The University of the State of New York

**The State Education Department**
**State Review Officer**
www.sro.nysed.gov

**No. 19-033**

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Springville-Griffith Institute Central School District**

**Appearances:**
Harris Beach PLLC, attorneys for respondent, by Jeffrey J. Weiss, Esq.

**DECISION**

## I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education from an interim decision of an impartial hearing officer (IHO), which determined her son's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2017-18 and 2018-19 school years. The IHO determined that the student's pendency placement was the placement established pursuant to the student's April 10, 2018 individualized education program (IEP). 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 parties' arguments in this case, a CSE convened on December 21, 2016 and found the student eligible to receive special education and related services as a student with an other health impairment (OHI) (Dist. Ex. 6 at p. 1).[1] The December 2016 CSE developed an

[1] The student's eligibility for special education as a student with an OHI is not in dispute in this proceeding. (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

IEP to be implemented from January 10, 2017 through June 23, 2017 (id. at pp. 1, 8-10). Among other things, the December 2016 CSE recommended that the student be placed in a Board of Cooperative Educational Services (BOCES) 8:1+1 special class with the related services of two 30-minute sessions per six-day cycle of individual occupational therapy (OT) and one 30-minute session per six-day cycle of individual counseling (id. at p. 8). For the 2017-18 school year, a CSE convened on April 21, 2017 and developed an IEP to be implemented from September 5, 2017 through June 21, 2018 (Dist. Ex. 5 at pp. 1, 2, 8-9). Finding that the student continued to be eligible for special education and related services as a student with an OHI, the April 2017 CSE recommended that the student continue to be placed in a BOCES 8:1+1 special class in a public school and receive the related services of two 30-minute sessions per six-day cycle of individual OT, one 30-minute session per six-day cycle of individual counseling and one 30-minute session per six-day cycle of counseling in a small group (5:1) (id. at pp. 1, 8-10).

A CSE convened on April 10, 2018 to develop the student's IEP for the 2018-19 school year (Dist. Ex. 4 at p. 1). Continuing to find the student eligible for special education and related services as a student with an OHI, the April 2018 CSE recommended 12-month services of a BOCES 6:1+1 special class in a public school with the related services of two 30-minute sessions per six-day cycle of individual OT and two 30-minute sessions per six-day cycle of individual counseling to be implemented from July 9, 2018 through August 17, 2018, and September 4, 2018 through June 25, 2019 (id. at pp. 1, 9-11).

According to a report card for the 2018-19 school year dated November 15, 2018, during the first trimester the student had been absent 12 days (Dist. Ex. 28 at p. 1). According to the parent, the student stopped attending school on November 8, 2018 (Tr. pp. 6, 31).[2] In correspondence dated December 4, 2018, the student's neurologist requested "home health instruction for [the student] while he transitions back to school" (Parent Ex. AA). Subsequently, the student was hospitalized on January 19, 2019 "due to increased depressed mood, suicidal ideation and self-injurious and aggressive behavior precipitated by feeling overwhelmed and anxious in the school setting," according to correspondence dated February 4, 2019 from the student's psychiatrist (Parent Ex. BB). The February 4, 2019 letter further stated that "[u]pon discharge, it is our recommendation that [the student] be placed on home instruction until appropriate arrangements at school can be made" to "aid in his transition back to his home and school environment" (id.).

**A. Due Process Complaint Notice**

By due process complaint notice dated December 7, 2018, the parent, through a lay advocate, asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 and 2018-19 school years (see Dist. Ex. 1). The parent also alleged violations of section 504 of the Rehabilitation Act of 1973 (section 504), and the Americans with Disabilities Act (ADA) (id.).

