The University of the State of New York

The State Education Department
State Review Officer
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No. 14-035

Application of the BOARD OF EDUCATION OF THE MIDDLETOWN ENLARGED CITY SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, David H. Strong, 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 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 respondents' (the parents') daughter's pendency placement during a due process proceeding challenging the appropriateness of the recommended educational program for the student's 2013-14 school year. 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, 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

The student is a 12 year-old girl who has been diagnosed with Down Syndrome. During the 2012-13 school year, the student was classified by the district as a student with an other health-impairment, and was educated pursuant to an IEP developed on May 10, 2012 (May 2012 IEP). This IEP recommended a 12-month program including, among other things, placement in a 9:1+3 "BOCES Class in a Public School,"[1] as well as related services which, from September 2012 through June 2012, included two 30-minute sessions of individual occupational therapy (OT) per

[1] Although not defined in the hearing record, BOCES stands for "Board of Cooperative Educational Services" (see Educ. Law § 1950).

week, one 30-minute session of individual physical therapy (PT) per week, and four 30-minute sessions of individual speech-language therapy (SLT) per week, (Tr. pp. 37-38; Dist Ex. 1 at p. 1, 10-12).[2] In accordance with this IEP, the student attended a 9:1+3 special class that was operated by a BOCES in a public elementary school outside of the district (Tr. p. 37; Dist. Ex. 1 at p. 10-12).

On June 4, 2013, a CSE convened for an annual review and to develop the student's IEP for the 2013-14 school year (Dist. Ex. 2 at p. 1). The June 2013 CSE determined that the student continued to be eligible for special education and related services as a student with an other health-impairment and continued to recommend that she receive services on a 12-month basis (id. at pp. 1, 11-12). In addition, the CSE continued to recommend that the student receive OT, PT, and SLT, with the only change in delivery of the student's related services from the year before being that one session of OT and one session of SLT in the September to June portion of the school year were changed from individual to small group (2:1)[3] (Tr. pp. 42-43; compare Dist. Ex. 1 at pp. 1, 10, with Dist. Ex. 2 at pp. 1, 10). In addition, the June 2013 CSE continued to recommend that the student receive instruction in a 9:1+3 special class (Dist. Ex. 2 at p. 10). However, unlike the previous school year, the June 2013 CSE recommended a placement in the student's "Home Public School District" (id. at p. 1). Accordingly, while the June 2013 IEP continued to recommend that the student receive services during the summer at a BOCES site (id. at p. 12), it recommended—"[a]s per district administration"—that the student be placed in a district-operated 9:1+3 special class for the 10-month portion of the 2013-14 school year (id. at pp. 1-2, 10-12).

In July 2013, the district sent the parents prior written notice indicating that the district proposed to amend the student's IEP to change her "school placement" to a district public school in a 9:1+3 class, with the current "program duration and related services [to] remain the same" (Parent Ex. C at p. 1). The prior written notice indicated that the district proposed the amendment because the district had developed programs and services "comparable to those offered" by the BOCES, and that it was obligated to provide special education services in the least restrictive environment (id.) The parents, however, rejected this and requested a CSE meeting (Parent Ex. E). Accordingly, the CSE sent a meeting notice dated August 13, 2013 to the parents and scheduled a CSE meeting for August 21, 2013 (Parent Ex. B at p. 1).[4]

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[2] The May 2012 IEP also recommended related services during the summer months (July and August 2012) as well, but these are not relevant for purposes of this appeal. In addition, the IEP made a recommendation for one 30-minute session of PT in a group per week during the September to June portion of the school year; however, the attorneys for the parties stipulated during the hearing that the group PT was a typographical error and was not a part of the student's related services (Tr. pp. 123-24).

[3] The June 2013 IEP continued to recommend the same level of related services for July and August as the May 2012 IEP (Dist. Ex. 2 at p. 12).

[4] It appears that the CSE met on August 21, 2013, and that an IEP resulted from that meeting that offered the same programs, placement and services as the June 2013 IEP (compare Dist. Ex. 2 at pp. 10-12, with Dist. Ex. 3 at pp. 9-11). The comments section of the August 2013 IEP, however, indicates that the parents requested that the August 21 CSE meeting be "tabled" in order for them to contact their attorney (Dist. Ex. 3 at p. 1). It is not clear, therefore, whether this August 2013 IEP was meant to supersede the June 2013 IEP. However, since the programs, placement and services recommended in these two IEPs are identical, whether or not the June 2013 IEP has been superseded is immaterial for purposes of this appeal and need not be decided.

