pp. 6-7).

B. Impartial Hearing Officer Decision

By letter dated May 16, 2013, the district moved to dismiss the local DSS's complaint, alleging that once the local DSS was appointed the student's guardian, the district was no longer responsible for providing the student with a FAPE, such that the local DSS had either failed to state a claim under the IDEA or the IHO did not have subject matter jurisdiction over the complaint (IHO Ex. 6). By letter dated May 20, 2013, the local DSS opposed the district's motion, arguing that the local DSS's appointment as the student's guardian under Mental Hygiene Law article 81 did not obviate the district's obligation to provide the student with a FAPE and, in any event, the student was statutorily entitled to public funding of her stay put (pendency) placement (IHO Ex. 7). The IHO held a conference on May 20, 2013 and issued an interim decision dated June 1, 2013 (IHO Decision; Tr. pp. 1-37). In his decision, the IHO denied the district's motion to dismiss for lack of subject matter jurisdiction, finding that he had the authority to determine matters relating to the identification, evaluation, and educational placement of a student with a disability and the provision of a FAPE to such student (id. at p. 4). The IHO also found that the district was responsible for determining an appropriate program and placement for the student (id. at p. 5). However, the IHO found that a due process proceeding was not an appropriate forum to determine the issue of which public agency (a district or the local DSS) was ultimately financially responsible for the student's education at Hillcrest and found that the issue of tuition reimbursement was not within the powers of the IHO (id. at p. 4). In addition, the IHO denied the local DSS's request to render a determination of the student's pendency placement, finding that because the student had reached the age of 21 at the time of the hearing she was no longer entitled to a FAPE under the IDEA (id. at p. 5). The IHO determined that he retained jurisdiction over the student's right to compensatory education and directed that the matter be adjourned until after the parties received a final determination from an appropriate court or agency regarding financial responsibility for the student's education, or the parties agreed to go forward on the issue of compensatory education alone (id.).[5]

IV. Appeal for State-Level Review

The local DSS appeals from the IHO's interim decision, alleging that the IHO erred in finding that he did not have the authority to determine whether the district or local DSS was responsible for the provision of a FAPE to the student; in finding that the student was not entitled to a stay put placement because she was 21 years of age at the time of the hearing; and for adjourning the matter pending resolution of which party was financially responsible for the costs of the student's education.. The district cross-appeals, asserting that the IHO erred in finding that

[5] I note that the statement of the right to obtain review by a SRO included in the IHO's interim decision does not accurately state the time period within which an appeal must be taken from the decision of an IHO (IHO Decision at pp. 5-6; see 8 NYCRR 200.5[j][5][v]; 279.2[b]).

the district was responsible for determining an appropriate program for the student because he lacked subject matter jurisdiction to entertain the local DSS's claims regarding the provision of a FAPE and financial responsibility for the student's education. The district asserts that the IHO also erred in finding that the local DSS's claims for compensatory education were properly before him because, upon becoming the guardian of the student, the local DSS became responsible for the student's education, including the provision of a FAPE, prior to the time the April 2012 IEP was to be implemented.[6] The local DSS asserts that, as a guardian of the person and the property of the student appointed under Article 81 of the Mental Hygiene Law, the local DSS is only a fiduciary and is not the student's custodian.

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]; 8 NYCRR 200.16[h][3][i]; see M.G. v. New York City Dep't of Educ., 2013 WL 3974165, at *4 [S.D.N.Y. Aug. 1, 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. October 30, 2008]; Bd. of Educ. 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. 08-009). 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] [emphasis in original]; M.G., 2013 WL 3974165, at *4; 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]; see T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4069299, at *3 [S.D.N.Y. Aug. 7, 2012]). The pendency provision does not require that a student must remain in a particular site or location (Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753-54, 756 [2d Cir. 1980]; G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *6 [S.D.N.Y. Jan. 31, 2012]; Application of the Bd. of Educ., Appeal No. 99-90); 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). However, even though a change in location does not necessarily constitute a change of the pendency placement, "parents are not free to unilaterally transfer their child from one school to another with the assurance that special services will be provided by the school district at the new location" (Application of the Bd. of Educ., Appeal No. 00-073; see Ambach, 612 F. Supp. at 235).

[6] The district also argues that, although the IHO properly denied the parent's request for a determination of the student's pendency placement, he erred to the extent that he did not deny the request and dismiss the claim entirely for a lack of subject matter jurisdiction.

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; M.G., 2013 WL 3974165, at *4; T.M., 2012 WL 4069299, at *4). 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 (M.G., 2013 WL 3974165, at *4; T.M., 2012 WL 4069299, at *4; 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]). The United States Department of Education (DOE) 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. Raelee, 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, 290 F.3d 476, 483-84 [2d Cir. 2002]; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]).

