



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-036

**Application of a STUDENT WITH 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:**

Law Offices of Anton Papakhin, PC, attorneys for petitioner, Anton Papakhin, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for direct funding of her son's tuition costs at Kulanu Academy (Kulanu) for the 2011-12 school year. Respondent (the district) cross-appeals from the IHO's determination that it must continue to fund the student's 1:1 paraprofessional and related services at Kulanu pursuant to pendency (stay-put) provision until such time as the district offers the student a free appropriate public education (FAPE). The appeal must be sustained. The cross-appeal must be sustained in part.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school 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]; 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**

According to the hearing record, the student received diagnoses of cerebral palsy and ulcerative colitis; uses a wheelchair, a walker, and leg braces to assist him with ambulation; requires assistance throughout the day with activities of daily living (ADL) skills including toileting, eating, and dressing; and presented with a general learning disability (Tr. pp. 33, 35, 51-53; Parent Exs. B at pp. 1, 5; C at pp. 1, 5; K at p. 1). The student has attended Kulanu since the 2005-06 school year (see Tr. p. 56). Kulanu has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities

(Tr. p. 8; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute in this proceeding (Tr. p. 46; see 34 CFR § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

On April 13, 2011, the CSE convened for the student's annual review to develop his IEP for the 2011-12 school year, when he was 19 years old (Parent Ex. C at p. 1).<sup>1</sup> The CSE recommended, among other things, a 12-month educational program consisting of a 12:1+4 special class in a specialized school and related services consisting of speech-language therapy once per week for 30 minutes per session in a 3:1 setting, physical therapy (PT) 5 times per week for 45 minutes per session in a 1:1 setting, occupational therapy (OT) 3 times per week for 30 minutes per session in a 1:1 setting, and counseling once per week for 30 minutes per session in a 3:1 setting (id. at pp. 1-5, 13, 15-16).

By final notice of recommendation (FNR) dated June 13, 2011, the district summarized the recommendations made by the April 2011 CSE and informed the parent of the particular school to which the district assigned the student (Parent Ex. F at p. 1). In a handwritten notation on the FNR dated August 17, 2011, the parent stated that she "could not accept or reject" the assigned school until she could visit it in September 2011 (id.).<sup>2</sup> By letter dated August 22, 2011, the parent informed the district that she was unable to visit the assigned school because it was closed at that time, but indicated that she would "make every effort to observe the offered program in September 2011," and that she would notify the CSE if the "program placement" was appropriate and if she intended to enroll the student in the "recommended placement" (Parent Ex. E at p. 1). The parent also stated that her letter served as a "10 day notice letter" and that "[i]f the recommended placement was not appropriate, an impartial hearing would be requested "in order to secure reimbursement and/or direct payment for the [student's] tuition for the 2011-12 school year" at Kulanu (id.).

### **A. Due Process Complaint Notice**

In her August 31, 2011 due process complaint notice, the parent alleged, among other things, that the district failed to offer the student a FAPE for the 2011-12 school year because the April 2011 IEP terminated the services of the student's 1:1 health management paraprofessional and the student's three weekly sessions of PT delivered in a 2:1 setting, both of which had been provided to the student during the 2010-11 school year under his previous IEP dated May 25, 2010, and because the annual goals and short-term objectives contained in the April 2011 IEP were not

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<sup>1</sup> I remind the district that "IEPs developed for the 2011-12 school year, and thereafter, shall be on a form prescribed by the Commissioner" (8 NYCRR 200.4[d][2]; see "Model Forms: Student Information Summary and Individualized Education Program (IEP)," Office of Special Educ. Mem. [Jan. 2010], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/memo-Jan10.htm>; see also "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents: Miscellaneous Questions," Question 2, Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/answers-misc.htm>).

