The University of the State of New York

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

No. 12-008

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, John Tseng, Esq., of counsel

Law Offices of George Zelma, attorney for respondents, George Zelma, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining respondents' (the parents') daughter's pendency (stay put) placement during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student for the 2011-12 school year. The IHO found that the student's pendency placement was at the Rebecca School. The appeal must be sustained.

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, at least one psychologist, and school district representatives (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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

As relevant to the issues in this appeal, on November 13, 2008, the CSE convened to develop the student's program for the twelve-month period from November 26, 2008 to November 26, 2009 (Dist. Hr'g Br. Ex. A at pp. 1, 2). The November 2008 CSE continued the student's eligibility to receive special education and related services as a student with autism and determined that the student qualified for extended school year services (id. at p. 1).[1] The November 2008 CSE recommended that the student be placed in a 6:1+1 special class in a specialized school (id. at pp. 1, 2). As related services, the November 2008 CSE recommended that the student receive individual occupational therapy (OT) three times per week for 30 minutes a session, individual

[1] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

physical therapy (PT) twice per week for 30 minutes a session, individual speech-language therapy twice per week for 30 minutes a session, and speech-language therapy in a group of three, once per week for 30 minutes a session (id. at p. 18). The November 2008 CSE also recommended that the student be assigned a 1:1 health services paraprofessional and receive special education transportation in the form of an air conditioned bus and a 1:1 special transportation paraprofessional (id. at pp. 1, 18). The student attended the district's recommended program for the balance of the 2008-09 school year (Dist. Hr'g Br. at pp. 1, 3).

The CSE convened again on November 19, 2009 (see Parent Ex. E at p. 1).[2] The resultant November 2009 IEP indicates that the CSE deferred the student's specific placement to the district's central based support team (CBST) for the identification of an appropriate day program at a State-approved nonpublic school (see id. at pp. 1, 2). The November 2009 CSE further recommended that the student receive speech-language therapy, OT, and PT at the same frequency as the prior November 2008 IEP, as well as receive a 1:1 health services paraprofessional and a 1:1 special transportation paraprofessional (id. at p. 14). The November 2009 IEP indicated that the IEP was projected to be implemented on December 7, 2009 (Parent Ex. E at p. 2). The hearing record reflects that the parents were in agreement with the recommendation to defer the student's specific placement to the district's CBST, but that the CBST deferral process did not result in the identification of an approved nonpublic school (Tr. pp. 21, 23-24; Dist. Hr'g Br. at pp. 1, 3; Dist. Hr'g Br. Ex. B at pp. 2-3; see also Pet. ¶ 17; Answer ¶ 17). During the 2009-10 school year, the student continued to attend the 6:1+1 placement at the specialized school that she had been enrolled in previously during the 2008-09 school year (Pet. ¶¶ 22, 27, 33-34; Answer ¶¶ 27, 33-35).

In a letter dated June 13, 2010, the parents reportedly advised the district that the student would be placed at the Rebecca School in September 2010, and that the parents would seek tuition reimbursement from the district for the student's enrollment at that school (Dist. Hr'g Br. Ex. B at p. 4). In a due process complaint notice dated August 6, 2010, the parents requested an impartial hearing and sought the tuition and related costs for the Rebecca School (id. at pp. 1, 4, 5). The student attended the Rebecca School during the 2010-11 school year and the parties reached an agreement that the district would pay the costs of the student's tuition under the terms of a stipulation of settlement (Tr. pp. 21, 26-27; Pet. ¶ 18; Answer ¶ 18).[3, 4]

The CSE convened on May 24, 2011 to develop an IEP to begin on July 1, 2011 (Dist. Ex. 2 at pp. 1, 2; see also Parent Ex. D at p. 1; Pet. ¶ 19; Answer ¶ 19).[5] The resultant May 2011 IEP

[2] I note that the hearing record contains multiple duplicative exhibits. For purposes of this decision, only Parent exhibits were cited in instances where both a Parent and District exhibit were identical. I remind the IHO that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[3] The parents' August 6, 2010 due process complaint notice was withdrawn on or about November 23, 2010 (Dist. Hr'g Br. at p. 2; Dist. Hr'g Br. Ex. C at p. 2).