According to the parent's due process complaint notice, the district failed to assess the student in all areas of disability or suspected disability and failed to recommend an appropriate

[2] The district alleged in its Memorandum of Law that the student stopped attending school in approximately the middle of October 2018 (Dist. Mem. of Law at p. 1).

program and placement in the least restrictive environment (LRE) (Dist. Ex. 1 at pp. 2-3). Specifically, the parent alleged that the student's present levels of performance as stated on the April 10, 2018 IEP were not accurate and the IEP did not reflect the student's needs or the parent's concerns (id. at p. 3). The parent also alleged that the IEP did not include a "positive reinforcement behavioral intervention plan" (BIP) and that the CSE "did not recommend a timely functional behavioral assessment" (FBA) (id.). Additionally, the parent claimed that the student had been restrained multiple times without instructions included on the IEP that restraints would be used or a doctor's prescription to utilize physical restraints (id.). The parent further alleged that the district failed to comprehensively evaluate the student in the areas of assistive technology, OT and sensory needs, visual processing needs, speech-language needs, social/emotional needs, auditory processing needs, and failed to complete a physical evaluation (id.).

The parent also claimed that the district failed to exhaust all supplementary aids and services before placing the student out of district in a more restrictive BOCES 6:1+1 special class (Dist. Ex. 1 at p. 3). The parent alleged that the April 10, 2018 IEP did not include seizure protocols and the CSE failed to recommend a nurse to accompany the student on the bus to administer seizure medication (id.). The parent also argued that the April 10, 2018 IEP did not contain appropriate special education programs and services and she disagreed with virtually every aspect of the IEP (id. at pp. 3-4). Additionally, the parent contended that the district failed to schedule the student's annual review at a mutually agreed upon date, time and location, and failed to provide prior written notice and informed consent (id. at p. 4). The parent also claimed that the district failed to measure progress or lack thereof toward the student's annual goals for the 2017-18 and 2018-19 school years (id.).

As relief, the parent requested that the district provide prior written notice, schedule CSE meetings at a mutually agreed upon date, time and location, and provide "comprehensive independent" evaluations and recommend appropriate services in the areas of OT with sensory integration, speech-language, visual processing, assistive technology, and auditory processing (id.). The parent further requested an FBA, an appropriate BIP that included positive reinforcement, and appropriate counseling services (id.). The parent also requested immediate placement at an in-district elementary school and listed a number of special education program options along the continuum of services to which she would agree as long as they were provided in-district (id. at p. 5). The parent further sought appropriate transportation with a nurse and limited travel time, measurable annual goals, appropriate supplementary aids and services, appropriate testing accommodations, appropriate progress reports to the parent, access to non-disabled peers and 12-month services (id.). Additionally, the parent requested a finding of a denial of a FAPE, and that the CSE be directed to reconvene and to "discuss and recommend any compensatory education and or related services" the student may require for failing to provide a FAPE (id.). Lastly, the parent invoked pendency requesting "home hospital instruction" to be provided in-district and to include transportation with a nurse (id. at pp. 6-7).

The district responded to the parent's due process complaint notice on December 19, 2018 (SRO Ex. 1).[3]

[3] As required by State regulation, the hearing record includes all exhibits admitted into evidence at the hearing,

### B. Impartial Hearing Officer Decision

An IHO was appointed to hear the matter and, on or about March 5, 2019, the parent submitted a motion seeking a pendency determination from the IHO (Mar. 18, 2019 Interim IHO Decision at p. 1).[4] By interim decision dated March 8, 2019, the IHO consolidated the parent's initial due process complaint notice with a second due process complaint notice dated February 19, 2019 (SRO Ex. 2) (Mar. 8, 2019 Interim IHO Decision at p. 1).[5] The IHO also granted the parent's request for access to the student's educational records (id.). By interim decision dated March 18, 2019, the IHO found that the parent's motion for pendency required a hearing (Mar. 18, 2019 Interim IHO Decision at p. 3). A hearing on pendency was held on April 1, 2019 (Tr. pp. 59-257) and by interim order dated April 17, 2019, the IHO determined that the student's pendency placement was a BOCES 6:1+1 special class as set forth in the "last implemented" IEP dated April 10, 2018 (Apr. 17, 2019 Interim IHO Decision at p. 5).

