The University of the State of New York

The State Education Department
State Review Officer
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No. 20-074

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian J. Reimels, 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 from the decision of an impartial hearing officer (IHO) which denied her request to order respondent (the district) to provide for her daughter's future education in a private school. 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 parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. In a due process complaint notice, dated May 15, 2019, the parent, who appeared pro se, alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (see Parent Ex. A).[1] The parent asserted that despite repeated requests for an evaluation in prior school years, the district

[1] The parent's exhibit list and the IHO's exhibit list indicate that the parent's due process complaint notice was dated March 15, 2019 (IHO Decision at p. 16). The due process complaint notice was not dated by the parent, but date-stamped by the Impartial Hearing Office on May 15, 2019 (Parent Ex. A at p. 1). The hearing record submitted to the Office of State Review by the district also included an illegible copy of Parent Exhibit M, however the substance of that exhibit was read into the record, the author testified and was cross-examined regarding its content and it was relevant to the appropriateness of the student's unilateral placement at Cathedral High School which was not appealed (Tr. pp. 66-67, see generally Tr. 68-75, 76-84). It is also noted that the parent submitted a legible copy of Exhibit M with her reply.

failed to conduct an initial evaluation of the student and convene a CSE until April 5, 2019 (id. at pp. 1, 13, 16). The parent did not challenge the appropriateness of the IEP developed by the April 2019 CSE, but argued that it was not "administer[ed]" (id. at pp. 1, 13-14). The parent contended that the principal and faculty of the student's school during the prior years failed to address the student's educational disabilities and caused the student to fall behind, however the parent did not raise any claims associated with any school year other than the 2019-20 school year, nor did she request relief to remedy any failure to offer the student a FAPE during any other school year (id. at pp. 2, 13-18). However, as relief, the parent requested that the district "incur and sponsor the cost of [the student]'s future education-in attending a private school" and conduct a neuropsychological evaluation at district expense (id. at p. 17-18).[2]

An impartial hearing convened on December 13, 2019 and concluded on February 25, 2020 after three days of proceedings (Tr. pp. 1-96). In a decision dated March 15, 2020, the IHO determined that the district failed to offer the student a FAPE for the 2019-20 school year, that Cathedral High School (Cathedral) was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 8-14).[3, 4] As relief, the IHO ordered the district to reimburse the parent for the cost of the student's tuition at Cathedral for the 2019-20 school year (IHO Decision at pp. 12-14).

IV. Appeal for State-Level Review

The parent appeals from a portion of the IHO's decision and, once again proceeds pro se. The parties' familiarity with the particular issues for review on appeal in the parent's amended request for review and the district's answer thereto is also presumed and will not be recited here. The parent alleges that the IHO investigated the facts of the matter in a meticulous fashion,[5] but that the basis of her appeal is that the IHO failed to go beyond the 2019-20 school year and award tuition reimbursement for the student's remaining three years at Cathedral (the 2020-21, 2021-22, and 2022-23 school years).[6]

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[2] At the time of the filing of the due process complaint notice, the parent was considering enrolling the student in Winston Preparatory School (Parent Ex. A at p. 17). At a prehearing conference, the parent informed the IHO that the student was attending Cathedral High School and clarified that this was the private school for which she was requesting tuition reimbursement for the 2019-20 school year (Tr. pp. 4, 7).

[3] The IHO decision has not been paginated. For the purposes of this decision, and consistent with the pleadings, the cover page is designated as page 1 with the remaining pages assigned page numbers 2-17.

[4] The IHO decision stated that the parent essentially withdrew her request for a neuropsychological evaluation at the hearing since so much time had passed and an acceptable unilateral placement was in place (IHO Decision p. 4).

[5] While not an investigator, the IHO engaged in considerable questioning in order to develop the hearing record in this matter as neither party was represented by an attorney at the impartial hearing.

