The University of the State of New York

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

No. 20-163

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:
Howard Friedman, General Counsel, attorneys for petitioner, by Thomas W. MacLeod, Esq.

The Law Office of Andrew Weisfeld, PLLC, attorneys for respondent, by Andrew Weisfeld, 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 district) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from that portion of an interim decision of an impartial hearing officer (IHO) which directed that the respondent's (the parent's) son's pendency placement be provided in an early childhood program selected by the parent during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student for the 2018-19, 2019-20, and 2020-21 school years. The appeal must be sustained in part.

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) or a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 4402, 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3; 200.4[d][2]; 200.16). 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

A CPSE convened on December 11, 2018 and found the student eligible for special education as a preschool student with a disability (Parent Ex. C at p. 1). The December 2018 CPSE recommended the following program and services: placement in a 12:1+2 special class; individual speech-language therapy two times per week for 30 minutes; individual occupational therapy (OT) two times per week for 30 minutes; and parent counseling and training four times per year for 60 minutes (id. at p. 21). The IEP indicated that the special class and related services recommendations would be provided in an "Approved Special Education program" (id.). The

CPSE deemed the student eligible for 12-month services with the same special education program and services recommended during the 10-month portion of the school year (id. at p. 22).

On the same date as the December 2018 CPSE meeting, the district provided the parent with a letter titled "Notice of Eligibility for Partial Services" (Parent Ex. C at p. 26). According to the notice, the district was "unable to identify a preschool" to implement the 12:1+2 special class (id.). As a result, the district offered the following services: special education itinerant teacher (SEIT) services for 15 hours per week; individual speech-language therapy two times per week for 45 minutes; and individual OT two times per week for 45 minutes (id.). The parent consented to the partial services outlined in the December 2018 notice (id.). In a summary of the IEP, a box under the "Location for Provision of Related Services for SEIT and/or RS program recommendations" was checked to indicate "Early Childhood Program selected by parent" (id. at p. 1).[1] According to the hearing record, the student attended Reade Street Prep, a nonpublic school, for the 2018-19 school year at parent expense (Tr. p. 113; see Tr. pp. 21-22).

A CPSE convened on August 7, 2019 and found the student continued to be eligible for special education as a preschool student with a disability (Parent Ex. D at pp. 2, 14). The August 2019 CPSE recommended the following special education programs and services: direct SEIT services five times per week for 180-minutes; 2:1 speech-language therapy one time per week for 30 minutes; individual speech-language therapy two times per week for 30 minutes; and individual OT two times per week for 30 minutes (id. at p. 10). The CPSE recommended that the student receive 12-month programming (for summer 2020), consisting of the same services as the 10-month school year, except the 12-month services did not include a recommendation for group speech-language therapy (id. at p. 11). The IEP stated that the services were to be provided at an "Early Childhood program selected by the parent" and that the 12-month services were to be provided at an "Early Childcare location selected by the parent" (id. at pp. 10, 11). The IEP summary contained a note that the student would attend a universal pre-kindergarten (UPK) program and identified the school the student was going to attend (id. at p. 1). As of September 2019, the student began attending a UPK program and received services identified in the August 2019 IEP (see Tr. pp. 114, 118-19).[2]

A CSE convened on March 6, 2020 and found the student eligible for special education and related services as a student with autism (Parent Ex. E at pp. 3, 27). The March 2020 CSE recommended placement in a 12:1+1 special class for ELA, math, and social studies in a district "Non-Specialized" school; counseling one time per week for 30 minutes in a group of three; OT one time per week for 30 minutes in a group of three; individual OT one time per week for 30 minutes in the special education classroom; individual OT one time per week for 30 minutes in the therapy room; speech-language therapy one time per week for 30 minutes in a group of three; individual speech-language therapy one time per week for 30 minutes in the special education

[1] The only other box available in the form for this portion of the IEP summary was "Childcare Location selected by Parent" (Parent Ex. C at p. 1).

[2] The parent testified that, for summer 2020, in order to receive the IEP program and services, she had to enroll the student in a camp at her own expense (Tr. pp. 116-17).

classroom; individual speech-language therapy one time per week for 30 minutes in the therapy room; and parent counseling/training one time per year for 30 minutes (id. at pp. 19-21).[3]

A. Due Process Complaint Notice

In a due process complaint notice, dated June 8, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19, 2019-20, and 2020-21 school years (Parent Ex. B at pp. 1, 11).[4] Pertinent to this appeal, the parent requested "an immediate pendency order that the Student may pend under a full-day non-public or private school with related services in accordance with the Student's preschool program for the duration of the litigation" (id. at p. 15).