## IV. Appeal for State-Level Review

The parent, together with the lay advocate, appeals and argues that the IHO incorrectly determined that: (1) the April 10, 2018 IEP was implemented and therefore is the last "agreed upon placement"; (2) the services provided during the student's hospitalization were not agreed to by the district; and (3) a BOCES 6:1+1 special class was the last implemented IEP. As relief, the parent requests that the IHO's order be annulled and a finding made that the student's pendency placement is home/hospital instruction for a minimum of two hours per day, and the related services of OT two times per week for 30 minutes, and counseling once per week for 30 minutes. The parent further requests ten hours per week of home/hospital instruction by a special education teacher, and the related services of OT two times per week for 30 minutes, and counseling once per week for 30 minutes as compensatory educational services to remedy the denial of services from February 4, 2019 through the current date. In the alternative, the parent requests a finding

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the transcript of the proceedings, responses to the due process complaints, all briefs, arguments or written requests for an order filed by the parties for consideration by the IHO, and all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order (8 NYCRR 200.5[j][5][vi][a], [b], [c], [e]-[f]). However, many of these such documents have not been marked as exhibits. For ease of identification and citation, the unmarked documents will be cited as SRO Exhibits 1-7.

[4] The lay advocate did not wish to use the term "motion" believing it inappropriate because she was not an attorney, but even pro se parties are fully capable of filing motions, both in due process proceedings and in courts of record. It was an application from the parent for an order from the IHO and the term fits. As further discussed below, the parent supplemented her position on the student's pendency on or about April 12, 2019, after the hearing related to pendency, and the district indicated its position on the student's pendency placement in an email bearing the same date (SRO Exs. 6; 7).

[5] In her second due process complaint notice dated February 19, 2019, the parent realleged the claims set forth in her first due process complaint notice and also alleged, among other things, that the district failed to obtain parental consent for an FBA and for reevaluation, failed to convene a properly composed CSE on April 10, 2018, failed to allow equal participation by the parent and predetermined the recommendations made at the June 12, 2017 and April 10, 2018 CSE meetings, failed to document the parent's concerns on the student's IEP, failed to recommend placement in the LRE, failed to provide prior written notice of the out-of-district placement, and denied the student a FAPE for the 2017-18 and 2018-19 school years (SRO Ex. 2 at pp. 3-6). The district responded to the parent's second due process complaint notice on March 1, 2019 (SRO Ex. 3).

that the student's pendency placement is a BOCES 8:1+1 special class as indicated in the January 10, 2017 IEP.

In an answer, the district responds to the parent's claims with admissions and denials and argues that the IHO's decision be upheld in its entirety.

**V. Applicable Standards**

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163[2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 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., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 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]; T.M., 752 F.3d at 170-71; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; 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, 756 [2d Cir. 1980]; 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).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding

whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and 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" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also 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).

**VI. Discussion**

The parent argues that the IHO erred by finding that the April 10, 2018 IEP which recommended a BOCES 6:1+1 special class was implemented and represents the last agreed upon placement. The parent also alleges that the district agreed to the provision of home/hospital instruction during the student's hospitalization. The district contends that the IHO correctly determined the student's pendency placement for the duration of the proceedings.

As indicated above, the hearing record contains the parent's letter-motion to the IHO dated March 5, 2019 seeking a determination that the student's then-current placement for the purposes of pendency was home/hospital instruction (SRO Ex. 4).[6] The parent argued therein that the student had not attended school since November 8, 2018 and the last instruction the student received was on-site during his hospitalization (id. at pp. 1-2). The parent contended that as a result, home/hospital instruction constituted "the operative placement actually functioning" and represented a "pendency changing event" (id. at p. 2).

In a response dated March 5, 2019, the district countered that the student had attended a BOCES 6:1+1 special class from July 2018 until the middle of October 2018, when the parent stopped sending the student to school (SRO Ex. 5 at p. 1). The district also contended that the parent requested home instruction but had not provided additional information required by the district (id. at pp. 1-2). Additionally, the district alleged that the parent was seeking home instruction because she disagreed with the appropriateness of the BOCES 6:1+1 special class (id. at 2).