<sup>2</sup> A second handwritten note by the parent on the June 2011 FNR dated October 26, 2011 (after the parent's due process complaint notice), stated that she had visited the particular school recommended in the FNR, "but it was totally inappropriate" for the student and set forth the reasons she believed that the school could not "offer him an appropriate education" (Parent Ex. F at p. 1).

sufficiently related to the student's present levels of performance (Parent Ex. A at p. 2). The parent sought a pendency order from an IHO directing the district to continue to provide the student's 1:1 paraprofessional and related services as recommended in his May 2010 IEP, and for an IHO to direct the district to reconvene the CSE to modify the student's April 2011 IEP to include a full-time 1:1 health management paraprofessional and PT three times per week for 30 minutes per session in a 2:1 setting consistent with his May 2010 IEP (Parent Ex. A at pp. 2-3).<sup>3</sup>

After filing the due process complaint notice,<sup>4</sup> the parent visited the assigned school in September 2011 and believed it was inappropriate for the student (Tr. pp. 57-60). The hearing record reflects that the student began the 2011-12 school year at Kulanu on September 6, 2011 (Parent Ex. O), and that on September 23, 2011, the parent signed an enrollment contract with the school applicable to the student's 2011-12 school year (Parent Ex. N).

## **B. Impartial Hearing Officer Decision**

On September 15, 2011, an impartial hearing convened in this matter and concluded on December 14, 2011 after three days of proceedings.<sup>5</sup> Pursuant to an order on pendency dated

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<sup>3</sup> Although the parent's August 22, 2011 letter to the district indicated that she would be requesting an impartial hearing "in order to secure reimbursement and/or direct payment for the [student's] tuition for the 2011-12 school year at [Kulanu]," the parent's due process complaint notice did not specifically seek such relief (compare Parent Ex. A at pp. 2-3, with Parent Ex. E at p. 1).

<sup>4</sup> The hearing record does not indicate the date upon which the parent visited the assigned school.

<sup>5</sup> The hearing record reflects that on September 15, 2011 representatives for both parties were in attendance (see Tr. pp. 1-11), and on November 7, 2011 the district's representative appeared telephonically due to a scheduling conflict, at which time the IHO granted a joint request from both parties to adjourn the impartial hearing to December 14, 2011 (see Tr. pp. 13-19). On December 14, 2011 the district's representative failed to appear due to another scheduling conflict, and the IHO indicated on the record that between November 7, 2011 and December 14, 2011, the district's representative "sent...several E-mails asking for [another] adjournment unofficially, and I kept telling her that I wasn't able to grant her an adjournment because of her scheduling conflict," adding that the district's representative "asked for an adjournment officially on December [2, 2011] and it was denied because her scheduling conflict was not good cause in order for me to delay this case any longer" (Tr. pp. 21, 24-25). The IHO noted that the district's representative made another e-mail request for an adjournment on December 9, 2011, again due to a scheduling conflict, and that the IHO telephoned the district's representative and left a message indicating that "I told [the district's representative] that if she had another hearing scheduled at 9:30 [a.m.] today, I would ... appear as early as 8:00 a.m. in order to accommodate her schedule, if she could work it out with [the parent's advocate]," but that the district's representative "never contacted me in response to my offer to reschedule this hearing and I did tell her that I was not willing to adjourn [the impartial hearing] again" (Tr. pp. 25-27). Although the district did not present evidence and confront, cross-examine, and compel the attendance of witnesses as guaranteed under the IDEA and State and federal regulations (see 20 U.S.C. § 1415[h][2]; 34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]), it was not for a lack of opportunity to do so, (albeit not under ideal conditions), I note that, according to the US Department of Education's (USDOE's) Office of Special Education Programs (OSEP) in Letter to Anonymous, (23 IDELR 1073[OSEP 1995]), "decisions regarding the conduct of [IDEA] due process hearings are left to the discretion of the hearing officer. These decisions, however, are subject to review under [the federal regulations] if a party to the hearing believes that the hearing officer has compromised the party's [due process] rights." In this case, I note that the district does not challenge the IHO's action in its answer and cross-appeal. However, assuming for the sake of argument that the district did advance such a challenge, IHOs have the authority to proceed with an impartial hearing in the absence of a party, provided that said party has been notified of the impartial hearing date and been afforded ample opportunity to participate in the impartial hearing (see Davis v. Kanawha Cty. Bd. of Educ., 2009 WL 4730804, at \*11-\*14 [S.D.W.V. Dec. 4, 2009]; Horen v. Bd. of Educ., 655 F. Supp. 2d 794, 806-07 [N.D. Ohio Sept. 8, 2009]). In this case, the hearing

September 15, 2011, the IHO noted that the parties agreed that the student was entitled to receive the related services mandated on his May 2010 IEP pursuant to pendency and therefore, she directed the district to provide the student with those services "until such time that the due process proceedings have been completed" (Tr. pp. 9-11; IHO Ex. II at pp. 2-6).