A. Due Process Complaint Notice

By due process complaint notice dated August 19, 2013, the parents requested an impartial hearing on claims related to the 2012-13 and 2013-14 school years (Parent Ex. F). Specifically, and regarding the 2012-13 school year, the parents claimed that the student was improperly classified as a student with an other health-impairment and that the CSE failed to reconvene to adjust the student's goals during the school year (id. at p. 2). Regarding the 2013-14 school year, the parents, among other things, again asserted that the June 2013 CSE[5] did not properly classify the student, and that it did not "properly consider the appropriateness" of the student's proposed placement in the district's "newly developed class" (id. at pp. 1-2). As a proposed resolution the parents requested, among other things, that the CSE reconvene and change the student's classification from other health-impaired to "MR,"[6] and that the student "continue in her placement" at her current BOCES class (id. at p. 3). The parents also requested that the student remain in her current BOCES class during the pendency of these proceedings (id.).[7]

B. Impartial Hearing Officer Decision

On November 8, 2013, an IHO held a "pendency hearing" to determine the student's placement while the claims raised in the parent's due process complaint notice were being adjudicated. By decision dated January 20, 2014, the IHO issued an "interim order on pendency" which determined that "BOCES is the student's pendency placement" (IHO Decision at p. 9). In support of this determination, the IHO noted that the district agreed that the "last agreed upon recommendation" for the student was her May 2012 IEP which recommended a "BOCES class in a public school" (id. at p. 2). The IHO, therefore, reasoned that while a change in location is not "per se a change in program" (id. at p. 7), moving a child from a "more restrictive setting to a less restrictive setting is a change of placement for purposes of the pendency provisions of Federal and State law" (id. at pp. 7-8). In addition, the IHO opined that "the State Review Officer treats BOCES placements differently than in-district programs" (id. at 8). Accordingly, the IHO concluded that "while a change in location does not constitute a change in program, . . . the student's out of district BOCES program is distinguished from a district placement"(id. at p. 9).

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[5] The parents' due process complaint notice was filed before the August 2013 CSE meeting and, thus, the allegations in this notice, to the extent that they relate to the 2013-14 school year, appear to present challenges to the June 2013 IEP.

[6] The parents' due process complaint notice references only the acronym "MR" as a classification (Parent Ex. C at pp. 2-3). It appears that the parents are referring to the classification of "mental retardation" under the federal regulations; however, State regulations now use the term "intellectual disability," which has the same definition (compare 34 CFR 300.8[c][6], with 8 NYCRR 200.1[zz][7]).

[7] The hearing record reflects that for the 2013-14 school year, the parent arranged for the student to attend the same BOCES class she attended for the 2012-13 school year, and as of the date of the impartial hearing the student was attending that BOCES class (see, e.g., Tr. pp. 88-89, 117). The record is silent, however, with respect to how the student's attendance in this class is being funded, nor is there any indication that the district approved of and/or consented to this placement.

IV. Appeal for State-Level Review

The district appeals the IHO's pendency decision and contends that the student's pendency placement should be in the district-operated 9:1+3 special class. As it did before the IHO, the district agrees that the student's pendency placement "is the program of special education and related services recommended in the [student's May 2012 IEP]" (Pet. ¶ 37), but it maintains that the IHO erred in finding that the district's "decision to offer the recommended program of special education and related services in a District school, as opposed to a BOCES-operated program located in [an] out-of-district public school, constituted a change in placement" (Dist. Mem. of Law at pp. 5-6). In this regard, the district posits that the program recommended for the student in the 2013-14 school year is substantially similar to the program recommended in the May 2012 IEP, and that the district's 9:1+3 special class was "specifically created to parallel the BOCES special class that [the student] attended during 2012-2013" (id. at pp. 7-8). In addition, the district maintains that there is no evidence in the hearing record to support the parent's position that the student needs to remain in a specific school site. Accordingly, the district argues that moving the student from the BOCES class that she attended in the 2012-2013 school year to the in-district class constitutes a change in location, and not a change in educational placement as the IHO found. In addition, the district contends that there is no basis to treat BOCES placements differently from in-district placements, and that the IHO erred by not comparing the special education programs and related services offered by the two classes and making any findings of fact with respect to them.

The parents have not appeared in this matter and, therefore, have not responded to the district's arguments and/or allegations.

