The University of the State of New York

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

No. 20-164

**Application of a STUDENT WITH A DISABILITY, by her parents, 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:**
Law Office of Elisa Hyman, PC, attorneys for petitioners, by Erin O'Connor, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, 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. Petitioners (the parents) appeal, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining the student's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational programs for the student for the 2018-19, 2019-20, and 2020-21 school years. The IHO determined that the student's pendency placement was the placement established pursuant to the student's 2019-20 individualized education program (IEP) created by the Committee on Preschool Special Education (CPSE). 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 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]).[1] 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[a]). 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]).

[1] Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local CPSE that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804).

## III. Facts and Procedural History

Given the limited scope of this appeal, a recitation of the student's educational history is not necessary. Briefly, a CSE convened in May 2020 to develop the student's IEP for the 2020-21 school year (kindergarten) (see Parent Exs. A at p. 7; D at pp. 6-7). In a prior written notice to the parents dated May 28, 2020, the district summarized the special education program recommended by the May 2020 CSE (see Dist. Ex. 1 at pp. 1-3). Based upon the prior written notice, the May 2020 CSE found the student eligible for special education as a student with autism and recommended a 12-month school year program in a 6:1+1 special class placement together with related services of occupational therapy (OT), physical therapy (PT), speech-language therapy, and parent counseling and training (id. at p. 1). Thereafter, in a school location letter dated June 15, 2020, the district informed the parents of the particular school site within which the student's May 2020 IEP would be implemented (see Dist. Ex. 2 at pp. 1-3).

By due process complaint notice dated July 1, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 and 2019-20 school years (when the student was in preschool), as well as for the 2020-21 school year when she became eligible for special education and related services under a school-aged IEP, based upon various procedural and substantive violations (see Parent Ex. A at pp. 1-11). As relevant here, the parents—within the section of the due process complaint notice captioned as "Pendency"—alleged that the district had an "illegal policy where it refuse[d] to implement payments for last agreed-upon/pendency placements and services after a hearing [was] filed without an order from an [IHO], even where there [was] no legitimate and/or substantive dispute about the nature of the pendency placement and services" (id. at p. 12). In addition, the parents indicated that the district's "illegal policies on pendency" forced parents to "retain counsel and incur legal fees by retaining counsel and filing for an impartial hearing" (id.). The parents also indicated if the district "refuse[d] to implement the [s]tudent's pendency/last agreed-upon placement and insist[ed] upon the issuance of an interlocutory decision from an [IHO] before doing so, [the parents] respectfully request[ed] an immediate pendency hearing" (id. [emphasis in original]).

With respect to the relief requested and as relevant to this appeal, the parents sought an order finding the student's pendency placement consisted of the following services: a 6:1+3 special class placement "and/or [a] private program as a substantially similar program to [the student's] pendency program"; two 30-minute sessions of individual PT; two 30-minute sessions of individual speech-language therapy; one 30-minute session of speech-language therapy in a small group; two 30-minute sessions of individual OT; one 60-minute session per month of parent counseling and training services; a 12-month school year program; and "special education transportation" (Parent Ex. A at p. 12). Additionally, as part of their overall requested relief, the parents sought compensatory educational services for "any failure to implement pendency" (id. at p. 13).

By letter dated August 26, 2020 (August 2020 letter), the parents advised the district of their intention to enroll the student at Manhattan Star Academy beginning on September 14, 2020 (see Parent Ex. D at p. 1). While the parents' August 2020 letter was written to provide the district with a "Ten-day notice pursuant to the IDEA," the parents also repeated much of the same information and allegations from the July 2020 due process complaint notice concerning the 2018-19, 2019-20, and 2020-21 school years (compare Parent Ex. D at pp. 1-11, with Parent Ex. A at pp. 1-11). As relief in the August 2020 letter, the parents requested Manhattan Star Academy as

the student's pendency placement and for the district to "fund [Manhattan Star Academy], as well as the home-based program, assistive technology, related services, transportation and extended school year program that [were] part of [the student's] stay-put placement" (id. at pp. 1, 11). In addition, the parents requested "special education, door-to-door bus services to school from their home" for the student "as of the first day of school" on September 14, 2020 (id. at p. 11).

In a letter to the parents dated August 31, 2020, the Manhattan Star Academy "extend[ed] an offer of placement" for the student for the 2020-21 school year (Parent Ex. C at p. 1). On September 14, 2020, the parents executed a document accepting Manhattan Star Academy's placement offer for the student, as a "10 month contract" (id. at p. 2).