On January 4, 2012, the IHO issued a decision finding, among other things, that the district failed to offer the student a FAPE for the 2011-12 school year, and that the hearing record did not show that Kulanu is an appropriate placement for the student (IHO Decision at pp. 6-9). Specifically, the IHO found that Kulanu is inappropriate for the student because the parent failed to produce any evidence relative to the 2011-12 school year establishing that Kulanu's educational program is specifically designed to address the student's unique educational needs,<sup>6</sup> detailing the nature of the academic instruction and vocational training that the student receives at Kulanu, and describing the student's progress in his related services at the school (*id.* at p. 9). The IHO also concluded that Kulanu is inappropriate because, with the exception of math and "workplace literacy," the majority of work done by the student at Kulanu during the 2011-12 school year is overseen by his 1:1 paraprofessional and related service providers, all of whom are funded by the district (*id.*).

Although she denied the parent's request for tuition reimbursement, the IHO remanded the case to the CSE to "update assessments and hold a new review to determine an appropriate placement" (IHO Decision at p. 9). She further ordered the district to maintain the student's related services pursuant to the May 2010 IEP and September 15, 2011 pendency order "until such time that the . . . district offers a [FAPE] to him" (*id.* at pp. 9-10).

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

The parent appeals from the IHO decision, and argues, among other things, that Kulanu is an appropriate placement for the student for the 2011-12 school year, that the student's progress is not the sole determining factor relevant to determining whether Kulanu is appropriate for the student, and that the hearing record does not support an inference that the student's 2011-12 progress reports were deliberately withheld by the parent. The parent seeks reversal of the IHO decision and an order determining that she is entitled to direct funding from the district for the student's tuition at Kulanu for the 2011-12 school year.

In its answer, the district asserts that the IHO correctly found that Kulanu is not an appropriate placement for the student for the 2011-12 school year, because its program is not specifically designed to address the student's unique special education needs, the hearing record lacks evidence establishing that the student progressed at Kulanu during the 2011-12 school year,

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record establishes that the IHO acted within her discretion in proceeding with the impartial hearing on December 14, 2011, because the district presented with multiple scheduling conflicts, had ample notice of the December 14, 2011 hearing date, and was afforded the opportunity to participate in the impartial hearing on December 14, 2011 through the IHO's attempt to reschedule the start time of the impartial hearing for the purpose of accommodating the district representative's scheduling conflict.

<sup>6</sup> The IHO stated that "[a]ll of the reports that were submitted were from the prior school year, and, as the impartial hearing took place in December [2011], there was no reason why this information was not produced" (IHO Decision at p. 9).

and Kulanu's program fails to address the student's related services needs. However, in the event that the unilateral placement is found to be appropriate for the student, the district advances the argument that equitable considerations should preclude direct tuition funding because Kulanu's tuition is "excessive and unreasonable" as it does not include the student's 1:1 paraprofessional and his related services, all of which are funded by the district.

The district cross-appeals the portion of the IHO's decision directing the district to continue to fund the student's 1:1 paraprofessional and related services at Kulanu pursuant to the IHO's September 15, 2011 interim order on pendency "until such time that the school district offers a [FAPE] to him" (IHO Decision at pp. 9-10), arguing that the IHO lacked the authority to direct the district to continue to provide the student with these services beyond the pendency of these proceedings, and seeks reversal of that portion of the IHO's decision and dismissal of the parent's petition. The parent submitted an answer and a reply to the district's answer and cross-appeal and maintains that the pendency aspect of the IHO's decision should be upheld.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR. 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## VI. Discussion

### A. Limited Issues on Appeal

Before turning to the merits of the appeal and cross-appeal, I note that in its answer, the district concedes that it did not offer the student a FAPE for the 2011-12 school year, and therefore, does not cross-appeal the IHO's finding to that effect (Answer ¶ 39; see IHO Decision at pp. 8-9). I also note that the parties do not appeal the IHO's remand of this case to the CSE for the purposes of updating the student's evaluations, holding another CSE meeting, and developing an appropriate program and placement for the student (see IHO Decision at p. 9). An IHO decision is final and binding upon the parties unless appealed to an SRO (34 CFR § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Consequently, these findings will not be further addressed in this decision.