[6] The parent filed a reply to the district's answer which also included a collection of documents and emails between the parent and district personnel, including communications with the attorney representing the district on appeal. These documents are not marked as exhibits and the parent's reply included only a generalized request for me to examine information about the student's years in middle school, which may be generously construed as a request

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

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to add additional evidence on appeal. Generally, documentary evidence not presented at an impartial hearing will be considered in an appeal from an IHO's decision only if the additional evidence could not have been offered at the time of the impartial hearing and is necessary to render a decision (8 NYCRR 279.10[b]; see, e.g., L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 468-69 [S.D.N.Y. 2013]). Here, most of the documents submitted with the parent's reply were available at the time of the impartial hearing (except email communications with the district's attorney on appeal) and they are not necessary to render a decision in this matter. Therefore, I decline to exercise my discretion to consider the parent's submissions as additional evidence, but for noting for the sake of completeness that a legible copy of Parent Exhibit M is available among the documents.

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[7]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should

[7] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Prospective Placement

As neither party has appealed the IHO's determinations that the district failed to offer the student a FAPE for the 2019-20 school year, that the parent's unilateral placement of the student at Cathedral for the 2019-20 school year was appropriate, and that equitable considerations favored the parent (see IHO Decision at pp. 8-13), those determinations have become final and binding on both parties and they will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

In her appeal, the parent requests to continue the unilateral placement of the student prospectively at Cathedral for the 2020-21, 2021-22, and 2022-23 school years. In her due process complaint notice, the parent requested a neuropsychological evaluation at public expense and indicated Winston Preparatory School as a potential unilateral placement for the student (Parent Ex. A at pp. 17-18). However, during the impartial hearing, the parent began to change her position and reported to the IHO that she no longer wanted a neuropsychological evaluation of the student completed and that the student had been unilaterally placed at Cathedral (Tr. pp. 7, 8, 33). Initially, the parent argued that the district had failed to conduct an initial evaluation of the student for more than three years but abandoned that request and took the position that a new IEP was not necessary because the student was doing well at Cathedral (Tr. pp. 5, 22, 33, 35). Although it may have unintended consequences, withdrawal of her request to have the student evaluated tends to undermine her claims that the student should have been evaluated in prior school years. The parent also did not seek compensatory education for any alleged past deficiencies at any point during the impartial hearing. Instead, as she explains on appeal, the parent asserts that the purpose of the impartial hearing was to obtain "tuition for all four years at Cathedral" (Req. for Rev. at p. 3).

A review of the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2019-20 school year, that Cathedral was an appropriate unilateral placement and that equitable considerations did not merit a reduction in an award of tuition reimbursement. As noted above, the parent did not continue to pursue any cognizable claims she may have had arising from her allegations associated with the prior school years. The parent has offered a constellation of factually based failings on the part of the district, however none of these contentions are linked to a violation of the IDEA in the year in which they are alleged to have occurred. Under the circumstances of this case, tuition reimbursement for the 2019-20 school year as ordered by the IHO is an adequate and appropriate remedy for the district's failure to offer the student a FAPE for the 2019-20 school year.

The additional years of a unilateral placement after the 2019-20 school year sought by the parent in this case is not appropriate at this time because it would tend to undermine the district's

continuing obligations to the student and the procedural process of the IDEA. That is, an award of a placement in a nonpublic school for the 2020-21 school year and beyond would tend to circumvent the very statutory process that Congress envisioned, under which the CSE is the entity tasked with meeting every year at the very least to review information about the student's progress under current educational programming and periodically assess any changes in the student's continuing needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).[8]

This is especially true here, as the 2019-20 school year has been completed and the CSE should have met to develop the student's program for the 2020-21 school year (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). In addition, since the April 2019 CSE meeting, the district has offered to complete a neuropsychological evaluation (Tr. pp. 2, 20, 21, 30) and the district reported that a CSE meeting was scheduled for June 26, 2020 (Answer ¶17 n. 2). Accordingly, when the CSE reconvenes it should have, or should reiterate its offer to, obtain additional information to consider and should attempt to determine a mutually acceptable public placement for the student along the continuum of services, assessing the extent to which the student can be educated with nondisabled peers in a public school setting before considering more restrictive nonpublic school options (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]).