On September 15, 2020, the parties proceeded to an impartial hearing (see Tr. pp. 1-8). Over the course of two additional impartial hearing dates, the parties presented their respective positions with regard to the student's pendency (stay-put) placement during the administrative proceedings (see Tr. pp. 9-98; see generally Parent Exs. A-H; Dist. Exs. 1-3).[2] According to the parents' attorney, the student's pendency placement arose from the June 2019 CPSE IEP as well as the "operative placement that was in place," which the student had received as a "result of that CPSE IEP" (Tr. p. 13; see generally Parent Ex. B). Specifically, the parents' attorney stated the following as the requested pendency placement: a 6:1+3 special class "in an [applied behavior analysis] ABA-based program"; two 30-minute sessions per week of individual PT; two 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of speech-language therapy in a small group (2:1); two 30-minute sessions per week of individual OT; one 60-minute session per month of parent counseling and training services; a 12-month school year program; and "special education transportation including limited travel time in a small, air-conditioned school bus minivan" (Tr. p. 13; see Parent Ex. H at p. 2). The parents' attorney acknowledged that although the "language, ABA-based program, . . . [was] not explicitly listed on the [June 2019 CPSE] IEP because the [district] . . . refuse[d] to add language about methodology on IEPs," the articulated special education program and related services were the "operative placement that was in effect for the [s]tudent" and what the student had "been receiving" (Tr. pp. 13-14). Similarly, the parents' attorney stated that, with regard to the special education transportation requested, the June 2019 CPSE IEP was "not as specific as what was operative for this [student], which [was] limited travel time, small air conditioned school bus or minivan that was the operative placement" (Tr. pp. 14-15).

Next, the IHO asked the parents' attorney to point to where, within the exhibits, the requested pendency placement services could be located (see Tr. p. 15). In response, the parents' attorney directed the IHO's attention to the June 2019 CPSE IEP (parent exhibit B) and a progress report (parent exhibit E) that "mention[ed] the methodologies that [were] being used" at the student's preschool implementing the IEP (see Tr. pp. 15-18).

The IHO then turned to the district representative for the district's position as to the student's pendency placement (see Tr. p. 19). In response, the district representative generally

[2] Parent exhibits "G" and "H"—written statements of the direct testimony of the student's mother and the coordinator of admissions at Manhattan Star Academy, respectively—while referenced and styled as affidavits, were neither signed nor notarized (Tr. pp. 62-63; Parent Exs. G at pp. 1, 4; H at pp. 1). At the impartial hearing, each witness did testify, however, to making the statements contained in each witness's written statement and to the truth of those statements (see Tr. pp. 66-69, 72-73).

agreed that the student's pendency placement was found in the June 2019 CPSE IEP, but she specifically disagreed with the parents' position that the student's pendency program included an "ABA-based program"—arguing that the student's IEP did not "recommend ABA as part of the program" (Tr. pp. 19-20, 56-57). Otherwise, when the IHO referred to parent exhibit F—a proposed pendency order drafted by the parents' attorney—the district representative agreed that the student "should be receiving" the services "as cited by the CPSE IEP" (Tr. pp. 19-21; see Parent Ex. B at p. 1; see generally Parent Ex. F). However, the district representative voiced concerns about using "draft orders for the [IHO] to sign" (Tr. pp. 20-21).

As a final component of the student's pendency placement, the IHO asked the parents' attorney to address "where [the student was] going to be receiving [her] services" (Tr. pp. 20-22). Here, the parents' attorney stated that, because the student "aged out" of her preschool program in an early learning center, "that program [was] no longer available to the [student]," and "simultaneously, the [d]istrict ha[d] not offered any alternative substantially similar program for the [student] to attend as pendency" (Tr. p. 22). As a result, the parents' attorney argued that the parents had been "left with no choice but to try to find a program that [was] substantially similar to [the preschool program provided at the] early learning center" (Tr. p. 22). To that end, the parents "identified Manhattan Star Academy as a substantially similar program that c[ould] deliver the [student's] pendency services" (Tr. p. 22; see generally Parent Ex. C). Additionally, the parents' attorney stated that the district's "implementation unit c[ould] handle the implementation of the placement under pendency" (Tr. pp. 22-23).[3]

The IHO then asked for the district's position as to implementation of the pendency placement (see Tr. p. 23). The district representative stated that it was the district's "responsibility" to provide the "placement where pendency [was] implemented" (Tr. p. 23). Accordingly, the district representative stated that the district provided the student with a seat in a 6:1+1 special class placement in a specialized school for the "upcoming school year"—and the seat was "ready" and "available" at that time—and nothing prohibited a student from attending a "contested placement during pendency" (Tr. pp. 23-24, 26). She reiterated, however, that it was the district's "responsibility to locate a program, which would be a 6:1:3 program" (Tr. p. 24).