### B. Appropriateness of Kulanu

With regard to whether the parent's unilateral placement of the student at Kulanu was appropriate for the student, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]; see also Educ. Law § 4404[1][c]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459

F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, \*9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

The IHO based her finding that Kulanu is not appropriate for the student for the 2011-12 school year in part upon determinations that, during the impartial hearing the parent failed to present evidence, specifically reports from the 2011-12 school year demonstrating how Kulanu's educational program is specially designed to address the student's unique educational needs (IHO Decision at p. 9). However, although the IHO correctly noted that the documents proffered by the parent were generated during the student's 2010-11 school year (see Parent Exs. G-M), the hearing record also contains testimony from Kulanu's coordinator of school programs (coordinator) and the parent describing the student's educational program and his performance at the school during the 2011-12 school year at issue (see Tr. pp. 30-63). After careful review, I find that, for the reasons discussed below, the documentary and testimonial evidence contained in the hearing record, when considered together, demonstrates that the IHO erred in concluding that the parent's unilateral placement of the student at Kulanu for the 2011-12 school year is not an appropriate placement for the student.

According to the hearing record, Kulanu, a school consisting entirely of students with disabilities, has a total of 37 students and 11 State certified special education teachers for the 2011-12 school year (Tr. p. 32; Parent Ex. D at p. 1). The hearing record reflects that the student is enrolled in Kulanu's "Bridges to the Future" program, described by Kulanu's coordinator as a program "for students 18 to 21 [years old] that really need a very functional, vocational, educational program," which focuses on enabling a students to "transition successfully from their role of 'high school' students to their new role as adults in the community" (Tr. pp. 33-34; Parent Ex. D at p. 1). Although the hearing record does not indicate the total number of students in the student's class, it reflects that the class is staffed with one teacher and four teaching assistants, and



that the student receives the services of a 1:1 paraprofessional throughout the school day, in addition to the related services discussed below (Tr. pp. 33-34, 43-46; Parent Ex. D).

The student's progress and ongoing needs with regard to academics, social/emotional functioning, fine motor skills, gross motor skills, speech-language development, and vocational skills were identified in progress reports prepared by Kulanu staff during spring 2011 (see Parent Exs. H-M). With regard to academics, the student's 2010-11 special education teacher at Kulanu indicated in a 2010-11 third trimester report that, among other things, the student demonstrated continued needs in his abilities to independently read and use functional vocabulary terms, produce legible handwriting, and independently use functional math skills, such as rounding amounts of money to the nearest dollar and differentiating between a dollar sign (\$) and the number "5" (Parent Ex. H at pp. 1-2).

With regard to the 2011-12 school year, Kulanu's coordinator indicated that the student's academic needs are addressed in part through his participation in a workplace literacy class, which focuses on developing his functional literacy skills, such as reading signs posted in the community and learning to categorize and sort items such as clothing and groceries, and in a functional math class, which targets the student's practical math skills, including "money math" and "menu math" to prepare him to enter the community and purchase his own lunch, and addresses concepts of measurement (Tr. p. 37). Kulanu's coordinator also testified that the student follows a flexible schedule at the school, which allows him to work individually with his teachers to cover any classroom material he missed while receiving his related services, and that his teacher wrote "internal" goals for the student (Tr. pp. 40-41).<sup>7</sup> Kulanu's coordinator further stated that she set her own goals for the student, which included introducing the student into the work world, participating in the community as much as possible, increasing his verbalization, and making him feel more a part of a group to improve his self-esteem (Tr. p. 41). In furtherance of these goals, Kulanu's coordinator also described a "different kind of mainstreaming activity" that the school offers to the student once per week, during which the student, accompanied by his 1:1 paraprofessional, purchases his own lunch and spends lunch time with a mainstream student from another school (Tr. pp. 39-40).