Following the pendency hearing, in a letter to the IHO dated April 12, 2019, the parent argued that the April 10, 2018 IEP was not implemented as written (SRO Ex. 6 at p. 2).

[6] The parent's letter-motion in support of her request for pendency included 19 exhibits which were separately emailed to the IHO and identified as P#1 through P#19. For citation purposes, those exhibits will be referenced as Parent Pendency Exs. 1-19).

Specifically, the parent alleged that beginning in September 2018 the student was transported to an elementary school other than the elementary school named in the IEP (id.). As a result, the parent argued that she did not agree to any change to the April 10, 2018 IEP as she was unaware of the change, and was not informed of, or asked for her consent to, the changes (id. at pp. 3, 5). As such, according to the parent, the April 10, 2018 IEP cannot be the last agreed upon IEP (id. at pp. 2-3).

In an email to the IHO dated April 12, 2019, the district reiterated its position that the student's pendency placement was a BOCES 6:1+1 special class and argued that any "instruction" provided to the student during his hospitalization was not provided, recommended, approved or paid for by the district, and did not constitute a pendency changing event (SRO Ex. 7).

In his April 2019 interim decision regarding pendency, the IHO found that the evidence adduced at the hearing did not support the parent's request for a determination that home/hospital instruction was the student's pendency placement (Apr. 17, 2019 Interim IHO Decision at pp. 4-5).

According to the parent, the student stopped attending the BOCES 6:1+1 special class on November 8, 2018 (Tr. pp. 6, 31). In the correspondence of December 4, 2018, the student's neurologist directed a letter "[t]o whom it may concern" requesting "home health instruction for [the student] while he transitions back to school" (Parent Ex. AA). The parent shortly thereafter filed her first due process complaint notice on December 7, 2018 (Dist. Ex. 1 at p. 2). The district responded to the parent's request by letter dated December 19, 2018 (SRO Ex. 1). The hearing record reflects that the student was hospitalized from January 19, 2019 through February 4, 2019 (Parent Ex. BB). In a February 4, 2019 discharge letter addressed to "School Official", the student's psychiatrist recommended that the student "be placed on home instruction until appropriate arrangements at school can be made" (id.). The hearing record also indicates that, during his hospitalization, the student had the opportunity to participate in a "Structured Study Hall" for one or two hours per day, Monday through Friday (Parent Ex. MM at p. 1). According to the hospital's Education Coordinator, the student "attended the program" on eight dates and participated in class (id.). The hospital's Education Coordinator reported that he did not have "a set curriculum" but rather "typically rel[ied] on the school district to send relevant assignments for the students" and "[i]n the event[] the school district does not send work or if the parent does not want contact, [he] w[ould] provide supplemental assignments based on [his] professional judgment and training" (id.). In this case, according to the hospital's Education Coordinator, as the parent did not want contact with the district, the student was provided with "[g]eneral [s]cience and [s]ocial [d]evelopment assignments (id.). Additionally, the Education Coordinator stated that the academic support provided to the student was "not to be considered or defined as Home Instruction per NYS Law, rather a service provided to all students in a group setting by a certified Special Education and Career and Technical Education Teacher" (id.).

I find that the IHO correctly determined that the student's pendency placement was set forth in the April 2018 IEP which recommended a BOCES 6:1+1 special class five days per week for five hours per day with the related services of individual OT two times per six-day cycle for 30 minutes and individual counseling two times per six-day cycle for 30 minutes.

None of the parent's arguments to the contrary are supported by the law, the facts of this case or the hearing record. An educational agency's obligation to maintain stay-put placement is triggered when an administrative due process proceeding is initiated (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 445, 452 [2d Cir. 2015]). When triggered, there are numerous ways that the terms of the stay-put placement may be established. First, a school district and parent may simply reach an agreement as to the services and programming that the student shall receive while a proceeding is pending (20 U.S.C. § 1415[j] ["unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child"] [emphasis added]).