The due process complaint notice generally included allegations pertaining to the sufficiency or consideration of evaluative information available to the CPSE or CSE and the appropriateness of annual goals and recommended programs and services in the student's IEPs, as well as the district's implementation or capacity to implement the recommended programs and services (see Parent Ex. B at pp. 4-13). For relief, the parent requested compensatory education and that the CSE be required to develop an IEP with specified programs and services, including placement in a State-approved nonpublic, or if the district could not locate a State-approved nonpublic school, a non-approved nonpublic school at district expense (id. at pp. 15-16).

B. Impartial Hearing Officer Decisions

An impartial hearing convened on August 6, 2020 to address the student's stay-put placement for the pendency of the proceedings (Tr. pp. 1-52). During the impartial hearing, counsel for the parent took the position that the December 2018 IEP formed the basis of pendency and that the student should receive that program and services at a "substantially similar" State-approved nonpublic school (see Tr. pp. 6, 21). Counsel for the parent argued that, although the student received the SEIT and related services during the 2019-20 school year, the August 2019 IEP did not form the basis of pendency since the parent was contesting the appropriateness of that IEP (see Tr. p. 10). The district's representative at the impartial hearing, in turn, initially took the position that, because the parent was requesting the 12:1+2 special class recommended in the December 2018 IEP as pendency, the March 2020 IEP including the 12:1+1 special class in a district non-specialized school should be deemed substantially similar to that program with the addition of another aide to the classroom (see Tr. pp. 11, 16-17, 29-30). After further probing from the IHO to determine if the parties agreed as to the student's pendency placement, it became clear that the point of departure was whether the program would be implemented in a district public school or a nonpublic school at district expense (see Tr. pp. 17-21, 42). The district's representative

[3] The March 2020 CSE did not address the student's eligibility for 12-month services (Parent Ex. E at p. 22); however, as noted above, the August 2019 IEP included the CPSE's recommendations for special education and related services for summer 2020 (see Parent Ex. D at p. 11; see also Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2]).

[4] The hearing record indicates that the parent filed another due process complaint notice which was originally marked as parent exhibit "A"; however, it was agreed that the other due process complaint notice would not be addressed in this proceeding and parent exhibit "A" was excluded from the hearing record (Tr. pp. 3-5).

ultimately adopted the position that "technically" the August 2019 IEP formed the basis of pendency (Tr. pp. 41, 45-46, 47-48; see IHO Ex. I). The parent's attorney then argued that, if the August 2019 IEP was deemed pendency, that it was problematic that the district "does not provide SEIT services in a school-age program" (Tr. pp. 48-49). The parent's attorney argued that, if the August 2019 IEP was deemed pendency, then the services should be delivered at an early childhood location chosen by the parent, as specified in the IEP (see IHO Ex. IV at p. 1).

On August 15, 2020, the IHO issued an interim order on pendency (Aug. 15, 2020 Interim IHO Decision at pp. 1-6). First, the IHO determined that the December 2018 IEP was not implemented and, therefore, did not constitute pendency (id. at p. 3). Next, the IHO held that the "pendency program [wa]s the one that was implemented, which was the August 7, 2019 IEP" (id.). The IHO held that the language in the August 2019 IEP indicating that services would be provided at "an early childhood program selected by the parents" was not part of the CPSE's recommendations (id.). Since the student was no longer in preschool, the IHO reasoned that an early childhood program would not be available to the student and "services would be provided elsewhere" (id.). According to the IHO, "[i]f the Student is placed in a general education program, in a local public school, then the services would be provided there. If the Parents place the Student in some other location, then the services would be provided there" (id.). The IHO concluded that pendency consisted of the following 12-month program: 15 hours per week of SEIT services; individual speech-language therapy, two times per week for 30 minutes; group speech-language therapy, one time per week for 30 minutes; and individual OT, two times per week for 30 minutes (id. at p. 4).

In an email dated August 15, 2020, counsel for the parent requested that the IHO amend the pendency decision to reflect the language in the IEP that the services be delivered in an early childhood program of the parent's choosing (IHO Ex. VI at p. 4). The parent's attorney argued that "pendency law permits a student to 'stay put' in his/her preschool placement rather than transitioning into the recommended kindergarten placement" (id.).

