



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 10-111

Application of the BOARD OF EDUCATION OF THE ARLINGTON CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Kuntz, Spagnuolo, Murphy & Gronbach, P.C., attorneys for petitioner, Vanessa M. Gronbach, Esq., of counsel

DECISION

Petitioner (the district) appeals pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an amended interim decision (interim decision)¹ of an impartial hearing officer determining respondents' (the parents') son's pendency placement during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student for the 2010-11 school year. The impartial hearing officer found that the student's pendency placement was a 12:1+1 Board of Cooperative Educational Services (BOCES) special class at a district middle school. The appeal must be sustained in part.

The student's prior educational history is discussed in Application of the Bd. of Educ., Appeal No. 10-032 and will not be repeated here in detail. The hearing record is sparse relative to the student's educational history as it pertains to the issue presented in this appeal. At the time of the pendency hearing, the student was in ninth grade but was not attending school (Tr. pp. 6, 18, 21-22). According to the evidence contained in the hearing record, the student received a prior diagnosis of Opitz syndrome² and exhibited various associated physical abnormalities, and significant global delays involving learning, communication, social skills, daily living skills, and

¹ The amended interim decision regarding pendency indicates that a prior interim decision regarding pendency was issued on or about October 12, 2010, but that at the time, the hearing transcript was not available to the impartial hearing officer; consequently, the original interim decision on pendency lacked citations to the transcript (IHO Decision at p. 5). After receiving the transcript, the impartial hearing officer subsequently issued the amended interim decision on pendency on October 18, 2010 that including the citations to the hearing record (id.).

² Although not defined in the hearing record, Opitz syndrome is a developmental disability affecting multiple parts of the body (see Application of the Bd. of Educ., Appeal No. 10-032).

motor skills (Dist. Exs. 1 at pp. 3-4, 6-8; 2 at pp. 4, 6-8). Academically, the student was functioning at a second grade level in both reading and mathematics (Dist. Exs. 1 at pp. 3-4, 7; 2 at p. 4). The student's eligibility for special education programs and services as a student with multiple disabilities is not in dispute in this appeal (34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]; see Tr. p. 17; Dist. Exs. 1 at p. 1; 2 at pp. 1-2).

On March 26, 2009, the Committee on Special Education (CSE) convened for the student's annual review to develop an IEP for the 2009-10 school year (eighth grade) (Dist. Ex. 2 at pp. 1-2, 7). In attendance were the district's supervisor of special education (who served as CSE chairperson), a school psychologist, a special education teacher, a BOCES administrator, a speech-language therapist, an occupational therapist, a social worker, the district's assistive technology coordinator, and the student's parents (id. at p. 7; Tr. pp. 21, 39). The CSE observed that academically, the student was functioning well below age level, noting particular difficulties in the areas of phonics (complicated further by the student's articulation delays), decoding skills, ability to answer basic comprehension questions, receptive and expressive language, articulation and spelling, and functional math; however, the CSE noted improvements during the 2008-09 school year in the student's written expression, speech, and general mathematics skills (Dist. Ex. 2 at p. 4). In the social/emotional area, the CSE noted the student's difficulties with transitions between activities and identified his needs to develop social skills and improve his abilities to function in groups, to cope with his frustrations, and to manage transitions (id. at p. 6). Regarding the student's physical development, the March 26, 2009 IEP indicated the student's significant gross motor delays in the areas of motor coordination, motor planning, dynamic balance, proximal control, strength, and flexibility, and, although noting that he had progressed during the preceding school year, qualified that the student required continued physical therapy (PT) and occupational therapy (OT) (id. at pp. 6-7).

The March 26, 2009 CSE acknowledged the student's progress during the 2008-09 school year in vocabulary and keyboarding, as well in his articulation, social/emotional development, visual perception, peer interaction, independence, and in PT; the CSE also noted that he was "independent with self-help skills" (Dist. Ex. 2 at pp. 7-8). According to the May 2009 IEP, the student required "an intensive, small teacher-to-student ratio program in order to progress in all areas" and that he was "able to negotiate the school building with minimal assistance" (id. at p. 7).

The March 26, 2009 CSE recommended that the student be placed in a BOCES 12:1+1 special class and receive related services consisting of OT, once per week for 30 minutes per session in a 1:1 setting; PT, once per week for 30 minutes in a 5:1 setting and once per week for 30 minutes in a 1:1 setting; speech-language therapy, twice per week for 30 minutes in a 5:1 setting and three times per week for 30 minutes in a 1:1 setting; an assistive technology consult, once per month for 60 minutes; assistive technology in the form of a Dynavox device; testing accommodations consisting of extended time (2.0) and directions explained; and door-to-door transportation (Dist. Ex. 2 at pp. 1-3, 7-8; see also Tr. pp. 21-22). Extended school year (ESY) services were recommended for the student, which consisted of a BOCES 12:1+1 special class, related services consisting of OT, once per week for 30 minutes per session in a 5:1 setting; PT, once per week for 30 minutes per session in a 5:1 setting; and speech-language therapy, twice per week for 30 minutes per session in a 1:1 setting; and a shared 2:1 aide, daily (Dist. Ex. 2 at pp. 3, 8). According to the hearing record, the district implemented this program in a district middle school during the 2009-10 school year (see Tr. pp. 21-22).

On May 17, 2010, the CSE convened for the student's annual review to develop the student's IEP for the 2010-11 school year (Dist. Ex. 1 at pp. 1, 7). In attendance were the district's

supervisor of special education (who again served as CSE chairperson), a school psychologist, a special education teacher, a BOCES administrator, a speech-language therapist, an occupational therapist, and an assistive technology specialist; the student's parents declined to attend (*id.* at pp. 7, 16; *see* Tr. pp. 18-19; Parent Exs. B; C; D).³

The May 17, 2010 CSE observed the student's progress during the 2009-10 school year, as having attained a plateau in his reading skills and maintaining an end of second grade level in his decoding and sight vocabulary; however, the CSE also qualified that his comprehension remained delayed (Dist. Ex. 1 at p. 7). Although the student scored well on weekly spelling tests, teachers observed that he was "not able to carry over the knowledge of these words to written work" and was "not demonstrating the ability to process questions without being given cues for how to respond" (*id.*). His mathematics skills in three digit addition and subtraction were characterized as "inconsistent," and he required cuing in order to recall mathematics strategies (*id.*). Socially, he interacted well with regular education students, enjoyed attending his "specials," and socialized well in a small group setting; teachers noted an absence of crying behavior and a marked decrease in manifestations of frustration (*id.*). Physically, the student exhibited a poor range of motion, which affected his oral motor skills, and his eye contact remained in need of improvement (*id.*). However, the CSE noted that he was "making slow but steady progress in his gross motor skills," and although his motor planning was slower than average, it was improving, together with his keyboarding skills (*id.* at pp. 7-8).

According to comments recorded on the May 17, 2010 IEP, the student's parents "had previously indicated concerns about [their son] attending [the district high school]" and the May 17, 2010 CSE "discussed the possibility of placement in a BOCES District class at [the district high school] as well as the same program within a smaller high school setting" (Dist. Ex. 1 at p. 8). The IEP noted that "[d]iscussion of program centered upon a smaller, language-based classroom in an integrated setting, where [the student] would have the opportunity to interact with typical, age-appropriate peers as role models for language and socialization" (*id.*).

The May 17, 2010 CSE recommended that the student be placed in a BOCES 8:1+1 special class⁴ with related services that were substantially similar to those recommended in the March 26, 2009 IEP, except that the May 17, 2010 IEP recommended a shared aide in a 2:1 setting throughout the school year; in addition recommended ESY services for the student consisted of an 8:1+1 special class; and other ESY services that were substantially similar to those listed in the March 26, 2009 IEP, except that the May 17, 2010 IEP recommended an extra speech-language therapy

³ The hearing record indicates that the parents alleged in their due process complaint notice that the May 17, 2010 IEP was defective in that the parents were not present at the CSE meeting and allegedly did not consent to the meeting proceeding in their absence (Tr. p. 3). This issue will not be further addressed in the instant appeal, which is limited to the issue of the student's pendency placement for the 2010-11 school year (*see* IHO Decision at p. 3).

⁴ The district's supervisor of special education explained that the recommended class in the district high school featured a smaller 8:1+1 setting because "there's a job coaching component that's built into the high school program, so the class size is a little smaller for practical reasons, just makes that job coaching piece a little easier to undertake" (Tr. pp. 23-24).

session, and 1:1 PT (as opposed to 5:1)⁵ once per week (compare Dist. Exs. 1 at pp. 1-3, 7-8, with 2 at pp. 1-3, 7-8; see also Tr. pp. 20-24).

On August 24, 2010, the district received an undated due process complaint notice⁶ filed by the parents challenging the appropriateness of an individualized education program (IEP) developed by the CSE for the student on May 17, 2010 (Tr. pp. 3-4; Dist. Ex. 1; IHO Decision at p. 3). Following a pre-hearing conference, the impartial hearing was convened on September 29, 2010 to address a disputed issue regarding the student's pendency placement (Tr. p. 1; IHO Decision at p. 3). After one day of testimony, the impartial hearing officer issued an interim decision on October 18, 2010. The impartial hearing officer acknowledged that the parties did not dispute that the last agreed-upon IEP was that of March 26, 2010, and that the special education program it recommended should constitute the student's pendency placement and that the sole pendency issue was whether the district could implement the student's pendency placement in the district's high school (IHO Decision at pp. 3-5; see Tr. pp. 45, 52). The parents contended that due to safety concerns, the student should be placed at the district middle school; the district, on the other hand, argued that the pendency program and services should be implemented at the district high school (IHO Decision at p. 5).

The impartial hearing officer determined that while the programs offered at both schools may have been "substantially similar," the general environments of the schools were different, both in physical size and student population, noting that evidence contained in the hearing record established that approximately 600 students attended the district middle school, while over 4,000 attended the district high school (IHO Decision at p. 6; see also Tr. pp. 31-32). She determined that the parents' concern for the safety of their son in the district high school, as opposed to the district middle school, was "legitimate," and suggested that the general environment or setting of the district high school was not an appropriate place for the provision of special education programs and services to the student, and would constitute a change in the student's placement (IHO Decision at pp. 5-6). Furthermore, she noted that the district did not allege that the pendency program at the district middle school was unavailable to the student, but merely asserted that because the student had transitioned into the district high school as a ninth grader, the high school was the appropriate setting for the student's pendency placement (id. at p. 6). Accordingly, the impartial hearing officer ordered the student's pendency placement, based upon the March 26, 2009 IEP, to be implemented in the district middle school (id. at pp. 6-7). This appeal ensues.

The district appeals and seeks an order reversing the impartial hearing officer's interim decision on the grounds that: (1) the special education program and services recommended in the last agreed-upon IEP dated March 26, 2010 should be implemented in the district high school; (2) the evidence contained in the hearing record does not support a conclusion that the district high school is an inappropriate location to implement the student's pendency program; (3) the evidence contained in the hearing record does not support a conclusion that the environment at the district high school presented safety issues for the student; and (4) the evidence contained in the hearing record does not support a conclusion that the district high school class is not "substantially similar" to the district middle school class for the purposes of pendency.

⁵ According to the hearing record, the parents declined the district's recommendation of ESY services (Tr. p. 33; Dist. Ex. 1 at p. 2; Parent Ex. D at p. 1).

⁶ The hearing record does not include a copy of the due process complaint notice filed by the parents.

The parents answer, countering that: (1) the district high school placement does present legitimate safety concerns for the student, because of his difficulties with transitions; and (2) although the district middle school and high school programs may be similar, they are not the same, in that the high school program has a "job coaching component" which alters the classroom environment, the district high school presents significantly more students, a higher noise level, more confusion, more stimulation, a new, unfamiliar physical layout, and the need for the student to negotiate staircases in order to receive his related services. The parents also attach additional documentary evidence to their answer that was not admitted into evidence during the pendency hearing. In a reply, the district objects to, among other things, the introduction of the additional documentary evidence.

At the outset, I will address a procedural issue, namely, the submission of additional evidence together with their answer. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 10-062; Application of the Dep't of Educ., Appeal No. 10-047; Application of a Student with a Disability, Appeal No. 10-002; Application of a Student with a Disability, Appeal No. 09-104; Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, the additional evidence was available at the time of the impartial hearing, and it is not necessary in order to render a decision and, consequently, I decline to consider it.

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];⁷ Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; see 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. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). 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. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 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]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that

⁷ This is often referred to as the IDEA's "stay put" provision.

a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelle, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed impartial hearing officer's 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 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

The sole issue presented in this appeal is whether the relocation of the student from the district middle school to the district high school constitutes a change in the student's educational placement for purposes of pendency (see Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; see also Application of a Student with a Disability, Appeal No. 08-050; Application of the Bd. of Educ., Appeal No. 07-125; Application of the Bd. of Educ., Appeal No. 03-028; Application of a Child with a Disability, Appeal No. 02-031).

Under the IDEA, the pendency provision does not automatically require that a student must remain in a particular site or location (see Malcolm X Pub. Sch. 79, 629 F.2d 751, 756 [2d Cir. 1980]; Application of the Dep't of Educ., Appeal No. 10-110; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), 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). Courts have held that if a student's then current educational placement becomes unavailable, a district is required to provide a "similar" educational placement (Knight v. District of Columbia, 877 F.2d 1025, 1028 [D.C. Cir 1989]; McKenzie v. Smith, 771 F.2d 1527, 1533 & n.13 [D.C. Cir. 1985]; see also Wagner, 335 F.3d at 301-02 [holding that it is not appropriate to

direct a district to provide an "alternative placement" if the task at hand is to identify a student's then current educational placement]). Other courts have stated that a change in educational placement has been defined as a "fundamental change in, or elimination of, a basic element of the educational program" (see Sherri A.D. v. Kirby, 975 F.2d 193, 206 (5th Cir. 1992); see also Erickson v. Albuquerque Public Schools, 199 F.3d 1116, 1121 (10th Cir. 1999)).

In Letter to Fisher, the United States Department of Education Office of Special Education Programs (OSEP) specifically addressed the question of what constitutes a change in educational placement and opined that consideration should be given to whether a change in educational placement has occurred on a case-by-case basis, as it is a very fact specific inquiry (Letter to Fisher, 21 IDELR 992 [OSEP 1994]). OSEP concluded that whether a change in educational placement has occurred turns on "whether the proposed change would substantially or materially alter the child's educational program" (*id.*). OSEP set forth the following factors to be considered in determining whether a change in educational placement has occurred:

whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements

(Letter to Fisher, 21 IDELR 992). The "then-current educational placement" more generally refers to the educational program, which is a point along the continuum of placement options and, in many instances, does not refer to a particular institution or building where the program is implemented (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20, cert. denied, 130 S. Ct. 3277 [2010]; L.M. v. Pinellas County Sch. Bd., 2010 WL 1439103, at *1-*2 [M.D. Fla. Aug. 11, 2010]).⁸

A determination regarding whether a change in location would constitute an impermissible modification of the student's pendency placement must be supported by evidence in the record (see Application of the Dep't of Educ., Appeal No. 10-110; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 01-003). An impartial hearing officer must ensure that there is an adequate record upon which to premise his or her decision and permit meaningful review of the issues (Application of the Dep't of Educ., Appeal No. 10-110; Application of the Bd. of Educ., Appeal No. 07-125; Application of the Bd. of Educ., Appeal No. 04-017; Application of a Child with a Disability, Appeal No. 02-003; Application of the Bd. of Educ., Appeal No. 01-087). The Commissioner's Regulations provide that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination" (8 NYCRR 200.5[i][4][ii]).

In this case, the impartial hearing officer made the pendency determination based upon a limited record (see Tr. pp. 1-59; Dist. Exs. 1; 2; 3; Parent Exs. A; B; C; D). The evidence contained in the hearing record establishes that the recommended middle school class in the March 2009 IEP

⁸ I note that the purpose of the pendency provision is to provide consistency in the education of a student with a disability and to remove the "unilateral authority" of the school districts "to exclude disabled students . . . from school" (Honig, 484 U.S. at 323 [1987]) and that the IDEA is silent as to whether a unilateral change in educational placement by the parents may constitute a student's pendency placement.

was a BOCES 12:1+1 special class, while the high school class in the May 2010 IEP was a BOCES 8:1+1 special class, which was reduced in size to accommodate a "job coaching component" integrated into the high school program; however, there is no evidence in the hearing record that describes this aspect of the recommended program, or how, if at all, it alters the class dynamic of the high school's 8:1+1 BOCES special class versus the middle school's 12:1+1 BOCES special class (Tr. pp. 22-24; compare Dist. Exs. 1 at pp. 1-2, 8, with 2 at pp. 1-3, 8). The hearing record also indicates that in the high school class, the student would be afforded the services of a shared aide⁹ throughout the school day, to support the student's transition to the high school environment, which, according to the hearing record, presented a total student enrollment of over 4,000 students, as opposed to just over 600 total students in the middle school (Tr. pp. 22, 31-32, 34-35; Dist. Ex. 1 at pp. 2, 8).

