The University of the State of New York

The State Education Department
State Review Officer
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No. 14-060

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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Ilana A. Eck, Esq., of counsel

Weil, Gotshal & Manges, LLP, attorneys for respondent, David J. Lender, Esq., and Jared R. Freidmann, 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 respondent's (the parent's) son's pendency placement during a due process proceeding challenging the appropriateness of petitioner's recommended educational program for the student for the 2013-14 school year. The IHO found that the student's pendency placement was at the Cooke Center for Learning and Development (Cooke). 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

As relevant to the instant case, the parent previously initiated an impartial due process proceeding on or about November 22, 2011, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Parent Ex. S). By stipulation of settlement dated February 13, 2012, the parties resolved all matters related to the 2011-12 school year; the stipulation provided, among other things, that the district would pay for

the costs associated with the student's attendance at Cooke during the 2011-12 school year (see Parent Ex. P).

Thereafter, the parent initiated an impartial due process proceeding on or about October 26, 2012, alleging that the district failed to offer the student a FAPE for the 2012-13 school year (see Parent Ex. Q). During that impartial hearing, an IHO issued an interim decision, dated February 4, 2013, which denied the parent's request for pendency at Cooke (Dist. Ex. 21 at p. 3). The February 2013 interim decision determined that the stipulation of settlement entered into by the parties resolving the disputes over the 2011-12 school year contemplated pendency and expressly provided that the stipulation could not be relied upon to establish that Cooke constituted the student's "then current placement" for the 2011-12 school year (Dist. Ex. 21 at p. 3; see Parent Ex. P at p. 6). By stipulation of settlement dated February 20, 2013, the parties resolved all matters related to the 2012-13 school year; the stipulation provided, among other things, that the district would pay for the costs associated with the student's attendance at Cooke during the 2012-13 school year (see Parent Ex. A).

On or about November 5, 2013, the parent initiated the instant impartial due process proceedings, alleging that the district failed to offer the student a FAPE for the 2013-14 school year (Parent Ex. E).[1]

A. Impartial Hearing Officer Decision

On January 22, 2014, the parties proceeded to an impartial hearing with regard to the student's pendency (stay-put) placement, eventually contesting the student's pendency placement over three hearing dates, at the close of which both submitted written briefs to the IHO (Tr. pp. 1-515; see IHO Exs. 1-2). By interim order dated March 25, 2014, the IHO found that Cooke constituted the student's pendency placement and ordered the district to pay the student's tuition and other expenses at Cooke from November 5, 2013—the date of the due process complaint notice—through the pendency of these proceedings (Interim IHO Decision at p. 6). Contrary to the district's assertion that the student's pendency placement was at a particular State-approved nonpublic school pursuant to a March 2010 IEP, the IHO indicated that such a placement was "untenable" and "moot from inception" because, among other reasons, it came to light during the impartial hearing that the particular nonpublic school in question was full and would not accept the student to implement his pendency placement (id. at pp. 3-4; see Dist. Ex. 13). Although he did not specifically recite the basis for his determination that the student's pendency placement was at Cooke, the IHO noted the parent's position that the stipulation of settlement resolving the dispute over the 2011-12 school year was materially different from the stipulation of settlement resolving the dispute over the 2012-13 school year (see Interim IHO Decision at pp. 3-5; compare Parent Ex. A at p. 6, with Parent Ex. P at p. 6).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in determining that Cooke constituted the student's pendency placement. The district asserts that the student's pendency placement lies in

[1] Another SRO issued a decision regarding the merits of the parent's claims that the district failed to offer the student a FAPE for the 2013-14 school year (Application of a Student with a Disability, Appeal No. 14-163).

the program recommended by an IEP developed on February 26, 2013—a 12:1+1 special class with related services in a specialized school—because the parent did not challenge the CSE's placement recommendation for the student's 2013-14 school year; but, rather, only challenged the appropriateness of the particular public school site to which the student was assigned. The district contends that although it "revised" its position regarding the student's pendency placement during the impartial hearing, the IHO erred by failing to address its ultimate position that the program recommendation set forth in the February 2013 IEP constituted the proper pendency placement. The district also contends that the IHO's finding that Cooke constituted the student's pendency placement was not supported by the hearing record or controlling law.