In an amended order on pendency dated August 18, 2020, the IHO again concluded that the August 2019 IEP was pendency (Aug. 18, 2020 Interim IHO Decision). The IHO noted that the August 2019 IEP stated that the services were to be provided "in an early childhood program selected by the Parent"; however, the IHO was "unclear" whether that language was applicable to a "school age child" (id. at p. 3). Nevertheless, the IHO added language that the student's pendency program "be provided in an early childhood program selected by the Parent (if applicable)" (id.). The pendency program and services remained unchanged (id. at pp. 3-4). Finally, the IHO held that if there was a disagreement on the implementation of the program, the parties could request another pendency hearing (id.).

In an email dated August 26, 2020, counsel for the parent alerted the IHO to "a debate" regarding whether the district would fund an early childhood program of the parent's choosing (IHO Ex. IX at p. 1). Therefore, the parent requested that the IHO amend the pendency decision to state that funding of the program was the district's obligation (id.). The district's representative indicated that the language in the IEP referencing an "early childhood program" was, in essence, referring to "a gen[eral] ed[ucation] program while seated at the [district] center based Pre-K program" (IHO Ex. VII at p. 12). The district representative further stated that there was "a

practical difficulty" with implementing the pendency, since the student had aged out of the preschool he attended during the 2019-20 school year (id.). The district argued that, to the extent this made the pendency placement "functionally unavailable," it was not the district's obligation to propose alternatives or, alternatively, it was the district's prerogative to offer a substantially similar placement (id.). After further exchange, the IHO indicated that, since the parties were not in agreement and "the pendency order [wa]s unclear," more information was necessary and another hearing date would be scheduled to address the outstanding issues (id. at pp. 4, 6).

Thereafter, another hearing date took place to address the issue of pendency on September 9, 2020 (Tr. pp. 54-125). According to counsel for the parent, "[t]he sole reason for this hearing [wa]s that the [district] implementation office require[d] the wording in this order that the DOE fund the early childhood program selected by the parent in order for this order to be implemented" (Tr. p. 58). The district's representative disagreed with the parent's attorney as to what is meant by an "early childhood program selected by the parent" and presented a witness to explain the terminology (Tr. pp. 60-61, 64-97). The parent also testified during the pendency hearing (Tr. pp. 113-21).

In an interim decision on pendency dated September 14, 2020, the IHO continued to hold that the August 2019 IEP was the basis for the student's program for the pendency of the proceeding and noted that she "gleaned information on the meaning of the phrase 'early childhood program selected by the parents,'" from the witnesses (Sept. 14, 2020 Interim IHO Decision at pp. 2, 4). Considering the witnesses' testimony, the IHO found that the same practice that was used in identifying the student's school under the IEP should continue during pendency, and the IHO directed the district to provide the parent with "a list of early childhood programs from which the Parents may select a program [for the student] to attend for the school year" (id. at pp. 4, 6). The IHO also determined that a distinction was required between pendency for the school year and pendency for 12-month services because of a distinction in the August 2019 IEP (id. at p. 2). Accordingly, the IHO ordered that the student's pendency program and services "be provided in an early childhood program selected by the Parent, during the school year" and "in an early childcare location selected by the Parent[]" during the summer (id. at p. 5). The pendency program and services remained unchanged during the school year: 15 hours per week of SEIT services; individual speech-language therapy, two times per week for 30 minutes; group speech-language therapy, one time per week for 30 minutes; and individual OT, two times per week for 30 minutes (id.). The pendency 12-month program and services consisted of 15 hours per week of SEIT services; individual speech-language therapy, two times per week for 30 minutes; and individual OT, two times per week for 30 minutes (id. at pp. 5-6).

IV. Appeal for State-Level Review

The district appeals from the IHO's interim orders on pendency. The district argues that the IHO erred in basing pendency on the August 2019 IEP and argues that pendency should be based on the partial services agreement dated December 11, 2018. According to the district, the December 11, 2018 partial services agreement was the last program agreed on by the parties because the parent signed it. Additionally, the district contends that the parent is now challenging

the district's provision of a FAPE for every school year that the student was found eligible for special education and that pendency should therefore arise from the district's first offered program, which the district contends was the December 11, 2018 partial services agreement.