The student's social/emotional needs were identified in an April 11, 2011 counseling progress report completed by Kulanu's school psychologist (Parent Ex. M). The report included a list of goals for the student, which targeted increasing the student's abilities to express his feelings about specific issues and his wants and needs to school staff and peers; initiating and maintaining social interactions with peers and adults using appropriate behaviors and verbalizations, such as maintaining eye contact, respecting personal space boundaries, and using verbal and nonverbal greetings; and verbally identifying his own particular strengths and weaknesses (*id.*). Kulanu's coordinator testified that the student sees a psychologist at Kulanu once per week, and that sessions address the student's mild depression and his desire "to be included and not be treated differently," and she added that "[h]e's more open to all of us here. ... he's comfortable in the sense that he has a lot of disabilities. He doesn't get lost. ... But with the small classes and just the whole small organization, we get to really tap in on his abilities" (Tr. pp. 42, 45-46).

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<sup>7</sup> The content of these internal goals was not described in the hearing record.

The student's occupational therapist at Kulanu identified the student's needs in the areas of fine motor skills, focus and attention, and self-care skills in a spring 2011 OT progress report (Parent Ex. K at p. 1). The report reflected that the student continued to require moderate to maximum assistance with most self-care activities including toileting, dressing, and feeding, that he worked best in a 1:1 setting due to his difficulty focusing and his lack of safety awareness (particularly when transferring from his wheelchair to a standard classroom chair), and that he continued to exhibit deficits in fine motor skills and control, including arm/hand control, finger dexterity, finger opposition, bilateral coordination, handwriting, and typing proficiency (*id.* at pp. 1-2).

With regard to the 2011-12 school year, the Kulanu coordinator indicated that the school's occupational therapist works with the student three times per week in a 1:1 setting, and addresses his feeding skills, including cutting food, feeding himself with a fork, and organizing his table when food is served (Tr. pp. 41, 45). She also testified that the occupational therapist works with him in the classroom on handwriting skills, and currently focuses on increasing the student's computer typing skills (Tr. p. 45). Kulanu's coordinator further testified that the student's 1:1 aide also addresses the student's self-care skills by working with the student upon his arrival at school and encouraging him to unpack his book bag, retrieve his homework, and prepare for his day, and indicated that during breakfast, the student's vocational coordinator encourages the student "to help set up for breakfast, meaning that he'll at least put the plates out or the napkins out" (Tr. pp. 36-37).

In a June 11, 2011 PT annual report, the student's physical therapist at Kulanu identified the student's gross motor deficits in range of motion, muscle strength, balance, and control of movements (Parent Ex. L at p. 1). The physical therapist developed long and short-term goals for the student which primarily focused on improving his ambulation using his wheelchair or walker, and increasing his muscle strength, flexibility and range of motion to assist him in negotiating the school environment and in performing educational and daily living activities (*id.* at p. 2). Kulanu's coordinator indicated that the student currently receives 8 sessions of PT per week for 30 minutes per session in a 1:1<sup>8</sup> setting, and advised that his physical therapist collaborates with the student's physical education teacher to reinforce the skills learned during PT in his adapted physical education class (Tr. pp. 40-41, 44).

Relative to the student's speech-language needs, in an April 5, 2011 speech-language progress note, the student's speech-language pathologist at Kulanu indicated that the student demonstrated continued needs with regard to receptive, expressive and pragmatic language, and oral motor skills (Parent Ex. J). The report reflected that the student's receptive language goals continued to focus on developing his abilities to follow multistep directives, to respond to simple questions regarding basic short stories and past events, to sequence pictures using concepts of first, next and last, and to process information presented orally (*id.* at p. 1). According to the progress note, with respect to expressive language skills, the student continued to experience difficulties with word recall, describing pictures, and expressing similarities and differences between pictures