In an answer, the parent argues to uphold the IHO's interim order on pendency in its entirety. The parent contends that the February 2013 stipulation of settlement—that placed the student at Cooke at district expense—does not contain any language that would preclude Cooke from becoming the student's pendency placement and that the IHO's finding that Cooke constituted the student's pendency placement was therefore correct.

V. Applicable Standards—Pendency

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; 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 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]; T.M., 752 F.3d at 170-71; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; see T.M., 752 F.3d at 171 [holding that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers while his administrative and judicial proceedings are pending. Instead, it guarantees only the same general level and type of services that the disabled child was receiving"], citing Concerned Parents, 629 F.2d at 756).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000], aff'd, 297 F.3d

195 [2d Cir. 2002]). The United States Department of Education has opined that a student's then-current 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]). 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 Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).[2]

VI. Discussion

A. The District's Position

On appeal, the district asserts that the IHO erred in failing to address its argument that the program recommendation set forth in the February 2013 IEP constituted the student's pendency placement. However, as the parent points out in her answer, although the district changed its position regarding what constituted the student's pendency placement during the impartial hearing, at no time did it assert before the IHO that the program recommendation in the February 2013 IEP was the pendency placement for the student. At various points during the impartial hearing, the district asserted that the student's pendency placement was home schooling, the nonpublic school recommended by a March 2010 IEP, an affiliated nonpublic school in a different location, and a program "substantially similar" to the program recommended by the March 2010 IEP (see Tr. pp. 35-41, 46-47, 440, 500-01). The district's memorandum of law submitted to the IHO on the issue of pendency repeatedly set forth the district's contention that the student's pendency placement was at the nonpublic recommended by the March 2010 IEP (IHO Ex. 1 at pp. 3-4, 7, 11; see Dist. Ex. 13). Accordingly, the IHO did not err in failing to address whether the program recommended by the February 2013 IEP constituted the student's pendency placement; rather, the IHO addressed the district's final articulated assertion.

In any event, the district's assertion on appeal that the program recommendation set forth in the February 2013 IEP constituted the student's pendency placement is without merit. 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 Drinker, 78 F.3d at 867; Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625–26 [6th Cir. 1990];). Here, the district does not make—and the hearing record would not support—an assertion that the program recommendation set forth in the February 2013 IEP was the program

[2] Once a pendency placement has been established, it can be changed in several ways: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Bd. of Educ. v. Schutz, 290 F.3d 476, 484-85 [2d. Cir. 2002]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; Murphy, 86 F. Supp. 2d at 366).

contained in student's most recently implemented IEP, was the operative placement actually functioning at the time pendency was invoked, or was the placement at the time of the previously implemented IEP. Rather, the parent unilaterally placed the student at Cooke prior to the time the February 2013 IEP was to be implemented, thus the February 2013 IEP was not operative at the time pendency was invoked and has never been implemented (see Parent Exs. B; C at p. 2; E. at p. 1). A challenged IEP that is never implemented does not establish a student's placement for purposes of pendency (Millay v. Surry Sch. Dep't, 632 F. Supp. 2d 38, 42 [D. Me. 2009]).

B. The Parent's Position

The parent asserts that the IHO correctly identified Cooke as the student's pendency placement during the course of the impartial hearing. The parent contends that a difference in wording between the stipulation of settlement that resolved matters related to the 2011-12 school year and that of the stipulation of settlement that resolved matters related to the 2012-13 school year resulted in the second stipulation establishing the student's pendency at Cooke in the instant proceeding. Specifically, the parent points to the differences in two paragraphs in the stipulations. The February 2012 stipulation provides in relevant part as follows:

> 14. Neither (a) this Stipulation nor (b) the [district]'s provision of, or its reimbursement to the Parent for the costs of tuition, related services, transportation, or any other materials or services, for the Student during the 2011-12 school year, whether provided pursuant to this Stipulation or otherwise, shall be relied upon by any party to indicate, establish or support the position that it constitutes a recommendation or admission by the [district] that (i) the Student attend [Cooke], (ii) [Cooke] constitutes an appropriate placement, or (iii) [Cooke] constitutes the "then current placement" for the 2011-2012 school year or any subsequent school year.
>
> 15. The terms and conditions agreed to in this Stipulation shall be for the limited purpose of the settlement of [the impartial hearing requested by the November 2011 due process complaint notice] and for the 2011-2012 school year. This Stipulation shall not entitle the parent or the student to receive, or require the [district] to provide, reimbursement of or funding for any costs associated with the student's attendance, if any, at [Cooke] during any subsequent school year.

(Parent Ex. P at p. 6).

While the February 2013 stipulation provides in relevant part as follows:

> 14. Neither (a) this Stipulation nor (b) the [district]'s provision of, or its reimbursement to the Parent for the costs of tuition, related services, transportation, or any other materials or services, for the Student during the 2012-13 school year, whether provided pursuant to this Stipulation or otherwise, shall be relied upon by any party to indicate, establish or support the position that it constitutes a recommendation by the [district] that the

> Student attend [Cooke] or that [Cooke] constitutes an appropriate placement.
>
> 15. The terms and conditions agreed to in this Stipulation shall be for the limited purpose of the settlement of [the impartial hearing requested by the October 2012 due process complaint notice] and for the 2012-2013 school year. This Stipulation shall not entitle the parent or the student to receive, or require the [district] to provide, reimbursement of or funding for any costs associated with the student's attendance, if any, at [Cooke] during any subsequent school year.

(Parent Ex. A at p. 6).

The parent contends that the removal of the word "admission" from paragraph 14 of the stipulation and the clause in that paragraph providing that the stipulation may not be used to establish that Cooke constitutes the "then current placement" causes the February 2013 stipulation, which placed the student at Cooke for the 2012-13 school year at district expense, to establish the student's "then current placement" at Cooke upon the filing of the parent's due process complaint notice in the instant proceeding (compare Parent Ex. P at p. 6, with Parent Ex. A at p. 6; see Parent Ex. E at p. 1).[3]

However, a reading of the stipulation of settlement supports a finding that paragraph 15 of the stipulation, standing alone, effectively limits the terms of the stipulation to the 2012-13 school year and specifies that the stipulation does not entitle the parent or the student to receive funding or reimbursement for any costs associated with the student's attendance at Cooke in any subsequent school year (Parent Ex. A at p. 6).[4] Although the parties adroitly contest the impact of the

[3] During the impartial hearing and in the parent's answer, counsel for the parent asserted that the specific changes in paragraphs 14 and 15 of the February 2013 stipulation of settlement came about as a result of the February 2013 interim decision on pendency, which denied the parent's request for pendency at Cooke upon finding that the February 2012 stipulation of settlement contemplated pendency and specified that the stipulation could not be relied upon to establish or indicate that Cooke constituted the "then current placement" for the 2011-12 school year or any subsequent school year (Tr. pp. 30-31, 52-53, 260-62, 269-71, 273-74; Dist. Ex. 21 at p. 3; see Parent Ex. P at p. 6). According to the parent's counsel, the intent behind the changes made to the February 2013 stipulation was to allow that stipulation to set pendency at Cooke in a subsequent school year (Tr. pp. 269-71; Parent Mem. of Law at pp. 7-9). However, neither the parent's counsel, the parent herself, nor anyone else familiar with the drafting of the February 2013 stipulation of settlement testified as a witness at the impartial hearing, nor was any documentary evidence supporting these unsworn assertions admitted into evidence at the impartial hearing (see 8 NYCRR 200.5[j][3][xii]). In any event, as set forth below, because the stipulation is unambiguously limited to the 2012-13 school year by its own terms, it is unnecessary to go beyond the terms of the settlement to determine its meaning (see Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 [2004]). Despite counsel for the parent's protestations that he was "fooled" by the language contained in the first stipulation of settlement (Tr. pp. 269-71), should counsel in the future desire a stipulation of settlement to establish pendency, nothing precludes the parties from expressly providing for such.