The parents' attorney argued that the district's 6:1+1 special class was "not the pendency placement," it was the "contested placement" (Tr. p. 26). In addition, the parents' attorney explained that the 6:1+1 special class could not be the student's pendency placement because it was a 6:1+1 "classroom ratio"—rather than a 6:1+3 classroom ratio—and "it [was] not ABA-based" (Tr. p. 26).

Thereafter as the parties and the IHO discussed scheduling the third and final date for the pendency portion of the impartial hearing, the parents' attorney urged the IHO to issue a pendency order encompassing what she believed to be the special education program and services that the parties agreed upon, such as the "classroom ratio and services on the [June 2019 CPSE IEP]" (Tr. pp. 41-46). During this discussion, the IHO inquired about the "implementation unit," which the district representative explained was responsible for implementing hearing orders (Tr. pp. 42-43). As an example, the district representative hypothesized that if the IHO issued a pendency decision

[3] The IHO inquired about the implementation unit, noting that it was the "first time [she had] ever heard about an implementation unit making this decision" (Tr. pp. 24-25).

in this matter that ordered the district to "find a placement for a 6:1:3" and the district could not "locate a placement that was a 6:1:3, then implementation . . . would reach out to [the p]arents to try to make arrangements for an alternate placement, which would likely be whatever placement [the p]arent [was] seeking" (Tr. p. 43). The parents' attorney then continued to urge the IHO to issue a pendency decision to the "terms that [the parties] agreed to" that day because the student "remain[ed] without a placement" (Tr. p. 43). However, the IHO declined the parents' invitation to issue a decision, and then be required to issue a second interim decision on pendency after the third impartial hearing date and the presentation of further evidence (see Tr. pp. 42-47). In addition, the district representative noted that "neither side agree[d] with the placement proposed for pendency" and thus, it would be prudent to complete the impartial hearing on the next scheduled date and allow the IHO to "make her decision on that date" after hearing the evidence (Tr. p. 45).

On September 22, 2020, the parties concluded the pendency portion of the impartial hearing (see Tr. pp. 51-98).[4] On this date, the parties agreed that the pendency placement lay in the June 2019 CPSE IEP (parent exhibit B), and as reflected, substantially in part, within the parents' proposed order on pendency (parent exhibit F) (see Tr. pp. 56-57; see generally Parent Exs. B; F). Referring to the parents' proposed order on pendency, the IHO confirmed with both parties that, except for the "ABA-based program" language set forth in number one of that document, the parties otherwise agreed that the special education program and services listed in numbers one through eight constituted the student's pendency placement (see Tr. p. 57; Parent Ex. F).

In an interim order on pendency, dated September 23, 2020, the IHO found that both parties "stated that the last agreed upon pendency was the [s]tudent's [IEP] from June 8, 2019" (Interim IHO Decision at pp. 1-2). Consistent with the June 2019 IEP, the IHO ordered the following as the student's pendency placement: a 6:1+3 special class, two 30-minute sessions per week of individual PT, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group, two 30-minute sessions per week of individual OT, one 60-minute session per month of parent counseling and training services, a 12-month school year program, and special education transportation (id. at p. 1). In addition, the IHO ordered that the student's pendency placement "shall be effective as of July 2, 2020, the filing" of the parents' due process complaint notice and "shall remain in effect until a final decision in this matter" (id. at p. 2).

## IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by failing to specify in the interim order on pendency that the student's pendency placement included an "'ABA-based program,'" as the parents requested at the impartial hearing. The parents contend that when they filed the due process complaint notice, the student's operative placement consisted of a 6:1+3 special class "in an ABA-based program." Additionally, the parents argue that because the State now requires a "mandatory license for providers and [that] ABA itself is covered by health insurance," ABA is no longer considered "merely a methodology" but is now recognized by the State as a "'therapy,'

[4] When the parties met for the third impartial hearing date on September 22, 2020, the student's mother testified that the student was not currently attending school (see Tr. pp. 51, 70; Parent Ex. G at p. 4).

similar to [OT], speech and language therapy, and [PT]." The parents also argue that the IHO failed to articulate any reasons within the decision for failing to specify that the student's pendency placement included an "ABA-based program," and therefore, the IHO's decision warrants little, if any, deference. Additionally, the parents argue that the IHO erred by failing to specify the agreed-upon special education transportation in the interim decision on pendency.

Next, the parents assert that the IHO erred by failing to specify Manhattan Star Academy as the student's pendency placement and by failing to order the district to fund the student's attendance at the nonpublic school for purposes of pendency. Relatedly, the parents argue that the district failed to offer a "program or placement" that complied with the pendency placement mandate. According to the parents, Manhattan Star Academy could provide the student with an ABA-based program within a 6:1+3 special class placement—as well as the required related services—and the student has been accepted to the nonpublic school. Next, the parents contend that although the district offered to provide the student's pendency placement in the recommended 6:1+1 special class at a district public school, the district's offered program was not a substantially similar pendency program, which violated the stay-put mandate. Specifically, the parents argue that the 6:1+1 special class was not substantially similar to a 6:1+3 special class and that the different student-to-teacher ratio improperly modified the pendency placement without their consent. As relief, the parents seek to modify the IHO's interim decision on pendency by adding that the student's pendency placement includes an ABA-based program, special education transportation as requested, and alternatively, to order the district to fund the student's pendency placement at Manhattan Star Academy.