V. Discussion

A. Preliminary Matters—Personal Service

As an initial matter, the district's appeal must be dismissed for lack of proper service. An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified petition and other supporting documents upon a respondent (8 NYCRR 275.8[a], 279.2[a]). Exceptions to the general rule requiring personal service include the following: (1) if a respondent cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by a State Review Officer (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties may agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058); or (3) permission is obtained from an SRO for an alternate method of service (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of the Dep't of Educ., Appeal No.

08-006; Application of the Dep't of Educ., Appeal No. 05-082; Application of a Child with a Disability, Appeal No. 05-045; Application of the Bd. of Educ., Appeal No. 01-048).[8]

According to the affidavit of service attached to the district's petition, on February 24, 2014, the district served, via e-mail, the notice of petition, petition, and memorandum of law in support of the petition on the attorney who represented the parents during the pendency hearing (Dist. Aff. of Service). Initially, service of a petition for review by e-mail is not permitted by State regulations (8 NYCRR 275.8[a]; 279.2[a]). In addition, the parents have not appeared in this appeal and the district has provided no indication that the attorney served with the petition agreed to accept service on behalf of the parents, or agreed to accept service via electronic means. There is similarly no indication that the district attempted to contact hearing counsel for the parents to obtain such consent. Under these circumstances, I must dismiss the petition based upon the district's failure to properly initiate the appeal with personal service of the petition for review on the parents (8 NYCRR 279.2[a]).

B. Pendency

Notwithstanding the forgoing, the district's appeal must also be dismissed on the merits. 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 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. Oct. 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 M.R. v. Ridley Sch. Dist., 2014 WL 657343, at *3 [3d Cir. 2014]; 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 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, 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

[8] Pursuant to 8 NYCRR 279.1(a), "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires."

to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (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 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, 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]).

In this instance the district concedes that the student's May 2012 IEP, recommending a 9:1+3 BOCES class in a public school, is the last agreed upon IEP for the purposes of determining the student's pendency placement (Pet. ¶ 37). The disagreement arises over whether the district's proposed placement of the student in a district public school 9:1+3 special class for the 2013-14 school year would constitute a change in educational placement from the BOCES 9:1+3 special class the student attended during the 2012-13 school year. While not for the same reasons cited by the IHO, I concur with her ultimate conclusion that it would.

In general, the term "'[e]ducational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 191-92 [2d Cir. 2012]; K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x. 151, 154, 2010 WL 1193082, at *2 [2d Cir. 2010]; Concerned Parents, 629 F.2d at 756). Thus, it has been held that a change from one school building to another (i.e., a change in location), without more, does not necessarily constitute a change in educational placement (Concerned Parents, 629 F.2d at 753-54). However, a "change in placement" is defined by regulation in New York to mean "a transfer of a student to or from a public school, BOCES or schools enumerated in articles 81, 85, 87, 88 or 89 of the Education Law or graduation from high school with a local high school or Regents Diploma" (8 NYCRR 200.1[h] [emphasis added]). Accordingly, while I understand that the district has considerable interests in returning students to in-district placements, I am unable to find that the transfer of the student from a BOCES-operated classroom in a public school to a district-operated classroom in a public school is a mere change in location as the district argues. I am, therefore, constrained to agree with the IHO's conclusion that the student's placement for the purposes of pendency remains in the BOCES class in accordance with her May 2012 IEP.

Further, and irrespective of the above regulation, I would be unable to find on the record before me that the BOCES class that the student attended for the 2012-13 school year and the district-operated classroom to which the student was assigned for the 2013-14 school year constituted the same "educational placement." As the district correctly notes, in comparing locations and making determinations regarding whether a move from one location to another constitutes a change in educational placement, a case-by-case analysis is generally undertaken, and a number of factors must be considered, including: whether the educational program in the student's IEP has been revised; whether the student will be educated with nondisabled peers to the same extent; whether the student will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement is the same option on the continuum of alternative placements (Letter to Fisher, 21 IDELR 992 [OSEP 1994]). In this regard I note that a change from a BOCES-operated class in a public school to a district-operated class in a public school constitutes a "change in program" per New York State regulations (see 8 NYCRR 200.1[g]),[9] and a BOCES is also a different placement on the "continuum of placement options" in the State (see, e.g., "Continuum of Special Education Services for School-Age Students with Disabilities," Office of Special Educ. Memo [Nov. 2013], at p. 3, available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf). Further, and with respect to the remaining factors noted above, the record does not allow for an appropriate comparison of the two classrooms at issue. For example, the record does not clearly detail the differences, if any, in the opportunities to participate in nonacademic and extracurricular services that would be available to the student at each location. Likewise, and aside from conclusory statements that the district class was designed to "parallel" the BOCES class, and that the two locations were "substantially the same," insufficient specifics are provided about these classes to support a conclusion that the classrooms were, in fact, substantially the same. This is especially troubling since the parents have raised concerns regarding the comparability of the BOCES classroom and the district classroom, including the extent to which the student would have access to nondisabled peers (referencing a "buddy program" at the BOCES location),[10] and