[4] The stipulation itself is not included in the hearing record, but an undisputed excerpt of the text regarding the student's "then current educational placement" and the student's entitlement for reimbursement or funding of costs associated with the student's attendance at the Rebecca School for subsequent school years was submitted for consideration (see Answer ¶ 18).

[5] There is no evidence that an IEP was developed for the student for the period December 8, 2010 to July 1, 2011 (see Pet. ¶ 18).

included sections with respect to academic performance and learning characteristics, social and emotional performance, and health and physical development (id. at pp. 3, 4, 5). The May 2011 IEP also included annual goals and short-term objectives (id. at pp. 6-14). Additionally, the May 2011 IEP included a transition plan (id. at p. 18). The May 2011 IEP also indicated that the student's behavior seriously interfered with instruction, consequently a behavioral intervention plan was developed and attached to the IEP (id. at p. 4, 19).

The May 2011 IEP recommended that the student be placed in a 6:1+1 special class in a specialized school (Parent Ex. D at p. 1). It further recommended that the student receive speech-language therapy and OT as related services, and that the student also be provided with a crises management paraprofessional and a special transportation paraprofessional (id. at p. 16). Regarding speech-language therapy, the May 2011 IEP recommended that the student be provided with individual speech-language therapy three times per week for 45 minutes (id.). With respect to OT, the May 2011 IEP recommended that the student receive individual OT three times per week for 45 minutes a session and OT in a group, once per week for 45 minutes (id.). For PT, the May 2011 IEP recommended that the student receive individual PT twice per week for 45 minutes a session (id. at p. 17).

In a notice dated June 11, 2011, the district summarized the recommendations included in the May 2011 IEP and identified the particular school to which it assigned the student for the 2011-12 school year (Dist. Ex. 3). The parents rejected the district's offer and decided to place the student in the Rebecca School for the 2011-12 school year (Parent Ex. G).

A. Due Process Complaint Notice

In a due process complaint notice dated July 1, 2011, the parents requested an impartial hearing (Parent Ex. A at p. 1). The parents asserted numerous allegations regarding procedural and substantive flaws related to the May 2011 IEP for the student for the 2011-12 school year (id. at p. 5; see also id. at pp. 2-4).[6] Among other things, the parents sought tuition reimbursement and direct funding for the student's attendance at the Rebecca School for the 2011-12 school year (id. at p. 6). With regard to the student's pendency placement, the parents requested an order that the "student's pendency placement/program" was the Rebecca School (id. at p. 6).

B. Impartial Hearing Officer Decision -- Pendency

The impartial hearing convened on October 28, 2011, at which time the IHO considered the parents' request that the student's pendency placement was the Rebecca School (see Tr. p. 7; see also Tr. pp. 6-30). The IHO issued an oral decision finding that the student's pendency placement for the 2011-12 school year was the Rebecca School (Tr. p. 28). At that time, she also advised the parties that they could submit legal memoranda with respect to her decision if they wished to do so (id.). She also advised the parties that she would be issuing a written interim order regarding pendency, which might be changed, depending on the parties' submissions (Tr. pp. 29, 30, 145).

[6] I note that both the second and third pages of Parent Ex. A are referenced as page "2." For the purposes of this decision, I will reference the third page of Parent Ex. A as page "3" of that exhibit.

The district submitted a letter brief to the IHO dated November 18, 2011 (see Dist. Hr'g Br.). The hearing record does not reflect that the parents submitted a brief to the IHO with regard to the student's pendency placement.

In an interim decision dated December 5, 2011, the IHO ruled that the student's pendency placement was the Rebecca School (Interim IHO Decision dated Dec. 5, 2011 at pp. 7-8).[7] Among other findings, the IHO concluded that the November 2008 IEP, which recommended a 6:1+1 placement and related services, was "no longer an 'agreed upon' IEP by the CSE" because the November 2009 CSE had determined that a 6:1+1 placement was not an appropriate placement for the student (id. at pp. 3-4). The IHO also concluded that the November 2009 IEP was not relevant and that the November 2009 IEP did not represent a "placement," but a deferral to the CBST (id. at p. 3; see also Dist. Hr'g Br. at p. 2).