In its answer, the district responds to the parents' allegations and generally argues to uphold the IHO's interim decision on pendency in its entirety. More specifically, the district argues that, as found by the IHO, the parties agreed at the impartial hearing that the June 2019 CPSE IEP—as the last agreed upon placement—formed the basis for the student's pendency placement. The district asserts that the CPSE IEP does not "specify an ABA based teaching methodology"—and similarly does not include "limited travel time" as special education transportation—therefore, these are not components of the last agreed-upon placement or the pendency placement. The district further contends that the student's pendency placement does not include an ABA-based program under the operative placement analysis, which only arises when "there is no other basis establishing pendency." For similar reasons, the district argues that Manhattan Star Academy—which the parents contend is substantially similar to the preschool program—is also not the student's pendency placement because the pendency placement lies in the June 2019 CPSE IEP program. In addition, the district asserts that it offered to implement a substantially similar pendency program in the 6:1+1 special class placement within the district public school assigned for the 2020-21 school year and within which a seat was available to the student beginning in September 2020. Alternatively, the district asserts that if an SRO finds the offered seat in a 6:1+1 special class in a district public school is not substantially similar to the 6:1+3 special class pendency placement, the SRO could find that the 6:1+1 special class program "with the addition of a 1:1 paraprofessional would provide a substantially similar program."

Next, the district argues that the parents—who created this "'emergency' situation" by withholding the student from school—cannot create pendency at their preferred placement, Manhattan Star Academy. In addition, the district argues that the parents cannot seek funding for the student's attendance at Manhattan Star Academy "under the guise of pendency" in an effort to

"bypass the impartial hearing process" to establish the nonpublic school as an appropriate unilateral placement.

Finally, the district contends that the parents have initiated a parallel action in federal district court seeking a preliminary injunction and temporary restraining order for the district's failure to implement pendency orders. The district attaches additional documentary evidence on this point for consideration on appeal, arguing that the parents should not be allowed to seek pendency relief through multiple routes as it may result in potentially conflicting rulings. The district also asserts that the additional evidence should be considered on appeal to "create a complete and accurate record of the events and procedural history," and because without such document, "it would be impossible to render a decision." The district seeks to dismiss the parents' appeal on this basis and to allow the federal court matter to proceed.

## V. Discussion

### A. Preliminary Matters—Additional Evidence

With its answer, the district submits additional documentary evidence for consideration on appeal (see generally Answer Ex. 1). Answer exhibit 1 is a copy of the first amended federal complaint filed by the parents' attorney on or about October 6, 2020 in the United States District Court for the Southern District of New York, which includes allegations regarding the student's pendency placement in paragraphs numbered 267 through 272 and within the subheading titled "FACTS CONCERNING STUDENTS WHO REQUIRE EMERGENCY PROSPECTIVE FUNDING FOR IDENTIFIED PROGRAMS" (id. at pp. 1-3, 26-28). More specifically, the allegations note that this student was "entitled to pendency in a 6:1:3 private special education class that provides ABA with related services and transportation," the private school the student attended "was an ABA-based program" even though the defendant district "refused to put ABA on the IEP," the defendant district had not "been able to provide such a pendency as they do not offer this program or ABA and have refused to recommend her to a [S]tate-approved private school," the parents identified a "private school" (Manhattan Star Academy) as a program that provides "ABA and related services" with an "available seat" for the student, the defendant district "refused to fund this program" and the student was "out of school without any services or ABA," and the student is therefore "entitled to a prospective injunction for this comparable program and placement" (id. at pp. 27-28, 36-37). While Answer exhibit 1 is a document that is a public record related to the procedural history of administrative proceedings involving this student, the existence of which may be available for consideration by the undersigned without admitting the documents as additional evidence, in this instance, for purposes of convenience, the documents will be accepted and referenced by citing to the exhibits as identified and submitted by the district.

### B. Jurisdiction

While not directly asserting that an SRO lacks jurisdiction over the parents' appeal, the district argues that the parents—having filed an action in a federal district court seeking the same relief herein—should not be allowed to proceed in multiple forums for that relief. Thus, in order to avoid potentially conflicting rulings from an SRO and the district court, the district asserts that the parents' appeal must be dismissed and allowed to proceed in the federal district court.