[9] A "change in program" is defined as a "change in any one of the components of the [IEP] of a student as described in [8 NYCRR] section 200.4(d)(2)" (8 NYCRR 200.1[g]).[9] This includes a change in a student's placement (8 NYCRR 200.4[d][2][xii]). As noted in State Education Department (SED) guidance, an assignment to a BOCES-operated classroom in a public school is considered a different "placement" than an assignment to a district-operated classroom (see "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Dec. 2010], at p. 57, available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf; "Questions and Answers on Individualized Education Program (IEP) Development, the State's Model IEP Form and Related Requirements," Office of Special Educ. Mem. [Apr. 2011], at p. 47, available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

[10] The "buddy program" is described in the hearing record as a "mainstreaming program" where general education students from the public school in which the BOCES classroom is located "blend with the BOCES children on a weekly basis or so" and "do projects with them, . . . play with them at recess, [and] eat lunch with them" (Tr. p. 104). The district argues that since this program was not listed on the May 2012 IEP, that it constitutes "retrospective evidence" and may not be considered. However, to the extent that evidence of the "buddy program" can be considered "retrospective evidence," only "retrospective evidence" that "materially alters [an] IEP" is impermissible (R.E., 694 F.3d at 188). In other words, such evidence is only impermissible when used for purposes of determining the adequacy of a challenged IEP which, as the Second Circuit has noted, "must be evaluated prospectively as of the time it was created" (id. at 188). Pendency claims like the one at issue, however, are evaluated independently from claims relating to the adequacy of a challenged IEP (see, e.g., Mackey, 386 F.3d at 160-61, citing Susquenita, 96 F.3d at 81 n.4, 83 [under the IDEA's pendency provisions a student must

whether the district public school offered an adapted physical education program (Tr. pp. 94-95).[11] While the district contends that the student's access to mainstreaming would be "substantially similar" at both locations, the student would have lunch and recess with nondisabled peers at the district location, and both the student's May 2012 and June 2013 IEPs mandate the provision of adapted physical education (Dist. Mem. of Law at pp. 9-10), statements like this do not alone provide sufficient detail about the two classes at issue to adequately compare the two locations (see, e.g., Application of the Bd. of Educ., Appeal No. 10-111 [requiring that there be a discussion comparing the two classrooms at issues, and that the basis for any conclusions and opinions offered be provided]). Therefore, and since a determination in the district's favor must be supported by evidence in the record (see Application of the Dep't of Educ., Appeal No. 10-110; Application of the Bd. of Educ., Appeal No. 07-125), this is an additional basis for the dismissal of the district's appeal.

VII. Conclusion

The district's appeal must be dismissed for failing to properly initiate this appeal with timely personal service of the petition for review on the parents (8 NYCRR 279.2[a]). Additionally, the district's appeal must be also dismissed on the merits for the reasons discussed above.

In light of the above, I need not consider the district's remaining contentions, including that the district-operated special class was not "any more or less restrictive" than the BOCES-operated special class.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 28, 2014

HOWARD BEYER
STATE REVIEW OFFICER

remain in their current educational placement until the dispute with regard to their placement is ultimately decided "regardless of whether their case is meritorious or not"]; C.B. v New York City Dep't of Educ., 2005 WL 1388964 at *26 [E.D.N.Y. 2005] [claims for reimbursement on a "pendency basis" are "separate and distinct" from claims for reimbursement based in the inadequacy of an IEP]; Bd. of Educ. v. O'Shea, 353 F.Supp.2d 449, 459 [S.D.N.Y. 2005] [parents deemed entitled to tuition reimbursement on pendency basis regardless of the merit of their underlying claim because "pendency placement and appropriate placement are separate and distinct concepts"]; see also M.R. v. Ridley, 2014 WL 657343, at *6; A.D. v. Hawaii Dep't of Educ., 727 F.3d 911, 913 [9th Cir. 2013]). Accordingly, the use of evidence regarding the "buddy program" in this matter was not improper.

[11] The parents also raised concerns regarding transportation, but it is not clear from the record that these concerns relate to a difference between to the two locations at issue.