The IHO also concluded that pendency was not strictly applied to mean only the last agreed upon IEP, but also considered other factors such as the "the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked," and concluded that this factor was relevant in this case (Interim IHO Decision dated Dec. 5, 2011 at pp. 3, 6). The IHO concluded that the Rebecca School was the student's "functioning placement" at the time the due process complaint notice was filed (id. at p. 5).

The IHO concluded that in light of the history of the two previous IEPs and the absence of an IEP during the 2010-11 school year, the district's argument that the 2008-09 IEP should determine the student's pendency placement as "the last unchallenged IEP" was not relevant because the student's "most recently implemented education program prior to initiating the impartial hearing" was the Rebecca School (Interim IHO Decision dated Dec. 5, 2011 at p. 6). The IHO further reasoned that basing the student's pendency placement on the 2008-09 IEP would "thwart the purpose of pendency" and that basing the student's current placement on a placement that was made more than three years previously and that had been determined to be inappropriate by the district would not be consistent with stability and consistency in the student's education (id. at pp. 5, 7).

IV. Appeal for State-Level Review

The district appeals the IHO's interim decision, and seeks reversal of the IHO's finding that the Rebecca School was the last agreed upon placement. In the alternative, the district seeks that the matter be remanded to the IHO to further develop the hearing record.[8] The district contends that the IHO incorrectly rejected its position and asserts that the November 2008 IEP is the last agreed upon placement and the basis for the student's pendency placement. The district further asserts that the November 2008 IEP was the last implemented IEP at the time the July 2011 due process complaint notice was filed and that the parents never challenged this IEP or its implementation during the 2008-09 school year. The district further contends that there has been no agreement to change the student's placement since that time; that the parties are in agreement

[7] I note that while the IHO's interim decision dated December 5, 2011 maintained her decision relative to the student's pendency placement, the reasoning in this interim decision was different than in her previous interim decision.

[8] The district also argues that the IHO failed to develop a sufficient record to make a determination that the Rebecca School was an appropriate pendency placement.

that the stipulation of settlement entered into with respect to the 2010-11 school year did not constitute an agreement for pendency purposes; and that there are no decisions by an IHO, an SRO, or a court subsequent to the November 2008 IEP upon which a pendency placement may be based. The district further asserts that the IHO incorrectly held that the November 2009 IEP was the last agreed upon IEP. Regarding the IHO's conclusion that the student's pendency placement for the 2011-12 school year was the Rebecca School, the district asserts that the IHO overlooked the terms of the settlement between the district and the parents relative to the student's attendance at the Rebecca School for the 2010-11 school year. The district argues that the IHO ignored relevant case law relating to settlement agreements and pendency.

In their answer, the parents contend that an earlier interim decision in November 2011 regarding pendency renders the petition untimely and that the petition should therefore be dismissed. In the alternative, the parents agree with the IHO's determination that the November 2008 IEP does not determine the student's pendency because the November 2009 CSE determined that the 6:1+1 special class placement was no longer appropriate for the student. The parents assert that the student's pendency placement should be the Rebecca School based on the November 2009 IEP which recommended deferral to the CBST for placement in a State-approved nonpublic school.

The parents further assert that they did not agree with or accept the continuation of the student's 6:1+1 placement during the 2009-10 school year, and that they were working with the district to find an appropriate State-approved nonpublic school for the student, but that the CBST placement process was unsuccessful. The parents assert that they decided to implement that IEP by placing the student at the Rebecca School. Among other things, the parents argue that the district misstated the terms of the stipulation of settlement but admit that the settlement stipulation does not establish any pendency rights relative to the student.

In its reply to the parents' answer, the district contends that its petition for review was timely.

V. Discussion

A. Preliminary Matters

1. Timeliness of the Appeal

I will initially address the parents' defense that the district's petition for review is untimely and should therefore be dismissed. An appeal from an IHO's decision to an SRO is initiated by timely personal service of a verified petition and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]; Application of a Student with a Disability, Appeal No. 11-117; Application of a Student with a Disability, Appeal No. 10-119; Application of the Bd. of Educ., Appeal No. 10-044; Application of the Dep't of Educ., Appeal No. 09-062; Application of the Dep't of Educ., Appeal No. 09-033; Application of a Student with a Disability, Appeal No. 08-142; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 05-082).