In support of its assertions, the district cites to Application of a Student with a Disability, Appeal No. 19-089. However, the posture of Application of a Student with a Disability, Appeal No. 19-089 differs significantly from this appeal. In that matter, while the parents' district court action seeking enforcement of the administrative decisions was pending, the parents requested a second interim administrative decision from the IHO directing placement of the student at iBrain, which the IHO denied, and the appeal for State-level administrative review in Application of a Student with a Disability, Appeal No. 19-089 ensued. As the SRO in that matter, I explicitly explained that IHOs and SROs do not have authority (that is, jurisdiction) to enforce favorable administrative orders (i.e., the first interim decision in favor of the parents) and declined to address the IHO's decision not to issue a second interim decision, noting in addition that the parents had elected to pursue the enforcement issue in district court and finding that "it would not be prudent to permit the same appeal to go forward in two different forums" (Application of a Student with a Disability, Appeal No. 19-089). In stark contrast, the parents in this matter are not seeking to enforce a favorable administrative decision—instead, the parents are actually challenging the IHO's interim decision on pendency. In that respect, the facts of this case more closely resemble those in Application of the Bd. of Educ., Appeal No. 20-033, which the district simultaneously cites to as authority that implicitly contradicts its argument to dismiss the parents' appeal to allow the matter to proceed in federal district court (see Answer ¶ 17). Additionally, in Application of a Student with a Disability, Appeal No. 19-089, the parents presented the IHO's decision not to amend a pendency order to the district court and the district court "decided that it would not direct the IHO to revisit the decision regarding pendency while that decision was being challenged in Court." Further differentiating the two proceedings, in this matter, although the parents have raised a similar pendency issue in district court, there is no indication in the hearing record that the district court has taken any action.

On another note: it is troubling that the parents' request for review—dated October 29, 2020—fails to mention the amended complaint pending at federal district court, which was dated and filed on October 6, 2020, and further, that the October 6, 2020 amended complaint also fails to mention the September 23, 2020 IHO interim decision on pendency (compare Req. for Rev., with Answer Ex. 1 at pp. 1, 38). The parents' Notice of Intention to Seek Review is dated October 8, 2020; while it is altogether unclear based upon the hearing record whether the parents—or their attorney—had access to the IHO's interim decision on pendency, dated September 23, 2020, which formed the basis for the parents filing the Notice of Intention to Seek Review, it seems more likely than not that the parents, and their attorney, knew of its contents prior to filing the first amended complaint with the district court on October 6, 2020. Regardless of this concern, the factual contents of the first amended complaint are perhaps more troubling. Noticeably absent from the first amended complaint is any mention of the impartial hearing dates that took place regarding this student's pendency placement (see generally Answer Ex. 1). Assuming for the sake of argument that the parents' attorney did not have the IHO's interim decision on pendency in this case and was unable to include its findings in the first amended federal complaint, the parents' attorney was well aware of the pending federal action when filing the request for review and, without explanation, withheld any and all information about that proceeding (see generally Req. for Rev.).

With that said, having the proceeding pending simultaneously in two forums at the same time leaves the matter in an awkward posture. This posture comes about because, unlike most matters under the IDEA, some courts have indicated that a parent may bring an action for pendency

without first exhausting administrative remedies (Ventura de Paulino, 2020 WL 2516650, at *8 [finding that "where 'an action alleg[es a] violation of the stay-put provision,' such action 'falls within one, if not more, of the enumerated exceptions' to the IDEA's exhaustion requirement"], quoting Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199 [2d Cir. 2002] [noting that the administrative process is inadequate given the time sensitive nature of stay-put rights]). I have considered whether or not it is appropriate to abstain from making a decision on the student's pendency placement, as the district court's decision on this issue will ultimately supersede this decision; however, given that the action brought in district court does not specifically reference the IHO decision being appealed from and there has not yet been any action taken in the district court, I have decided to proceed to the merits of the appeal. Accordingly, the district's argument that the parents' appeal be dismissed to allow the matter to proceed at the federal district court is denied.

**C. Pendency**

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, 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 (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 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]).[5] 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 to "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

[5] In Ventura de Paulino v. New York City Department of Education, 959 F.3d 519 (2d Cir. 2020), the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

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 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).

To establish the student's pendency placement at the impartial hearing, the parents and the district representative initially agreed that the student's June 2019 CPSE IEP formed the basis for the pendency placement (see Tr. pp. 13, 19; see generally Parent Ex. B). However, in addition to the special education program and related services described in the CPSE IEP, the parents also requested that the pendency placement include an ABA-based program and special education transportation—limited travel time on a small air-conditioned school bus or minivan—which, as the parents acknowledged, were not listed or described in the CPSE IEP, but which the parents argued were components of the pendency placement because that was how the CPSE IEP had been implemented and thus, functioned as the student's operative placement (see Tr. pp. 13-18). As noted above, the district representative—while agreeing that the June 2019 CPSE IEP formed the basis of pendency—specifically disagreed with respect to the ABA-based program because it was not listed in the CPSE IEP (see Tr. pp. 19-20).