At the time of the filing of the due process complaint in December 2018 in this matter, the parent had stopped sending the student to school in either October or November 2018, and for reaons that are evident from her allegations in her complaints, it has been the parent, not the district, that is seeking to change the educational placement, that is among the matters to be resolved on the merits in this proceeding. The parent alleged varying reasons for her decision to remove the student from school, i.e., lack of appropriate and medically safe bus transporation and physical harm caused by inappropriate restraints; health, seizure issues and diagnostic procedures needed; the student's neurologist indicated the student was suffering emotional harm; severe emotional responses to school and signs of depression; and regression in behavior, emotional status and incidences of harmful physical restraint (see Dist. Ex. 1 at p. 7; SRO Exs. 2 at p. 1; 6 at pp. 2, 5; Req. for Rev. at p. 3). At the time the first due process complaint notice was filed on December 7, 2018, the student was enrolled in and had most recently attended the BOCES 6:1+1 special class in accordance with his IEP. The student was hospitalized on January 19, 2019, 43 days after the filing of the first due process complaint notice. While a change in circumstances such as a student's hospitalization or medical treatment ordered by a physician in a student's home may trigger the need for a CSE to convene and review a student's special education programming and a CSE's determination is subject to challenge (see e.g., Questions and Answers on Providing Services to Children With Disabilities During an H1N1 Outbreak, 53 IDELR 269 [OSERS 2009] [noting that the need for a CSE meeting occurs generally for absences of more than 10 consecutive school days and for which an IEP meeting is necessary to change the child's placement and the contents of the child's IEP, if warranted]), the parent's contention that the student's hospitalization automatically constituted a pendency-changing event is unsupported by law.

Where the parents and school district cannot agree upon the stay-put placement, the focus shifts to identifying the "last agreed upon" educational placement as the then-current educational placement (E. Lyme, 790 F.3d at 452; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906; A.W. v. Bd. of Educ. Wallkill Cent. Sch. Dist., 2015 WL 3397936, at *3 [N.D.N.Y. May 26, 2015]).

Stay-put "is often invoked by a child's parents in order to maintain a placement where the parents disagree with a change proposed by the school district; the provision is used to block school districts from effecting unilateral change in a child's educational program" (Susquenita, 96 F.3d at 83). "Where the parents seek a change in placement, however, and unilaterally move their child from an IEP-specified program to their desired alternative setting, the stay-put rule does not immediately come into play" (M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 [3d Cir. 2014]). The purpose of the pendency provision is "to maintain the educational statuts quo while the parties' dispute is being resolved," and it "therefore requires a school district to continue funding whatever

educational placement was last agreed upon for the child until the relevant administrative and judicial proceedings are complete" (T.M., 752 F.3d at 152, 170-71).

The hearing record reflects that the district has continued to fund the student's educational placement in the BOCES 6:1+1 special class (Tr. pp. 79-80). With regard to the parent's claim that the April 10, 2018 IEP was not implemented because the student was allegedly transported to an unknown program at an unnamed elementary school, even if true, these facts would not change the pendency analysis or result under these circumstances, as that would be a change in location and stay-put does not require a school district to maintain a student's programming in the same brick-and-mortar building. In short, the district has maintained the availability of the student's pendency placement as required by the IDEA, even though the parent may now find that placement objectionable.

Thus, the parent's appeal is dismissed and the IHO's second interim decision on pendency dated April 17, 2019 is upheld in its entirety.