As to the time period for initiating an appeal, a petition must be personally served within 35 days from the date of the IHO's decision to be reviewed (8 NYCRR 279.2[b], [c]). State regulations expressly provide that if the IHO's decision has been sent by mail to the petitioner, the

date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition for review (8 NYCRR 279.2[b], [c]).

In this case, the IHO's interim decision is dated December 5, 2011 (see IHO Interim Decision dated December 5, 2011 at p. 8). The hearing record does not reflect whether the IHO's decision was transmitted by mail. The hearing record reflects that the district's petition was personally served on January 9, 2012 (Dist. Aff. of Service). The evidence reflects that the district served the petition within the prescribed time limits regardless of how the IHO's decision was transmitted. Accordingly, I find that the petition is timely (see 8 NYCRR 279.2[c]).[9]

2. Additional Evidence

With regard to additional evidence that was submitted with the parents' answer, generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO'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. 11-041; Application of a Student with a Disability, 10-047; Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; 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). The additional documentary evidence either could have been submitted at the time of the impartial hearing or is not necessary in order to render a decision. Accordingly, I will not consider this additional evidence.

With respect to the district's objection to certain references to testimony cited in the parents' answer, the district correctly notes that those references were to testimony that was given subsequent to the October 28, 2011 proceedings related to the IHO's pendency determination. Consequently, the district did not submit this portion of the hearing record with its petition. However, with regard to these particular citations, even if I accept the parents' factual allegations set forth in their answer as true, it would not alter the outcome of my decision.

B. Applicable Standards -- Pendency

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], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Student X, 2008 WL 4890440, at *20; O'Shea, 353 F. Supp. 2d at 455-56; 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;

[9] I am not persuaded by the parents' assertion that the timeliness of the petition should be based on the date of an earlier interim decision in November 2011. Even if I accepted their argument, under the circumstances of this case, the parents' success would likely be short lived insofar as State regulations would permit the review of any interim decision issued by the IHO after the final decision is issued (8 NYCRR 279.10[d]).

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., 694 F.2d at 906; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker, 78 F.3d at 864). 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 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). Furthermore, the pendency provisions of the State Regulations do not require that a student who has been identified as a preschool student with a disability must remain in a preschool program for which he or she is no longer eligible pursuant to Education Law § 4410 (Application of the Bd. of Educ., Appeal No. 07-125; 8 NYCRR 200.16[h][3][i]; see 8 NYCRR 200.5[m]).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (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 the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy, 86 F. Supp. 2d at 359; 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 the current 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. Raelee, 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 IHO'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 Second Circuit has described three variations on the definition of "then current educational placement:" (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked; and (3) the placement at the time of the previously implemented IEP (Mackey, 386 F.3d at 163, citing Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 [6th Cir. 1990] [emphasis added]; see Application of a Student with a Disability, Appeal No. 09-125;

Application of the Bd. of Educ., Appeal No. 08-126; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 05-006).

Turning to the district's request to overturn the determination that the Rebecca School was the student's pendency placement, I find that the IHO erred in concluding that the student's pendency placement was the Rebecca School. The parties agree that the stipulation of settlement providing for the public funding of the student's tuition costs at the Rebecca School for the 2010-11 school year does not establish the student's pendency placement for the 2011-12 school year (Tr. p. 22; Pet. ¶¶ 18, 29; Answer ¶¶ 18, 29). In cases involving stipulations between parents and boards of education, the determinative issue when deciding whether a stipulation becomes the basis for a student's pendency placement is whether the stipulation was explicitly limited to a specific school year or definite time period (Evans, 921 F. Supp. at 1187-88). In the instant case, the stipulation of settlement at issue set forth specific school year limitations insofar as it stated that the stipulation shall not be relied upon to establish the Rebecca School as the then current educational placement for the 2010-11 school year or any subsequent school year and that the stipulation did not require the district to pay for the student's attendance at the Rebecca School for any subsequent school years (Answer ¶18), and the 2010-11 school year has now expired. In Zvi D., the Second Circuit determined that the agreement expressly limited the time period the school district had agreed to pay tuition and as such the private school was not the student's pendency placement (Zvi D., 694 F.2d at 907-08; see also Verhoeven v. Brunswick Sch. Comm., 207 F.3d 1, 9-10 [1st Cir. 1999]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2002 WL 818008, at *4-*5 [N.D. Ill. 2002]; Mayo v. Baltimore City Pub. Sch., 40 F. Supp. 2d 331, 334 [D. Md. 1999]). Accordingly, in this case, the public funding supporting the student's placement at the Rebecca School pursuant to the stipulation of settlement does not establish the student's placement there.