Upon review, the IHO's interim decision on pendency, which numerically listed eight components as the pendency placement, failed to include any legal authority or analysis to reflect how the IHO reached the determination, except for indicating that the parties had agreed that the June 2019 CPSE IEP formed the basis for pendency (see Interim IHO Decision at pp. 1-2). The IHO's decision listed only those services as appeared in the June 2019 CPSE IEP, but failed to

explain why the ABA-based program requested by the parents was not part of the pendency placement (id.; see Parent Ex. B at pp. 2, 13).

On appeal, the parents contend that the IHO failed to include the ABA-based program and special education transportation in the interim decision on pendency, reflecting the student's operative placement. Initially, it must be noted that although neither party directly contests the IHO's finding that the June 2019 CPSE IEP formed the basis for the student's pendency placement in this matter (see generally Req. for Rev.; Answer), the parents note that the parties actually agreed upon the pendency placement reflected in parent exhibit F—their proposed pendency order for the IHO's signature—with the exception of an "ABA-based program" (see Req. for Rev. at p. 1; see generally Parent Ex. F). Notably, however, parent exhibit F reflects that the pendency placement arose from the June 2019 CPSE, and the items set forth in numbers two through seven mirror, verbatim, the services recommended in the CPSE IEP (see Parent Ex. F). According to the evidence in the hearing record, the student was receiving services pursuant to the June 2019 CPSE IEP at the time the parents filed the due process complaint notice in July 2020 (see Parent Ex. G at pp. 1-2). The hearing record also reflects that, consistent with the parents' representation on appeal, the parties agreed at the impartial hearing that all of the services listed in parent exhibit F—except for the "ABA-based program" set forth under number one—constituted the student's pendency placement (compare Req. for Rev. at p. 1, with Tr. p. 57). At that time, the district representative did not voice any objection to the special education transportation services listed on parent exhibit F, which included "limited travel time in a small air conditioned school bus/minivan" (see Tr. p. 57; Parent Ex. F).[6] Based on the evidence in the hearing record that the student was receiving services pursuant to the June 2019 CPSE IEP, there is no basis to depart from the IHO's determination that the June 2019 CPSE 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]).

Once a student's "then-current educational" placement or pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino, 959 F.3d at 532; Schutz, 290 F.3d at 483-84; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington, 421 F. Supp. 2d at 697; Murphy, 86 F. Supp. 2d at 366; Letter to Hampden, 49 IDELR 197). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings," S.S., 2010 WL 983719, at *1 [emphasis in the original]). And upon a pendency changing event, such changes apply "only on a going-forward basis" (id.). With that said, it has been held that in certain circumstances a court may, on equitable grounds, retroactively adjust a student's pendency placement if a state-level administrative decision in a parent's favor was not issued in a timely manner (see Mackey, 386 F.3d at 164-66; Arlington, 421

[6] According to the June 2019 CPSE IEP, the CPSE recommended air conditioning as the only special education transportation accommodation (see Parent Ex. B at p. 13). On appeal, the district only challenges the parents' request for "limited travel time" but fails to address in its answer the agreement reached at the impartial hearing with respect to the special education transportation (Answer ¶ 23).

F. Supp. 2d at 701; O'Shea, 353 F. Supp. 2d at 457-58; Murphy, 86 F. Supp. 2d at 366-67). Thus, with regard to the special education transportation, the IHO erred by failing to reflect the agreement reached between the parties at the impartial hearing concerning this service, and the interim decision on pendency must be modified to reflect special education transportation with "limited travel time in a small air conditioned school bus/minivan" as part of the student's pendency placement.