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, see Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625-26 [6th Cir. 1990]; T.M., 2012 WL 4069299, at *4; 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). Additionally, if a "private school placement funded by the school district is the pendency placement, then the school district must continue to pay for that placement for the duration of the proceedings regardless of the final outcome of the dispute" (T.M., 2012 WL 4069299, at *4; see Zvi D., 694 F.2d at 906, 908; Vander Malle v. Ambach, 673 F.2d 49, 52 [2d Cir. 1982]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1, *6, *8-*9 [S.D.N.Y. Mar. 17, 2010]; Ambach, 612 F. Supp. at 233-34).

VI. Discussion

A. Scope of Review – Interim IHO Decision

Initially, I note that State regulations governing the practice of appeals from impartial hearing determinations for students with disabilities limit appeals from determinations made by an IHO prior to or during an impartial hearing to those relating to a student's pendency placement (8 NYCRR 279.10[d]). Thus, to the extent that the local DSS asserts arguments in its appeal relating to the IHO's authority to grant the local DSS's requested relief and the district asserts arguments in its cross-appeal relating to subject matter jurisdiction or the district's obligation to provide the student with a FAPE, these issues are not properly addressed in an appeal of an impartial hearing officer's interim determination regarding a student's pendency placement and will not be reviewed or ruled upon in this decision. The student's right to a pendency placement arises out of the fact that there is a pending proceeding brought by a parent, in this case an entity acting in the place of a parent, and the interim determinations regarding the extent of the IHO's authority to order relief must await the IHO's determination on the merits based upon the final, fully developed record (8

NYCRR 279.10[d] ["[I]n an appeal to [an SRO] from a final determination of an [IHO], a party may seek review of any interim ruling, decision or refusal to decide an issue"]).

Although I make no finding other than on pendency as described in the next section, I urge the parties to review the New York State guidance memorandum regarding the educational responsibilities, both programmatic and fiscal, for student's placed in residential care ("Education Responsibilities for School-Age Children in Residential Care," VESID Mem. [Mar. 1996], available at http://www.p12.nysed.gov/specialed/publications/EducResponsSchoolAgeResidence.pdf). In reviewing the guidance document, I also suggest that on the record the IHO ascertain from counsel regarding their respective positions regarding the legal nature of Hillcrest in this dispute, for instance, whether the parties are asserting that Hillcrest meets the legal definition of a "child care institution" or a "residential treatment facility" for children and youth as those terms are defined in Article 81 of the Education Law (Educ. Law § 4001[2], [7]; see Mental Hygiene Law § 1.03[10], [33]), or another type facility or institution defined in law or regulation.

B. Pendency

The hearing record supports the local DSS's position that the IHO erred in determining that the student was not entitled to placement pursuant to the pendency provision of the IDEA because she had reached the age of 21 at the time of the impartial hearing. In New York State, a student with a disability is eligible for services under the IDEA until he or she receives a local or Regents high school diploma, or until the conclusion of the school year in which he or she turns 21 (Educ. Law § 4402[5][b]; see 8 NYCRR 100.6[c], 100.9[e]). In this instance, the student turned 21 prior to the commencement of the impartial hearing, but during the ten-month 2012-13 school year (IHO Exs. 1 at p. 1; 6A at p. 1). Accordingly, the student was entitled to her stay put (pendency) placement for the period beginning on the date of the due process complaint notice (April 26, 2013) through the end of the 2012-13 school year and the IHO's decision on this point must be reversed (see Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526 [S.D.N.Y. 2011] [the pendency provisions of the IDEA are triggered upon the filing of a due process complaint notice]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 386-87 [N.D.N.Y. 2001] [right to automatic pendency terminates at time student is no longer eligible for services]).

Having found that the student was entitled to remain in her current educational placement during the pendency of these proceedings through the end of the 2012-13 school year, I must now address what constituted the student's then-current educational placement (see Mackey, 386 F.3d at 163). Generally, a student's current educational placement is "the last agreed upon placement at the moment when the due process proceeding is commenced" (Arlington Cent. Sch. Dist. v L.P., 421 F. Supp. 2d 692, 696 [S.D.N.Y. 2006]; see Murphy, 86 F. Supp. 2d at 359).

As a brief background, the student attended Devereux during the 2011-12 school year pursuant to an IEP developed by the district (IHO Ex. 6A at pp. 2, 4, 7). In April 2012, the CSE developed an IEP for the 2012-13 school year and recommended placement in a 6:1+1 classroom in an approved non-public residential school and identified Devereux as the specific school the student would attend (IHO Ex. 6A at pp. 1, 3; see IHO Ex. 1 at p. 2). Although the reasons are not clear in the hearing record, the student was unable to attend Devereux and the local DSS and district sought alternative placements for the 2012-13 school year (IHO Exs. 6D at p. 2; 7D-7K).

The student began attending Hillcrest in October 2012; however, the record at this juncture is unclear as to whether the student was placed at Hillcrest by the district or the local DSS (IHO Exs. 7D-7K; 7P).