While the dismissal of the parent's claim seeking home/hospital instruction as pendency resolves the instant State-level review proceeding, it appears that the student is receiving little or no special education services at all at this time. Among the reasons proffered for the student's removal from school was the allegation that the BOCES 6:1+1 special class was harmful to the student's physical and mental well-being. However, the student is of compulsory school age and the parent does not have the option of unilaterally keeping the student at home indefinitely (see Application of a Child with a Disability, Appeal No. 05-128). Nevertheless, the parent is not left without any options. The pendency provision of the IDEA does not preclude a parent from seeking a traditional injunction (Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F.Supp.2d 375, 391 [N.D.N.Y. Jul. 3, 2001]; see also Sabatini v. Corning-Painted Post Area Sch. Dist., 78 F.Supp.2d 138, 143 [W.D.N.Y. Dec. 29, 1999]; A.T., I.T. v. New York State Educ. Dep't, 1998 WL 765371 at *11 [E.D.N.Y. Aug. 4, 1998]; J.B. v, Killingly Bd. of Educ., 990 F.Supp. 57, 72 [D.Conn. Dec. 19, 1997]; Kantak v. Bd. of Educ. of Liverpool Cent. Sch. Dist., 1990 WL 36803 at *2 [N.D.N.Y. Mar. 30, 1990]). The parent may pursue injunctive relief in a court of competent jurisdiction to prevent the district from returning the student to the BOCES 6:1+1 special class if she can demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief (Cosgrove, 175 F.Supp.2d at 391).

To be clear, there are other circumstances in which a student's placement may be quickly and temporarily changed from the one listed in the student's IEP which are not changes to the student's pendency placement. If a student is at risk of harm, and the district believes that maintaining the current placement of the student is substantially likely to result in injury to the student or others, the district (though not the parent under these circumstances) may initiate due process and request that the IHO move the student to an interim alternative educational setting (IAES) (34 CFR 300.532[a-b]; see Letter to Huefner, 47 IDELR 228 [OSEP 2007] [noting that an LEA may renew an IAES request to a hearing officer for subsequent 45 day periods under section 300.532]). The IHO, as a result, has the authority to order a temporary change in placement of the student to an appropriate IAES for up to 45 days, and the procedures may be repeated if the district believes that returning the student to the original placement is substantially likely to result in injury

to the student or to others (34 CFR 300.532[b]; see also Timberlane Reg'l Sch. Dist., 45 IDELR 139 [in which an IHO ordered the removal of a 14-year-old student with Type I diabetes, non-verbal learning disability and a possible emotional disability to an IAES for a complete evaluation]). The IHO in Timberlane, further directed the parents to cooperate by releasing requested records and to apply for the student's admission at the district's chosen placement (id.). Once the diagnostic placement was complete, the IHO ordered the district to convene an IEP team to determine an appropriate placement for the student (id.). However, even the IAES provisions are limited and do not completely supplant the stay-put provision because once the 45-day period elapses and the school fails to make a new IAES request to a hearing officer, the school cannot thereafter exclude the student from his or her then-current educational placement (see Olu-Cole v. E.L. Haynes Pub. Charter Sch., 292 F. Supp. 3d 413, 419 [D.D.C. 2018]). As noted above however this type of IAES addressing circumstances involving a substantial likelihood of injury is limited to school district requests, thus while factually closer to what the parent is alleging, the parent may not avail herself of this provision and then claim it as pendency.

Lastly, the parties may reach an agreement to change the student's pendency placement without sacrificing their respective positions on the merits of the underlying matter. The hearing record reflects periods of escalation in the contentiousness between the parties, and there is no indication what, if any, services the student is currently receiving. It appears as though the student has been out of school since at least November 8, 2018, possibly longer, and there is no evidence thus far of any collaborative efforts of ensuring the student receives some kind of educational services. Months have now passed since the student was discharged from the hospital, and the hospital staff indicated that any "[e]xtended need for home instruction can be re-evaluated post discharge by family, school, and outpatient providers as needed" (Parent Ex. BB). The district is reminded that if the student receives no services, the student will likely fall behind while the matter remains pending. The parent must understand that if she wants the district to provide special education services for her son during the pendency of these proceedings, delivery of those services is dependent upon her cooperation with the district's reasonable efforts to provide those services to the student going forward.

## VII. Conclusion

Based on the foregoing, the parent's appeal is dismissed. However, I fully expect that the district and the parent will adhere to their respective obligations concerning the student and his education. I also encourage the district to assist to the extent possible in establishing contact between the parent and local agencies that may assist the parent with respect to non-educational issues that may be a factor and alleviate some of her concerns relative to returning the student to school.

**THE APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**June 7, 2019**

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