[4] Although the impartial hearing officer ultimately decided that Cooke was the student's pendency placement for reasons that are not entirely clear from the interim decision, during the impartial hearing the IHO stated that despite the intention of counsel for the parent that the February 2013 stipulation of settlement establish the student's pendency placement at Cooke, "he was deficient in his ability to do that" and the import of the stipulation was "clear in [the IHO's] mind" (Tr. pp. 437-38).

limitation clauses in the February 2013 stipulation of settlement, a plain reading of the stipulation prevents the agreement from being employed to establish Cooke as the student's pendency placement under relevant case law (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. v. L.P., 421 F. Supp. 2d 692, 696-97 [S.D.N.Y. 2006] [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[5]]). In light of the above, the IHO erred in determining that Cooke was the student's pendency placement and that portion of the interim decision must be reversed.

C. The Student's Pendency Placement

As noted above, during the impartial hearing the district asserted that the student's pendency placement was at the particular nonpublic school recommended by a March 2010 IEP (Tr. pp. 35-41, 46-47, 440, 500-01; IHO Ex. 1 at pp. 3-4, 7, 11; see Dist. Ex. 13). Specifically, the March 2010 IEP recommended placement in an 8:1+2 special class in a particular State-approved nonpublic school and related services (Dist. Ex. 13 at pp. 1, 3, 10-11). The parent does not contest that the March 2010 IEP was the last one agreed upon by the parent and the hearing record indicates that during the 2010-11 school year, the student attended the nonpublic school pursuant to the March 2010 IEP (Tr. pp. 40-41, 51, 218; Dist. Exs. 12-13). Neither party has identified an IEP implemented subsequently to the March 2010 IEP, and as set forth above neither the February 2013 stipulation of settlement nor the February 2013 IEP modifies the student's pendency placement. Accordingly, the March 2010 IEP established the student's pendency placement and the program recommended therein remains the student's pendency placement until modified by agreement of the parties, an unappealed decision in favor of the parents, or an SRO decision in favor of the parents.[6]

[5] 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.

[6] During the course of the impartial hearing it became apparent that the nonpublic school identified in the March 2010 IEP did not admit children of the student's age and that the affiliated nonpublic school, which accepted children of the student's age, had no seats available and would not accept the student (see Tr. pp. 35-38, 47-48, 72, 440, 470, 500-01; IHO Interim Decision at pp. 3-4; Dist. Ex. 13). Upon learning this, the district asserted that

Although the district failed to accurately identify the student's pendency placement at the commencement of the impartial hearing or make an affirmative offer to immediately implement what it identified as the pendency placement, and although placing the student at Cooke during the pendency of the impartial hearing may have been in the student's best-interests, the pendency provision of the IDEA "substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships (Zvi D., 694 F.2d at 906; see J.F. v. New York City Dep't of Educ., 2015 WL 892284, at *5 [S.D.N.Y. Mar. 3, 2015] [noting that "equitable considerations do not provide an independent basis for relief" under the IDEA]; Application of the Dept. of Educ., Appeal No. 10-083).

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 due process proceedings commence, a parent who unilaterally places the child in a private school setting pending the completion of an appeal does so at his own financial risk]). While the parent's choice was understandable under the circumstances, and the district's failure to be prepared to implement the student's pendency placement is troublesome, the parent is not entitled to public funding for her unilateral placement of the student at Cooke under the pendency provision of the IDEA, especially since the hearing record read as a whole does not indicate that the parent desired the district to implement any pendency placement other than at Cooke.

VII. Conclusion

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's interim decision dated March 24, 2014, is reversed.[

Dated: **Albany, New York**
March 13, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER

pendency remained established by the March 2010 IEP and offered to implement a substantially similar 8:1+2 program in a different, unidentified, location (Tr. pp. 500-01). Under recent Second Circuit precedent, not available to the IHO, this was the appropriate course of action for the district to take (T.M., 752 F.3d at 171, citing Concerned Parents, 629 F.2d at 753, 756).