There are three placements appearing in the record as possibilities for the student's educational placement at the time of filing of the due process complaint notice: (1) Devereux; (2) the April 2012 IEP;[7] or (3) Hillcrest.[8] In this instance, there is insufficient evidence to determine which of these possibilities constitutes the student's educational placement for stay put purposes without further development of the hearing record. Although the local DSS argues that the student's current educational placement should be identified as a State-approved nonpublic residential school pursuant to the last agreed upon IEP and that Hillcrest should be identified as an alternate placement to Devereux, the hearing record does not indicate that Hillcrest is sufficiently similar to the student's last agreed upon placement to constitute her stay put placement. In addition, while the district does admit that Hillcrest would have been capable of implementing the student's April 2012 IEP, the district denies that Hillcrest should be considered the student's pendency placement. Because a pendency placement and an appropriate placement are separate concepts, the district's admission that Hillcrest is capable of implementing the April 2012 IEP does not have any value in identifying the student's pendency placement (O'Shea, 353 F.Supp.2d at 459; Student X, 2008 WL 4890440, at *20; see Mackey, 386 F.3d at 162 [a claim for tuition reimbursement under pendency is evaluated separately from a claim for tuition reimbursement pursuant to the inadequacy of an IEP]). It should also be noted that while the district admits that Hillcrest could implement the April 2012 IEP, and while the hearing record indicates that the student was enrolled at Hillcrest for the 2012-13 school year, there is nothing in the hearing record to indicate that Hillcrest is, in fact, providing the student with a program that is comparable to the program offered in the April 2012 IEP or to the student's program at Devereux. A change in educational placement occurs when there is a change in the educational program in which a student is enrolled (Concerned Parents & Citizens, 629 F.2d at 754; G.R., 2012 WL 310947, at *6). In this instance, there is insufficient information in the hearing record regarding the program the student was enrolled in at Hillcrest to determine whether it was sufficiently comparable to the program offered in the April 2012 IEP or the student's placement at Devereux, and could therefore, suffice as the student's pendency placement. The only evidence in the hearing record regarding Hillcrest is a school publication describing the school's general program (IHO Ex. 7L). There is no evidence as to the student's particular program, special education services, or classroom. Accordingly, for the reasons set forth above this matter must be remanded to the IHO to conduct a hearing to determine the student's pendency placement.[9]

[7] The parent did not raise claims regarding the adequacy of the April 2012 IEP or the recommended program in the due process complaint notice, but instead alleged that the district failed to implement the April 2012 IEP (IHO Ex. 1 at p. 2).

[8] It is also possible that Hillcrest could constitute the student's pendency placement if the district placed the student at Hillcrest (see M.G., 2013 WL 3974165, at *4 [implementation of services by district may alter student's current educational placement for purposes of pendency]). As noted above, the hearing record is unclear as to whether the district or the parent placed the student at Hillcrest.

[9] Although I only determine the issue of pendency on appeal from the IHO's interim order, to the extent that the IHO held the impartial hearing in abeyance pending direction from another forum as to the parties financial responsibility, I remind the IHO that State and federal regulations provide a strict timeline for conducting

VII. Conclusion

In accordance with the discussion above, the student is entitled to a determination of her pendency placement for the period commencing with the filing of the due process complaint notice through the end of the 2012-13 school year, and this matter must be remanded to the IHO for a determination on pendency as well as to the merits of the local DSS's challenge to the district's alleged failure to offer the student an appropriate educational placement. I have considered the parties' remaining contentions, including the district's allegations that the district is not responsible for the cost of the student's education or the provision of a FAPE, and find that there is no basis to address them in an interim appeal.

IT IS ORDERED that the IHO's interim determination dated June 1, 2013 is modified, by reversing those portions which found that the student was not entitled to remain in her then current educational placement and denied the local DSS's request for a pendency determination; and

IT IS FURTHER ORDERED that the matter be remanded to the IHO to determine the student's then current educational placement as of the filing of the due process complaint notice; and

IT IS FURTHER ORDERED that if the IHO who presided over the impartial hearing is not available to reconvene the hearing within 15 days of the date of this decision, the district shall appoint a new IHO in accordance with its rotational selection procedures.

Dated: Albany, New York
November 20, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER

impartial hearings (34 CFR 300.515; 8 NYCRR 200.5 [j][3][iii]). Additionally, while extensions to the timeline may be granted in certain circumstances, waiting for a decision from another forum is not a proper reason for granting an extension (8 NYCRR 200.5[j][5]), and no provision of law or regulation provides for an adjournment in the event that the interim determination of an IHO is appealed to an SRO. However well intentioned, an administrative hearing officer lacks authority to indefinitely stay a due process proceeding and even agreement of the parties under such circumstances is not a basis upon which to grant an extension of the timelines. In the event that an interim determination is appealed, the IHO should continue to the merits of the parent's challenge without waiting for the disagreement on pendency to be fully resolved.