Furthermore, there is no agreement otherwise by the parties or prior unappealed adjudication providing that the Rebecca School was an appropriate placement for the student that supports a determination that the Rebecca School is the student's pendency placement.

As described below, I find that based on the facts of this case, the student's pendency placement includes a 6:1+1 special class in a specialized school. The hearing record reflects that the parents agreed to this placement in 2008 insofar as there is no dispute that this placement was recommended in the November 2008 IEP and which was implemented during that school year (see Dist. Hr'g Br. at pp. 1, 3; Pet. ¶ 16; Answer ¶ 16). I further note that while the parents and the district did not agree with the proposed November 2009 IEP, the student continued in the same 6:1+1 special class placement in a specialized school during the 2009-10 school year that the student attended during the 2008-09 school year (see Tr. pp. 21, 23-34; Dist. Hr'g Br. at pp. 1, 3; Dist. Hr'g Br. Ex. B at pp. 2-3; Pet. ¶¶ 17, 22, 27, 33, 34; Answer ¶¶ 17, 27, 33, 34, 35).

The IHO reasoned that Mackey supports the conclusion that the student's pendency placement for the 2011-12 school year was the Rebecca School because the student was enrolled in and attending the Rebecca School at the time of the July 2011 due process complaint notice and therefore it was the operative placement actually functioning at the time pendency was invoked. However, circuit courts discussing the "operative placement" principle have noted that it applies to the IEP functioning at the time pendency was invoked or to the operative placement functioning "before any IEP has been implemented" (Drinker, 78 F.3d at 867 [emphasis added] quoting Thomas, 918 F.2d at 626; see Mackey, 386 F.3d at 163). The principle does not apply to the

Rebecca School in this case insofar as there has been no decision by the district to place the student there pursuant to an IEP and there has been no determination by an IHO, SRO or court that may be looked to in order to support the conclusion that the Rebecca School has become the student's pendency placement.[10] Furthermore, as explained above, the record reflects that the November 2008 IEP had actually been implemented and, therefore, this is not one of those instances in which pendency has been invoked before any IEP has been implemented for the student.[11] For the reasons above, I decline to adopt the IHO's conclusion that the Rebecca School was the student's pendency placement.

VI. Conclusion

In view of the foregoing discussion, I find that the student's pendency placement includes a 6:1+1 special class in a specialized school and that the portion of the IHO's interim decision finding the student's pendency placement is the Rebecca School must be reversed.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated December 5, 2011 is modified by reversing that portion which found that the Rebecca School is the student's pendency placement; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the student's pendency placement is a 6:1+1 special class in a specialized school in the event that the parents decide to enroll the student in a public school placement.

Dated: **Albany, New York**
March 1, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER

[10] I am also not persuaded by the parents' argument that they can unilaterally place the student in a non-approved, nonpublic school without the consent of the district to implement an IEP and thereafter successfully rely on such placement as the pendency placement at public expense, especially in the absence of any administrative or judicial finding that there has been a denial of a FAPE and that the resulting unilateral placement is appropriate.

[11] I recognize that the parties may have agreed at times in the past that a 6:1+1 special class placement was not appropriate for the student; however, what is "appropriate" for the student is a matter left to be resolved during the merits of this case and is not relevant to the analysis of the "then current educational placement," which is automatic in nature. If both parties come to believe that a different publicly funded placement becomes critical during the litigation, the IDEA provides that they may agree to alter the student's placement for purposes of pendency (20 U.S.C. § 1415[j]). Similarly, the determination in this decision has no bearing on the merits of the parties' current dispute over the CSE's recommendations (see Dist. Ex. 6).