The district further argues that the IHO erred in directing that pendency be implemented in a particular location, asserting that such an order eliminates the district's authority to determine how to provide the student's pendency program. Additionally, the district asserts that to the extent the IHO's order directing the district to produce a list of early childhood programs from which the parent may select a program results in the district having to fund a nonpublic school, the directive should be reversed because the student's pendency program only consists of services, not a school placement. Finally, the district argues that the student attended a UPK program during the 2019-20 school year and that, as the student is no longer eligible for a UPK program, the district should be permitted the authority to implement pendency at a public school.

In an answer, the parent argues for upholding the IHO's determination that the August 2019 IEP is the pendency IEP. According to the parent, the district argued during the hearing that pendency could be based on any of the student's three IEPs but did not argue that pendency should or could be based on the December 2018 partial services agreement. Accordingly, the parent asserts that the district waived this argument. The parent also argues that the student's placement, including location, is part of pendency and that the IHO correctly ordered the district to provide the parent with a list of schools that could implement the pendency program. The parent requests that the IHO's September 14, 2020 interim order on pendency be upheld and that the district provide the parent with a list of appropriate and approved schools that can implement the student's August 2019 IEP. In the alternative, the parent requests that the December 2018 IEP be found as the basis for the student's pendency placement and that the parent be permitted to place the student in an approved nonpublic school that could implement that program.

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 Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey, 386 F.3d at 163, 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]; 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 (Ventura de Paulino, 959 F.3d at 532; 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 (Ventura de Paulino, 959 F.3d at 532; 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, 86 F. Supp. 2d at 366; 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 district contends that the IHO erred in finding that the August 2019 IEP was the basis for the student's pendency placement because the parent is now challenging the district's provision of a FAPE for every school year that the student was found eligible for special education. At the time the due process complaint notice was filed, in June 2020, the student was four years of age and was receiving special education services, including 15 hours per week of SEIT services, one group and two individual sessions of speech-language therapy per week, and two individual sessions of OT per week, pursuant to the August 2019 IEP (Parent Ex. D at p. 10; see Parent Ex.

B at p. 7; IHO Ex. I at p. 2). During the hearing, the IHO went through great effort to pin down the district's position as to what formed the basis for pendency, and counsel for the district conceded that the August 2019 IEP "should be the one that is pendency" because it was the last agreed upon placement (Tr. pp. 45-48). Based on the district's concession and the student's receipt of SEIT and related services pursuant to the August 2019 IEP, there is no basis to depart from the IHO's determination that the August 2019 IEP constitutes the student's placement for the pendency of this proceeding (see Dervishi, 653 Fed. App'x at 57-58 [noting that "then current-placement" "typically" means the last implemented IEP, the operative placement, or the placement at the time of the previously implemented IEP]; see also Schutz, 290 F.3d at 483-84 [noting that an agreement between the parties may form the basis of pendency]).

The August 2019 IEP recommended a special education program consisting of direct SEIT services five times a week for 180 minutes per session along with group speech-language therapy one time per week for 30 minutes; individual speech-language therapy two times per week for 30 minutes; and individual OT two times per week for 30 minutes (Parent Ex. D at p. 10). The August 2019 IEP also recommended a 12-month special education program consisting of the same SEIT, OT, and individual speech-language therapy services, but did not include a recommendation for group speech-language therapy (id. at p. 11).

As noted by the attorney for the parent, having the August 2019 IEP as the student's pendency placement is "problematic" because the IEP recommended 15 hours per week of SEIT services, which are only available for preschool students (Tr. p. 49). State law defines SEIT services as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "Special Education Itinerant Services for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf; "Approved Preschool Special Education Programs Providing Special Education Itinerant Teacher Services," Office of Special Educ. [June 2011], available at http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]).

Although State regulations do not require that a student who had previously been identified as a preschool student with a disability remain in a preschool program for which he or she is no longer eligible by reason of age (8 NYCRR 200.16[h][3][i]; see 8 NYCRR 200.5[m]), SROs have long noted that the IDEA makes no distinction between preschool and school-age children and consequently, if a student is no longer eligible to remain in a particular preschool program, the district remains obligated to provide the student with "comparable special education services during the pendency of an appeal from the CSE's recommendation for [the student's] first year of education as a school age child" (Application of a Child with a Handicapping Condition, Appeal No. 91-25; see Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 61 [D.N.H. 1999] [holding that when a student has aged out of a particular program, the district "must fulfill its stay-put obligation by placing a disabled student at a comparable facility"]; Application of a Student with a Disability, Appeal No. 16-020; see also Makiko D. v. Hawaii, 2007 WL 1153811, at *10 [D.

Haw. Apr. 17, 2007]; Laster v. Dist. of Columbia, 394 F. Supp. 2d 60, 65-66 [D.D.C. 2005]; Letter to Harris, 20 IDELR 1225 [OSEP 1993]). In a proceeding such as this where SEIT services are at issue for a school-aged student, the substance of the services is, in essence, the provision to the student of educational services by a special education teacher who assists the student in addition to the classroom program. Accordingly, the 15 hours per week of SEIT services recommended in the August 2019 IEP shall for purposes of implementation be deemed the provision of 1:1 special education teacher support for the student.

Turning to the parties' arguments as to the location of the student's program, the August 2019 IEP indicates that the location where services will be provided is an "Early Childhood program selected by the parent" (Parent Ex. D at p. 10). With respect to 12-month services, the IEP noted that they would be provided at an "Early Childcare location selected by the parent" (id. at p. 11).

The district's CPSE administrator testified that the term "early childhood program selected by the parent" means "an educational setting that the parent has enrolled their student in"; for example, she indicated it could be a UPK, early head start, or daycare program (Tr. pp. 70-71).[5] According to the CPSE administrator the phrase was used to denote that the district was "offering special education itinerant teacher parent related services," services that the witness explained are offered "to students in their educational settings" (Tr. p. 73). She further explained that when "early childhood program selected by the parent" is placed on an IEP it means that the student is "not recommended for special classes and [the district is] not funding programs" (Tr. p. 73).[6] Therefore, according to the administrator, the district arranges for and provides the SEIT and related services in the educational setting in which a parent had enrolled his or her child (Tr. pp. 73-75). Separate from the meaning of "early childhood program selected by the parent," the CPSE administrator testified "early childcare location selected by the parent" (i.e., the language in the IEP to describe the location of the students 12-month (summer) services meant a noneducational setting, such as in a case where a student is not enrolled in school (Tr. pp. 86-87; see Parent Ex. D at p. 11).[7, 8]

[5] State guidance is also instructive on the issue of location of the SEIT and related services ("Special Education Itinerant Services for Preschool Children with Disabilities," Office of Special Educ. Field Advisory, at p. 3). According to the guidance document, "[i]f the CPSE recommends SEIS, the district must request that the parent identify the initial child care location arranged by the parent, or other site, at which SEIS would be provided" (id.). The guidance document further indicates that this information should be identified in the IEP as the location for the provision of this type of service (id.).

[6] However, she also testified that the district funds a student's attendance at a UPK program (Tr. p. 76).

[7] There is conflicting evidence in the hearing record as to whether or not the district funded the student's summer program (compare Tr. pp. 96-17, with Tr. pp. 116-17); however, for the reasons set forth below, in this instance, the party responsible for the funding is not determinative of the outcome of this matter.

[8] State law defines "child care location" as "a child's home or a place where care for less than twenty-four hours a day is provided on a regular basis and includes, but is not limited to, a variety of child care services such as day care centers, family day care homes and in-home care by persons other than parents" (Educ. Law § 4410[8]).

Based on the above, the special education programs and services recommended in the August 2019 IEP were itinerant services intended to be provided in the student's educational or childcare setting. However, as with the SEIT services, "early childhood programs" and "early childcare locations" are specific to preschool students and pendency do not operate to allow or require a student who is school age to remain in a preschool program (8 NYCRR 200.16[h][3][i]; see 8 NYCRR 200.5[m]). For the 2019-20 school year, beginning in September 2019, the student's educational setting was a UPK program; however, as of the beginning of the 10-month portion of the 2020-21 school year, the student had aged out of UPK.[9] In the September 2020 interim decision, the IHO found that the process contemplated by the CPSE for the selection of the education setting would also be the process for the selection of a location at which the student would receive services pursuant to pendency (see Sept. 14, 2020 Interim IHO Decision at pp. 4, 6). However, this overlooks that the recommended special education programs and services were itinerant and the selection of the UPK educational setting was not a part of the student's special education programming. That is, the phrases "early childhood programs" and "early childcare locations" describe locations, and, as noted above, pendency does not require or ensure that a student will remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents, 629 F.2d at 753; see Child's Status During Proceedings, 71 Fed. Reg. 46709). Accordingly, although the language "early childhood program selected by the parent" and "early childcare location selected by the parent" was included in the August 2019 IEP, such language was not part of the student's program and services, and therefore, did not constitute pendency.[10]

Generally, the Second Circuit has held that the selection of a location to provide a student special education and related services is an administrative decision within the discretion of the school district (R.E. v. New York City Dep't of Educ., 694 F.3d 167, 191-92 [2d Cir. 2012]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that, while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). Similarly, in assessing whether a parent's selection of private service providers was reimbursable as part of the student's educational program under pendency, the Second Circuit noted that "[i]t is up to the school district to decide how to provide that educational program, at least as long as the

[9] State law governing UPK programs defines eligible children as "resident children who are four years of age on or before December first of the year in which they are enrolled or who will otherwise be first eligible to enter public school kindergarten commencing with the following school year" (Educ. Law 3602-e[1][c]). Additionally, the State Education Department's website notes that "[a] child who is age-eligible to attend kindergarten is not eligible for the UPK" ("Universal Preschool Questions and Answers," Office of Instructional Support [last updated Jan. 2015], available at http://www.p12.nysed.gov/upk/QA.html).

[10] Moreover, although the phrasing in the IEP implied a degree of parental choice in the selection of the location for delivery of the SEIT and related services (see Parent Ex. D at pp. 10-11), ultimately, State law provides that the district is the party left with the obligation to arrange the student's programming (see Educ. Law §§ 4410[1][k]; [2], [5][c], [e]; Application of the Dep't of Educ., Appeal No. 19-125). For example, State law defines SEIT services as "an approved program provided by a certified special education teacher on an itinerant basis in accordance with the regulations of the commission, at a site determined by the board, including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location . . . "

decision is made in good faith" (T.M., 752 F.3d at 171). "Although the stay-put provision prevents a school district from modifying a student's pendency placement without the parents' consent, it does not prohibit the school district from determining how, and where, a student's pendency placement should be provided" (Ventura de Paulino, 959 F.3d at 536).

Finally, while the district may determine how and where to implement the student's pendency placement, to the extent there was a dispute over which party would be responsible for the costs of the student's attendance at an educational setting at which the district would implement the pendency services (see IHO Ex. VII), a final word is offered to avoid any confusion. Even assuming that there was some variability in the party responsible for the costs of the student's early childhood program or childcare setting when the student was a preschool student (see Tr. pp. 73, 76, 96-17, 116-17), once the student became school age, he became entitled to attend the public schools in the district at no cost (Educ. Law § 3202[1]). The pendency provision would not operate to deprive the student of a free education as a school-aged student.

In sum, the student's pendency placement consists of the following for the 10-month portion of the school year: 15 hours per week of SEIT services (i.e., 1:1 services from a special education teacher), individual speech-language therapy, two times per week for 30 minutes, group speech-language therapy, one time per week for 30 minutes; an individual OT, two times per week for 30 minutes (see Parent Ex. D at p. 10). For the summer portion of the school year, the pendency placement consists of 15 hours per week of SEIT services (i.e., 1:1 services from a special education teacher); individual speech-language therapy, two times per week for 30 minutes; and individual OT, two times per week for 30 minutes (see id. at p. 11). The pendency special education program and related services shall be implemented in a location determined by the district, which may be a district public school.

VII. Conclusion

Based upon the foregoing, the IHO's decision that the August 2019 IEP is the basis for the student's placement during the pendency of this proceeding is upheld; however, the decision must be modified to remove the language limiting the district's authority to exercise its discretion in identifying a school site for the student and in selecting the providers to implement the student's pendency.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated September 14, 2020, is modified by reversing that portion that limited the location for the provision of the pendency program to an "early childhood program selected by the parent" and an "early childcare location selected by the parent" and required the district to provide the parent with a list of early childhood programs from which the parent could select a program to attend; and

IT IS FURTHER ORDERED that the student's educational placement for the purposes of pendency includes the SEIT (i.e., 1:1 support from a special education teacher) and related services as set forth in the August 7, 2019 IEP.

Dated: **Albany, New York**
November 25, 2020

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SARAH L. HARRINGTON
STATE REVIEW OFFICER