With respect to the parents' request for an ABA-based program as a component of the student's pendency placement, the parties remain steadfast in their respective positions articulated at the impartial hearing and, in contrast to the special education transportation, did not reach an agreement pertaining to the ABA-based program. After reviewing the parents' arguments, neither the case law nor the evidence in the hearing record support the parents' contention that the student's pendency placement must include a specific methodology, such as an ABA-based program. Generally, a student's educational placement for purposes of pendency includes "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756); but the parents do not cite to any legal authority for the proposition that that general type of educational program includes a specific methodology (see generally Req. for Rev.). In addition, while the evidence in the hearing record reflects that the student attended a 6:1+3 special class placement in preschool that "utilize[d] the ABA methodology that [was] embedded in the STAR program," the evidence does not further explain that statement other than noting that the student worked on "matching object to object, gross motor imitation, and nonverbal imitation of objects" during "discreet trial[s]" (Parent Ex. E at p. 1 [emphasis added]). Moreover, a review of the student's June 2019 CPSE IEP implemented by the preschool reveals that the IEP does not include any references to the use of a specific methodology with the student in describing her present levels of performance or management needs (see Parent Ex. B at pp. 4-6). In addition, the annual goals in the CPSE IEP do not mandate the use of a specific methodology or the use of discrete trials, as noted in the preschool progress report, in order for the student to make progress toward achieving the annual goals (id. at pp. 7-10). According to the evidence, the student was evaluated using the "Strategies for Teaching based on Autism Research (STAR); The Creative Curriculum Developmental Continuum Assessment System" (id.). At the impartial hearing, the coordinator of admissions at the Manhattan Star Academy described "STAR" as a "curriculum" that included aspects of "many methodologies," including "ABA," "TEACCH," and "visual schedules to support children with autism" (Tr. pp. 72, 79-80).[7]

In light of the foregoing, there is no basis to disturb the IHO's finding that the pendency placement did not require an ABA-based program (see Interim IHO Decision at p. 1). As a result, the student's pendency placement consists of the following: a 6:1+3 special class, two 30-minute sessions per week of individual PT, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group, two 30-minute sessions per week of individual OT, one 60-minute session per month of parent counseling and training services, a 12-month school year program, and special education transportation with limited travel time in a small air-conditioned school bus or minivan.

[7] Although not explained in the hearing record, "TEACCH" is used as the acronym for the "Treatment and Education of Autistic and other Communication-handicapped CHildren" (see, e.g., Application of the Bd. of Educ., Appeal No. 17-105).

**D. Implementation of Pendency Placement**

Here, the parents argue that the IHO failed to identify where the student's pendency placement would be implemented. According to the parents, the unavailability of the student's preschool coupled with the district's failure to offer a substantially similar pendency program supports their request for the district to fund the student's pendency placement at Manhattan Star Academy, consistent with the holding in Ventura de Paulino. The district argues that the student's pendency placement can be implemented in the 6:1+1 special class placement located within the district public school the student was otherwise assigned to attend during the September 2020 through June 2021 portion of the 2020-21 school year because it is substantially similar to the 6:1+3 special class component of the pendency placement.

Ventura de Paulino concerned two cases wherein the IHOs had concluded that the parents' unilateral placements of their children at a nonpublic school were appropriate for a prior school year and, upon the district's decision not to appeal those rulings, by operation of law, the district consented to the students' placement at the nonpublic school (959 F.3d at 532). The issue presented was whether a parent could unilaterally move a student to a different nonpublic school and still receive pendency funding (id.). The Court concluded that a parent could not effectuate this unilateral move since it is the district that is authorized to decide how (and where) a student's pendency services are to be provided as per the text and structure of the IDEA and given that the district is the party responsible for funding the pendency services (id. at 533-35). The Court observed that:

> If a parent disagrees with a school district's decision on how to provide a child's educational program, the parent has at least three options under the IDEA: (1) The parent can argue that the school district's decision unilaterally modifies the student's pendency placement and the parent could invoke the stay-put provision to prevent the school district from doing so; (2) The parent can determine that the agreed-upon educational program would be better provided somewhere else and thus seek to persuade the school district to pay for the program's new services on a pendency basis; or (3) The parent can determine that the program would be better provided somewhere else, enroll the child in a new school, and then seek retroactive reimbursement from the school district after the IEP dispute is resolved

(id. at 534). Therefore, the Court concluded that "[r]egardless of whether the educational program that the Students are receiving at [the new nonpublic school] is substantially similar to the one offered at [the prior nonpublic school], when the Parents unilaterally enrolled the Students at [the new nonpublic school] for the 2018-2019 school year, they did so at their own financial risk" (id.).

In the present matter, the student's last agreed upon placement for purposes of pendency is based on the June 2019 CPSE IEP, with a slight modification regarding the special education transportation agreed upon by the parties at the impartial hearing. The crux of the parents' argument is that because they selected Manhattan Star Academy—a nonpublic school—that is substantially similar to the student's preschool program and thus capable of implementing the student's preschool program, pendency must be provided at Manhattan Star Academy and that the

district must fund this pendency placement. The parents assert that, in Ventura de Paulino, the Second Circuit left open the question as to what would happen if a student's prior nonpublic school placement was not available to provide pendency services and the district either refused or failed to provide pendency services (959 F.3d at 534 n.65).[8] However, the present case does not present such an instance, as the evidence in the hearing record reflects that the district has offered to implement the student's pendency placement in its 6:1+1 special class placement at a district public school.