While I understand the parent's frustration with this process, especially considering her belief that the district has delayed evaluating the student, this is not one of those few cases where a prospective placement might be appropriate (see Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"]). In other words, even if the district violated the IDEA by failing to evaluate the student, the appropriate response is to evaluate the student and provide appropriate public programming. Simply casting aside the process envisioned under that statute on a going forward basis in favor of a privately

[8] These concerns simply do not arise in the same way in retrospective, unilateral placement cases in which the public school district's responsibility to assess the student and continue to propose an appropriate public school placement typically continues uninterrupted and there is only a deviation in the delivery of services that changes while the student is unilaterally placed at the parent's own risk. The parent's solution for the outlying school years would hamstring the CSE process by establishing the student's placement and/or services years ahead of time, and it merely becomes an end run around the entire process. While I understand her frustration and desire to prolong what she sees as a favorable outcome, I cannot sanction this approach in these circumstances.

obtained education selected solely by the parent is not a realistic option for carrying out the requirements of the statute.

Accordingly, the CSE should reconvene and consider the additional evaluations, as well as all other public placement possibilities, prior to deciding whether the student needs to be in a nonpublic school. Anything less would eliminate the important statutory purpose of attempting, whenever possible, to have disabled students meaningfully access the public school system each year by first attempting placement in a public school (see Cooke Center for Learning and Dev. v. Mills, 19 A.D.3d 834, 836 [3rd Dep't 2005] ["The federal law prefers a 'public' education, where a 'child is educated in the school that he or she would attend if nondisabled,' if possible"]; Matter of Pelose, 66 A.D.3d 1342, 1344 [4th Dep't 2009] ["Indeed, the central purpose of the IDEA . . . and article 89 of the Education Law . . . is to afford a 'public' education for children with disabilities"]).

After due consideration of the foregoing, the district is required to provide the parent with prior written notice on the form prescribed by the Commissioner, specifically indicating whether the CSE recommended or refused to recommend such services on the student's IEP and explaining the basis for the CSE's recommendation therein, as well as describing the evaluative information relied upon in reaching these determinations (8 NYCRR 200.5[a]; see 34 CFR 300.503[b]). If the parent continues to disagree with the CSE's recommendation for the student's program for the 2020-21 school year, she may obtain appropriate relief by challenging the district's determinations regarding that school year at that time (see Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

Accordingly, the parent and district should cooperate in the CSE process to determine a mutually acceptable educational placement. However, if those processes fail and the parties cannot reach agreement (and as noted by the district in its answer), the parent retains the right to challenge the district's proposed programming for the student for the 2020-21 and future school years through the due process hearing mechanism and assert a right to maintain the student's placement at Cathedral at public expense while such proceedings are pending. 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., 752 F.3d at 170-71; Mackey v. 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]). 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). When a school district has been paying for a student's tuition at a nonpublic school pursuant to pendency as the then current educational placement, "it must continue to do so until the moment when the child's educational placement changes" (E. Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584,

599 [S.D.N.Y. 2011], aff'd sub nom. R.E. v. New York City Dep't of Educ., 694 F.3d 167 [2d Cir. 2012]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *6 [S.D.N.Y. Mar. 17, 2010]).

Thus, the parent should attend meettings of the CSE going forward and work to identify an appropriate public placement; however, should the parent disagree with the district's recommendations for the 2020-21 school year, she is free to challenge the appropriateness of those recommendations by filing a due process complaint notice and invoking the student's right to pendency or "stay put" placement.

VII. Conclusion

Having determined that the IHO's award of tuition reimbursement for the 2019-20 school year was a sufficient remedy for the denial of a FAPE to the student for the 2019-20 school year, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 27, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER