The University of the State of New York

The State Education Department
State Review Officer
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No. 21-242

**Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

**Appearances:**
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nathaniel Luken, Esq.

**DECISION**

## I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining his son's pendency (stay-put) placement during a due process proceeding challenging the appropriateness of respondent (the district's) recommended educational program for the student for the 2021-22 school year. The appeal must be dismissed.

## II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

## III. Facts and Procedural History

Due to the nature of this appeal from an interim decision related to pendency and the scant hearing record, a full recitation of the student's educational history is not necessary or possible. Briefly, the student had been classified by the Committee on Preschool Special Education (CPSE) as a preschool student with a disability from approximately 2018 through 2020 (Dist. Ex. 6). With respect to the 2020-21 school year, the parent was informed by prior written notice dated April 17, 2020, that the student was recommended for declassification from special education services as a result of an April 16, 2020 CSE meeting, during which, it was determined that the student did not meet the eligibility criteria for an educational disability as defined by State regulation and that the student was "Kindergarten ready," based on review and discussion of a February 14, 2020 teacher

report (Dist. Ex. 5). The projected date of declassification was June 30, 2020, and the student was not recommended for declassification support services (Dist. Ex. 4).

With respect to the student's preschool IEP, on May 6, 2020, the CPSE reconvened to develop an IEP amendment which identified May 11, 2020 as the projected implementation date (see Parent Ex. C). Having found the student eligible to receive special education and related services as a preschool student with a disability, the May 2020 CPSE recommended a 12-month school year program extending through "July/August 2020 only" consisting of 10 hours (20 30-minute sessions) per week of special education itinerant teacher (SEIT) services (3:1) in a general education classroom, together with two 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual occupational therapy (OT) (see Parent Ex. C at pp. 1, 2, 9-10, 11-12).[1]

In a due process complaint notice dated September 2, 2020 from a prior proceeding, the parent alleged that the district failed to arrange for a teacher to implement the student's SEIT services for the 2020-21 school year (Dist. Ex. 2 at p. 1).[2] The parent further alleged, for the 2020-21 school year, that the student's last agreed upon program was the May 2020 IEP which authorized 10 hours per week of SEIT services as well as the related services of speech-language therapy and OT; however, the district failed to provide the SEIT services, and although not able to locate a SEIT provider for the student at the district's standard rate, the parent was able to obtain a SEIT provider for the student at a rate higher than the district's standard rate (id.). As relief for the 2020-21 school year, the parent requested a pendency hearing as well as an order for 10 hours of SEIT services per week "at an enhanced rate" for payment to the student's "provider/agency," as well as related services listed on the IEP and related services authorizations (RSAs) "if required by the parent" (id. at p. 2).

Subsequently, the parent and the district entered into a pendency agreement for the 2020-21 school year consisting of the May 2020 IEP services, which the student received, and the September 2, 2020 prior due process complaint notice was withdrawn without a substantive hearing (Tr. pp. 16-17, 26; see IHO Exs. I [Parent Post-Hr'g Brief at p. 2]; II [District Post-Hr'g Brief at p. 2]).

[1] At the impartial hearing, with regard to the issue that the IEP amendment was developed by the CPSE after declassification by the CSE "and required services after the declassification," the district noted that "it's unfortunate that this is something that does happen occasionally, [] because the Turning 5 IEPs for students are done separately from the child's preschool IEPs, done by a different team, a different school" (Tr. p. 31). The district further indicated that the May 2020 CPSE IEP was for summer services for the 2020-21 school year only and that there was no subsequent IEP after the declassification that classified the student as a school-age student with a disability for the remainder of the 2020-21 school year starting in September 2020, and as such "these services were intended to be for this child's final preschool summer" and the declassification would start in the fall (Tr. pp. 31, 32).

[2] In a July 8, 2021 Order Regarding Consolidation, the IHO denied consolidation of the 2020-21 and 2021-22 due process complaint notices.

### A. Due Process Complaint Notice

In a due process complaint notice dated July 1, 2021, the parent alleged that the district denied the student a FAPE for the 2021-22 school year (see Parent Exs. A; B).[3, 4] The parent repeated similar claims for the 2021-22 school year as were set forth in the prior due process complaint notice for the 2020-21 school year (compare Dist. Ex. 2, with Parent Exs. A; B). The parent further asserted that "[f]or the full 12-month 2021-2022 school year, the student requires the same special education teacher services and the same related services each week as set forth on the IEP, including during the summer to avoid regression" and that the parent "disputed and disputes subsequent programs" (Parent Exs. A at p. 1; B at p. 1). As relevant to this appeal, the parent requested a pendency hearing and asserted that the last agreed upon program lay in the IEP developed on May 6, 2020 which mandated 10 hours per week of SEIT services, as well as certain related services (Parent Exs. A at p. 1; B at p. 1).

### B. Impartial Hearing Officer Decision

After a prehearing conference on August 18, 2021, the parties proceeded with a hearing on pendency which was conducted on August 25, 2021, and one other status conference took place on October 6, 2021 prior to the issuance of the interim decision being appealed from in this matter (see Tr. pp. 1-56). In an interim decision dated November 2, 2021, the IHO found the student's "declassification to commence no later than September 1, 2020 was determined by the CSE" and that the declassification "had not been disputed by the parent either directly or by action consistent with a disagreement that would inform the district" (IHO Decision at p. 4).[5] The IHO further concluded that "the declassification superseded the CPSE IEP," and that she gave "no weight to CSE/CPSE transitional dating issues" noting that the September 2, 2020 due process complaint notice "was filed after the conclusion of the CPSE mandated services" and the district's agreement to provide the requested services during the pendency of the 2020-21 due process proceeding was "not a basis for a conclusion that that constituted the student's 'operative placement'" and support for pendency in this matter (id.). The IHO determined that "in view of the uncontested

[3] The hearing record also contains a "[second corrected]" due process complaint notice with an asterisk on the original date stating "Address corrected July 31, 2021" and "School corrected August 18, 2021" (Parent Ex. B).

[4] The parent also filed an amended due process complaint notice dated November 27, 2021, a copy of which was included with the hearing record on appeal but was not entered into evidence as an exhibit. This due process complaint notice post-dates the IHO's Decision of November 2, 2021 in this appeal and thus is not properly part of the hearing record in this appeal (see 279.9[d] [the hearing record for an appeal from an interim decision shall "consist[] of those items . . . developed as of the date of the interim decision"). Similarly, a transcript of the hearing, that took place on November 3, 2021, is included as part of the hearing record; however, as that hearing took place after the November 2, 2021 interim IHO decision being appealed from in this matter, it is not properly part of the hearing record on appeal (see Tr. pp. 57-71). Accordingly, neither the November 27, 2021 amended due process complaint notice nor the November 3, 2021 hearing transcript will be considered as a part of this appeal.

[5] The Office of State Review also received an IHO Decision bearing the date of the original decision with the additional notation "C[orrected] (E[xhibit] L[ist]) December 8, 2021" (see December 8, 2021 IHO Decision). The corrected decision lists an additional exhibit, District Ex. 7 "Report Card 20-21," but does not contain any substantive changes.

declassification pendency may not be based on the last previously implemented IEP" and further, that "the CPSE provided program is not the student's 'then-current educational placement'" (id.).

**IV. Appeal for State-Level Review**

The parent appeals asserting that the IHO erred in finding that: (1) the declassification was not contested; (2) the IEP was not the last agreed upon program or the last operative placement; and (3) pendency in this case may not be based on the IEP. The parent argues that contrary to the IHO Decision, "it is not true" that the parent did not challenge the declassification by direct filing or by his actions, arguing that the standard for determining the adequacy of a due process complaint notice "is simply whether [the p]arent has 'raise[d]' the issue in their due process request" and that the parent has done so here and in the prior (2020-21) due process complaint notice by "explicitly" raising that the student requires 10 hours per week of special education teacher services and related services during the school year and that this request for services "only makes sense" where the parent is demanding that the student remain classified with a disability. With respect to the IHO's finding that the declassification was to commence September 1, 2020, the parent asserts that the IHO's use of that date was "unclear" and "arbitrary," as there was no document in the record stating that declassification was to begin on September 1, 2020, and that the district's own written document used June 30, 2020 as the date declassification was to begin—albeit which was not adhered to—but that the parties undisputedly agreed to keep the student classified "at least until August 31, 2020." Further, the parent argues that, "[i]f anything, declassification is a defense to the issues [the p]arent raised" and the district must prove that the declassification determination was procedurally and substantively appropriate at a hearing on the merits, therefore there was no factual or legal basis for the IHO to find that the parent has not challenged declassification, or to use the district's declassification as a basis to deny pendency.

In addition, the parent argues that contrary to the IHO Decision, the "operative placement actually functioning at the time when the due process proceeding was commenced and the last program agreed to by the [p]arent and the [district] are proper bases of pendency," further asserting that, as the "supposed declassification" was to go into effect June 30, 2020, and the district did not put it into effect because it subsequently agreed services should continue through August 31, 2020, "the 'operative placement' and the last agreed upon program has never been declassification." However, the parent asserts that when the district agreed to provide funding for the mandated services in the IEP under pendency, upon the filing of the 2020-21 due process complaint notice, the declassification remained "dormant," and the IEP remained the last operative placement and the last agreed-upon program for the student.

The parent requests that the IHO's findings be reversed and pendency relief be awarded "retroactive to the filing date that requires the [district] to provide the 12-month program mandated in the IEP, which is 10 hours per week of individual SEIT; individual speech language therapy 2 periods per week of 30 minutes each; and individual occupational therapy 2 periods per week of 30 minutes each," and that pendency be delivered by the district, either by district employees that are providers of the services or by the district funding providers obtained by the parent for each service.

In an answer, the district argues that the IHO correctly denied the parent's pendency request. The district asserts that the student was declassified as of June 30, 2020 and, as such, the

district is not required to provide the student with a special education program or related services on either a full-time or interim pendency basis. According to the district, upon declassification, the student became a general education student with no special education status quo to maintain via pendency. The district also argues that despite the parent's argument that he challenged the student's declassification in his July 2021 due process complaint notice (and prior September 2020 due process complaint notice), the language of the due process complaint notices does not properly raise the student's declassification as an issue, as they do not make allegations or references to the student's declassification or the process by which the district used to declassify the student and, as such, the parent's allegations are "over-broad" and the parent's interpretation "would hinder the district's ability to prepare for a hearing and improperly expand the district's burden of proof." The district further argues that even if the parent did raise the student's declassification as an issue, the student would still not have been eligible for the requested pendency program as "any potential challenge to the [s]tudent's declassification, which took place prior to the previous school year, cannot serve as the basis for the [s]tudent's pendency program during this proceeding." The district also argues, to the extent the parent asserts that the student is entitled to the May 2020 IEP services as pendency because the district continued to provide them beyond the effective date of the student's declassification, that it was "logical" for the district to provide the student with services as a preschool student with a disability through the summer months of his "turning 5" school year, as it is the CPSE's responsibility to do so even though the student was not classified by the CSE for the 2020-21 school year. According to the district it was the CSE's responsibility to develop a special education program beginning in the fall of a student's turning 5 school year.

Finally the district argues, with regard to the parent's argument that the parties' 2020-21 pendency agreement can serve as the basis for the same pendency program for the 2021-22 school year, that although the 2020-21 pendency agreement was not entered into evidence the agreement was specific to the 2020-21 school year and there is no authority to extend the agreement "beyond the conclusion of the proceedings which gave rise to the stay-put right" and, as such, the student's right to remain in the pendency placement under the 2020-21 pendency agreement "lapsed" once the prior proceedings concluded and, in this matter, the IHO properly refused to extend it. Additionally, while the district argues that the 2020-21 agreement cannot constitute pendency in this matter, the district also argues, in the alternative, that "if the SRO determines that the [s]tudent's declassification did not eliminate the [s]tudent's pendency program . . . the basis for the [s]tudent's pendency program is the parties' pendency agreement for the 2020-21 school year."

**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., 752 F.3d at 170-71; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the

requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; 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

### A. Pendency

The issue presented in this appeal is whether the IHO should have determined that the student's stay-put placement lay in the May 2020 CPSE IEP, as the "operative placement actually functioning at the time when the due process proceeding was commenced and the last program agreed to" as argued by the parent, rather than finding that the student was no longer eligible for special education as a student with a disability at the time the due process complaint notice was filed, and therefore was not entitled to a pendency placement, as determined by the IHO and argued by the district.

The standard stay-put analysis does not apply to a student who is not eligible for special education (Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 416 n.8 [S.D.N.Y. 2005]). Generally, the stay-put provision does not apply beyond expiration of the student's eligibility for special education (see Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Ill. State Bd. of Educ., 79 F.3d 654 [7th Cir., 1996]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 385-90 [N.D.N.Y. 2001]). However, courts have found that a student should remain in a stay-put placement in instances where one of the purposes of the pending proceedings is to challenge the factor which terminated the student's eligibility, i.e., to challenge the age limit on special education (see A.D. v. Hawaii Dep't of Educ., 727 F.3d 911, 915 [9th Cir. 2013] [finding that stay put applied for a student with a disability who challenged state-imposed age limits on IDEA eligibility, even though the student exceeded that age limit while the proceedings were pending]) or to challenge whether the disabled student met the requirements for graduation (see R.Y. v. Hawaii, 2010 WL 558552, at *6-*7 [D. Haw. Feb. 17, 2010] [noting that the right to stay put was not extinguished because the parents were challenging whether student was entitled to a regular high school diploma]; Tindell v. Evansville-Vanderburgh Sch. Corp., 2010 WL 557058, at *2-*4 [S.D. Ind. Feb. 10, 2010]; Cronin v. E. Ramapo Cent. Sch. Dist., 689 F. Supp. 197, [S.D.N.Y. 1988] [finding that stay put continued after the district graduated the student because the parents contended that that student had not attained the recommended targets established for him in the educational program]).

In this instance, the hearing record shows that the April 2020 CSE met and determined that the student did not meet the criteria for an educational disability as defined by State regulation, that the student did not require special education, and that the student was ready for kindergarten (Dist. Exs. 4; 5 at p. 1). The CPSE subsequently met in May 2020, found the student remained eligible for special education as a preschool student with a disability and recommended a 12-month program consisting of 10 hours per week of SEIT services, as well as one hour per week of speech-language therapy and one hour per week of OT (Parent Ex. C at pp. 1, 9-10).

Much of the parent's arguments regarding pendency—particularly with respect to the assertion that the district's provision of the services recommended in the May 2020 IEP resulted in the May 2020 IEP being the last operative placement and the last agreed-upon program for the student—appear to be the result of some confusion due to the overlap between the CSE and CPSE processes as they were dealing with two different time periods—the CPSE with the student's 2019-20 school year and the summer portion of the 2020-21 school year, and the CSE with the student's school-age programming beginning in September 2020. As noted by the district at the hearing,

"unfortunate[ly] [] this is something that does happen occasionally, [] because the Turning 5 IEPs for students are done separately from the child's preschool IEPs, done by a different team, a different school" (Tr. p. 31). More specifically, as a preschool student with a disability, the student was entitled to continue to receive special education and related services under the CPSE through summer 2020 (Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2]). Additionally, a preschool student with a disability and a school-age student with a disability are defined differently pursuant to State regulation (compare NYCRR 200.1 [mm][2] [defining preschool student with a disability], with 200.1 [zz] [defining students with a disability and related disability classifications]). Accordingly, while the student still qualified for services as a preschool student with a disability "through the month of August of the school year in which the child first bec[ame] eligible to attend school pursuant to section [3202 of the Education Law]" (Educ. Law 4410[i]; NYCRR 200.1 [mm][2]) and the CPSE continued to recommend a special education program for the student during that period (Parent Ex. C), the April 2020 CSE found that the student was not eligible for special education as the student was ready for kindergarten (Dist. Exs. 4, 5), accordingly, the hearing record supports the IHO's conclusion that the student was no longer eligible for special education and related services as of September 2020.

Considering the above, at the commencement of this proceeding, the student was not classified as a student with a disability and was not eligible for special education; accordingly, there was not a "status quo" special education program or placement for the student to maintain through the IDEA's "stay-put" provisions.

Next, as discussed above, although the student was declassified, the student could continue to receive pendency services if the parent challenged the April 2020 CSE's determination that the student was not eligible for special education. Here, a plain reading of the language of the parent's due process complaint notice shows that it did not explicitly challenge the April 16, 2020 CSE's decision to declassify the student, nor did the prior due process complaint notice (see Parent Exs. A; B; District Ex. 2). Initially, the parent asserts that a due process complaint notice must "simply" raise an issue, arguing that the prior (2020-21) and current (2021-22) due process complaint notices do so, by including the following language:

> The last program the Department of Education (DOE) developed for the child that the parent agreed with was an Individualized Education Services Program developed on 05/06/2020 (IEP). The student was awarded 10 hours per week of special education itinerant teacher services (SEIT), as well as certain related services (speech and OT, each 2x30:1). For the full 2020-2021 school year, the student requires the same special education teacher services and the same related services each week as set forth on the IEP.

(Dist. Ex. 2).

> The last program the Department of Education (DOE) developed for the child that the parent agreed with was an Individualized Education Services Program developed on 05/06/2020 (IEP). The student was mandated for 10 hours per week of special education itinerant teacher services (SEIT), as well as certain related services. For the full 12-month 2021-2022 school year, the student requires the same special education teacher services and the same related services each week as

> set forth on the IEP, including during the summer to avoid regression. Parent disputed and disputes subsequent programs.

(Parent Exs. A; B).

This general language without any further specificity cannot be found to be an explicit challenge to the April 2020 CSE's determination. The parent argues that the challenge to the April 2020 CSE's decision to declassify the student was implicit in the language of the current and prior due process complaint notices, because he "explicitly" asserted that the student required 10 hours per week of special education teacher services as well as related services during the school year, and that this request for services "only makes sense" where the parent is demanding that the student remain classified with a disability. However, it could also indicate an argument that the student was currently—at the start of the 2021-22 school year—eligible for special education as a student with a disability, and accordingly, it does not necessarily present a challenge to the April 2020 CSE's determination that the student was not eligible for special education at that time. Therefore, this argument fails because, among other things and as argued by the district, the parent's allegations are overly vague and following the interpretation requested by the parent would hinder the district's ability to prepare for a hearing by improperly expanding the district's burden of proof (see N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *5 [S.D.N.Y. Feb. 11, 2016]).

Moreover, given that a substantial amount of time has passed between the decision to declassify the student, made in April 2020, and the initiation of this proceeding regarding the 2021-22 school year, the parent has had ample opportunity to directly challenge, either in this proceeding or in the prior proceeding related to the 2020-21 school year, the April 2020 CSE's determination that the student was not eligible for special education as a school-age student with a disability at the time of the April 2020 CSE meeting. The parent cannot remedy the failure to raise a direct challenge to the student's declassification by merely asserting that the student needs for the current school year the same services as were recommended by the May 2020 CPSE. The parent, as of the time of the IHO's decision being appealed from in this matter, has not challenged the April 2020 CSE's determination in either the September 2020 due process complaint notice, initiating the prior proceeding, or in the July 2021 due process complain notice initiating this matter and the August 2021 corrected due process complaint notice (Tr. pp. 11-39; Parent Exs. A; B; Dist. Exs. 1; 2).

Accordingly, based on the evidence in the hearing record as of the date of the IHO's decision, there is not a sufficient basis to disturb the IHO's determination that "the declassification superseded the CPSE IEP" and that the student is not entitled to receive the services recommended in the May 2020 CPSE IEP as pendency in this proceeding.

However, I note that the hearing record is not well-developed as to the parties' agreement regarding the student's pendency program with respect to the prior proceeding related to the 2020-21 school year, the conclusion of that proceeding, or the possible impact of that proceeding or the parties' agreement on the student's eligibility or stay-put program in this proceeding. Although the prior proceeding is referenced in the hearing record, including references to a pendency agreement for the 2020-21 school year (Kindergarten) consisting of the May 2020 IEP services, as well as to the withdrawal of the due process complaint notice in that proceeding, the only document from that proceeding entered into evidence was the due process complaint notice initiating the prior

matter (Tr. pp. 16-17, 26; see Dist. Ex. 2; IHO Exs. I at p. 2; II at p. 2). As the settlement agreement was not entered into the hearing record in this matter, there is no basis for determining whether the agreement could impact a determination as to pendency in this proceeding. However, to the extent the 2020-21 pendency agreement might warrant a different conclusion from the one made here, the parent or district may submit the written pendency agreement into the hearing record and the parties can make an argument before the IHO as to whether the prior agreement should affect the student's rights in this proceeding, including pendency.

## VII. Conclusion

Based on the foregoing, there is insufficient reason presented on appeal to disturb the IHO's determination that the student was not entitled to a pendency placement based on the May 2020 CPSE IEP. Additionally, if the parties have not already done so, the student may be referred to the CSE for an initial evaluation consistent with State regulations (8 NYCRR 200.4[a][iv], [b]).

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

**THE APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**February 2, 2022**

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