On appeal, the district remains willing to implement the student's pendency placement, as previously offered, arguing that the 6:1+1 special class placement is substantially similar to the 6:1+3 special class placement mandated as the pendency placement. Whether a student's educational placement has been maintained under the meaning of the pendency provision may, under certain circumstances, depend on whether the educational program is "substantially and materially the same" as the student's educational program for the prior school year (Letter to Fisher, 21 IDELR 992 [OSEP 1994]; see Application of a Student with a Disability, Appeal No. 16-020). The United States Department of Education's Office of Special Education Programs identified a number of factors that must be considered in determining whether a move from one location to another constitutes a change in educational placement, including: whether the educational program in the student's IEP has been revised; whether the student will be educated with nondisabled peers to the same extent; whether the student will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement is the same option on the continuum of alternative placements (Letter to Fisher, 21 IDELR 992). Student-to-staff ratio is also a relevant factor in determining whether a student's program has changed (M.K. v. Roselle Bd. of Educ., 2006 WL 3193915, at *14-*15 [D.N.J. Oct. 31, 2006]; Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 60-61 [D.N.H. 1999]; Application of a Child with a Disability, Appeal No. 05-028). State regulations define a change in program as "a change in any one of the components" of an IEP, which include the size of the special class in which a student is recommended to receive services (8 NYCRR 200.1[g]; 200.4[d][2][a], [b][2]). While these factors, in many instances, are specific to district programs, they are instructive in this current circumstance.

Under this standard, the change in class ratio is an indication that the 6:1+1 special class placement offered by the district is not substantially similar to the 6:1+3 special class required under pendency (see 8 NYCRR 200.1[g]; 200.4[d][2][a], [b][2]). However, the district alternatively argues that if the undersigned determined that the 6:1+1 special class was not substantially similar, the district would supplement the class with additional adult support in the

[8] The Court in Ventura Paulino cited Wagner, in which the Fourth Circuit held that 20 U.S.C. § 1415(j) does not impose any affirmative obligations on a school district to seek out alternative placements when a student's then-current educational placement is not functionally available (Wagner, 335 F.3d at 301 [finding that "the question of availability is entirely irrelevant to the task of identifying the child's then-current educational placement, and it is only the current placement, available or unavailable, that provides a proper object for a 'stay put' injunction"]). However, the Fourth Circuit noted two situations in which a student's pendency placement could be changed: either by an agreement of the parties or by "a preliminary injunction from the district court, changing the child's placement" (Wagner, 335 F.3d at 302). This follows the long-standing principle that "the stay-put provision in no way purports to limit or pre-empt the authority conferred on courts" (Honig, 484 U.S. at 327; see 20 USC 1415[i][2][C][iii]).

6:1+1 special class by providing the student with a 1:1 paraprofessional, thereby rendering the special class less dissimilar to the 6:1+3 special class.

At this juncture, even though the district has not offered a 6:1+3 special class within which to implement the student's pendency placement, I decline to find that this constitutes a refusal to implement pendency, which could result in pushing this matter outside the scope of Ventura de Paulino (959 F.3d at 534 n.65).[9] Rather, the district is directed to implement the student's pendency placement, consistent with this decision, in a 6:1+3 special class placement, and the parents' request that the student attend Manhattan Star Academy, at district expense, to implement the pendency placement is denied.

**VI. Conclusion**

Based on the foregoing, the hearing record supports the parents' argument that the IHO erred by failing to include special education transportation with limited travel time on a small air-conditioned school bus or minivan as part of the student's pendency placement. However, the evidence in the hearing record does not support the parents' arguments that the IHO erred by failing to include an ABA-based program as part of the pendency placement. Finally, based on the Second Circuit's holding in Ventura de Paulino, the evidence in the hearing record supports a denial of the parents' request that the district fund the student's attendance at the Manhattan Star Academy pursuant to pendency.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the district shall implement the student's pendency placement consistent with this decision.

**Dated:** **Albany, New York**
**December 10, 2020**

**STEVEN KROLAK**
**STATE REVIEW OFFICER**

[9] The parents are not left without any other options. The parties could reach an agreement to change the student's pendency placement without sacrificing their respective positions on the merits of the underlying matter. Further, although courts tend to apply the automatic injunction provided for under the IDEA, they have from time to time also found it necessary to apply the traditional injunctive relief standards to create or modify a student's pendency placement when circumstances warrant such relief (see Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F Supp 2d 375, 391 [N.D.N.Y. 2001]; see also Sabatini v. Corning-Painted Post Area Sch. Dist., 78 F. Supp. 2d 138, 143 [W.D.N.Y. 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. 1997]; Kantak v. Bd. of Educ. of Liverpool Cent. Sch. Dist., 1990 WL 36803 at *2 [N.D.N.Y. Mar. 30, 1990]). Accordingly, the parents may obtain injunctive relief in a court of competent jurisdiction 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).