When asked to compare the middle school and high school programs, the district's supervisor of special education commented that "[t]here's very little difference, obviously, it's a different teacher, the class size [of the high school program] is a little bit smaller But other than that, it's a very similar program, the student profile is very similar for both programs" (Tr. pp. 23-24). She added that in comparison to the middle school program, the high school program is "the same, the needs of the students [are] the same" and advised that four students from the middle school program transitioned during the current school year to the high school program (Tr. p. 24). She also explained that the student would interact with other students in the high school building during lunch in the cafeteria (supervised by at least one teaching assistant) and gym (also supervised), but could not quantify the number of students the student would participate with during either lunch or gym in the high school placement versus the middle school placement (Tr. pp. 35-36). Furthermore, I note that there is no evidence contained in the hearing record detailing the opportunities for socialization with staff, special education peers, and other regular education students presented by the middle school program, at the high school.

Beyond this limited testimony, however, there is scant evidence contained in the hearing record comparing significant aspects of both the middle school and high school programs. Although she concluded that the high school program would be a safe location for the student, the district's supervisor of special education neither provided a basis for her opinion, nor was she able to compare the physical layouts of both schools (Tr. pp. 34-37). I find that the evidence in the hearing record is conclusory and is bereft of any discussion comparing the classroom environments of both programs beyond the student/teacher ratios, comparing how the respective programs would deliver the student's related services, or explaining the transitions the student would be required to make in both programs. The hearing record also lacks any explanation of how the shared aide, if accepted by the parents, would assist the student in these transitions, and provides no description of the student's prior difficulties with transitions that would necessitate assigning him a shared aide in the first place.¹⁰

It appears from a review of the interim decision that the impartial hearing officer emphasized the difference in the overall size of the student population between the two schools in arriving at her conclusion (see IHO Decision at pp. 5-6). However, the hearing record does not contain any information that explains how a change in the size of the student body would affect

⁹ According to the May 17, 2010 IEP, the CSE was to reconvene after the first marking period during the 2010-11 school year to "review the [student's] continued need for a shared aide" (Dist. Ex. 1 at p. 8).

¹⁰ I note that for purposes of pendency, nothing precludes the parties from agreeing to the provision of the shared 2:1 aide and the job coaching aspects of the student's program (8 NYCRR 200.5[m]).

the implementation of the student's pendency IEP. Furthermore, there is almost no description of the physical plant of either the middle school or high school setting, or whether such a change in setting, in this instance, would materially alter the delivery of the student's special education services (see Tr. pp. 32, 35). After a careful review of the totality of evidence contained in the hearing record, I find that the hearing record is not adequate to conduct a meaningful review of whether the change in location of the student's school from the district middle school to the district high school substantially or materially altered the student's educational program (see Letter to Fisher, 21 IDELR 992; Application of the Dep't of Educ., Appeal No. 10-110; Application of a Student with a Disability, Appeal No. 08-050; Application of the Bd. of Educ., Appeal No. 07-125; Application of the Bd. of Educ., Appeal No. 03-028; Application of a Child with a Disability, Appeal No. 02-031; Application of a Child with a Disability, Appeal No. 01-003). Accordingly, I will annul the impartial hearing officer's interim decision and remand this matter to the impartial hearing officer for a redetermination of the student's pendency placement based upon development of an adequate record regarding whether the change of the location of the student's school recommended by the district constitutes a change in the student's educational placement.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my decision herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's amended interim decision dated October 18, 2010 is annulled; and

IT IS FURTHER ORDERED that this matter shall be remanded to the same impartial hearing officer who shall, unless the parties agree to an alternative pendency placement, convene the impartial hearing, and upon submission of sufficient evidence by the parties, render a new determination as to the student's pendency placement within 30 days of receipt of this decision; and

IT IS FURTHER ORDERED that if the impartial hearing officer who issued the interim decision dated October 18, 2010 is not available, a new impartial hearing officer shall be appointed.

Dated: Albany, New York
December 23, 2010

JUSTYN P. BATES
STATE REVIEW OFFICER