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<sup>8</sup> Kulanu's coordinator testified that for the 2011-12 school year, the student was originally scheduled to receive 5 sessions of PT per week for 30 minutes per session in a 1:1 setting, and 3 sessions of PT per week for 30 minutes per session in a 2:1 setting; however, because there were no other students to pair the student with, he receives all 8 of his PT sessions in a 1:1 setting (*see* Tr. pp. 43-44).

and objects (*id.*). With regard to pragmatic language skills, the speech-language pathologist noted the student's continued difficulties initiating and maintaining conversations with peers and developing appropriate solutions to a given problem (*id.* at p. 2). The student's continued oral motor needs, as identified in the progress note, included decreased oral facial muscle tone, open mouth posture/drooling, and supervision during eating to ensure that the student took small bites, chewed his food, and swallowed before taking another bite; the speech-language pathologist also noted that the student's articulation was affected by his low oral facial muscle tone and identified sound substitutions, distortions, and omissions within his speech (*id.*).

During the school year at issue, Kulanu's coordinator testified that the student receives individual speech-language therapy three times per week, and that the student's speech-language pathologist occasionally takes the student out into the community to order his food, which affords him opportunities to use words, communicate, and engage in conversations in order to develop the student's functional language (Tr. pp. 44-45).

In a vocational progress report dated June 10, 2011, the student's job coach at Kulanu indicated that the student participated in the school's career development program, which combined school-based and work-based activities, and that the student worked at the school's retail center identifying merchandise and sorting, labeling, hanging, and buttoning clothing (Parent Ex. I at p. 1). The vocational progress report also reflected that the student's job coach collaborated with the student's classroom teacher to assist the student in generalizing and reinforcing both mastered and current math goals, such as counting bills, identifying currency denominations, and role playing a customer making a purchase (*id.*). The student's job coach opined that the student needed to work on problem solving in the workplace by better communicating his wants and needs and by seeking out natural supports to assist him when appropriate, improving fine and gross motor skills in the workplace to complete assigned tasks more independently and accurately, sustaining his focus for longer periods of time, and exploring other "career clusters" (*id.* at pp. 1-2). Kulanu's coordinator corroborated that the student currently works in the school's "mock-retail" store, where he sorts, folds, hangs, and places items in the appropriate aisle by category, noted that the student has shown an interest in working in a retail store, and testified that the student's goal for the 2011-12 school year is to be placed in a retail store for at least 90 minutes per day (Tr. pp. 37-39, 41; see Parent Ex. C at p. 4).

Based on the above, I find that there is sufficient evidence in the hearing record to demonstrate how Kulanu's educational program was specially designed to address the student's unique educational needs during the 2011-12 school year.

### **C. Related Services**

The IHO also found Kulanu inappropriate for the student for the 2011-12 school year because his 1:1 paraprofessional and related services<sup>9</sup> were funded by the district, and not included in Kulanu's tuition (IHO Decision at p. 9). Kulanu's coordinator testified that the student's related service providers are Kulanu employees, with the exception of the student's physical therapist, who was "contracted out" (Tr. p. 42). Kulanu's executive director confirmed that neither the

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<sup>9</sup> I note that, according to the hearing record, the student receives related services at Kulanu similar to those recommended by the April 2011 CSE (compare Tr. pp. 41-42, 44-45, with Parent Ex. C at pp. 1-5, 13, 15-16).

student's 1:1 paraprofessional nor any of his related services are included in the school's annual tuition, but are funded either directly by the parent or through related services authorizations (RSAs) (Tr. pp. 64-65; see Parent Ex. N at p. 2). However, as discussed above, in order to establish the appropriateness of a unilateral placement to address a student's needs, the parent need not show that the placement provides every special service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; M.H. v. Dep't of Educ., 712 F. Supp. 2d 125, 166 [S.D.N.Y. May 10, 2010]; Stevens, 2010 WL 1005165, at \*9; see R.K. v. Dep't of Educ., 2011 WL 1131522, at \*3-\*4 [E.D.N.Y. Mar. 28, 2011]). Based on the circumstances in this case, where the student was receiving the necessary related services, the fact that the parent availed herself of a right afforded by the IDEA itself by seeking funding for a paraprofessional and related services from the district pursuant to its obligation to provide the student with pendency services does not per se result in a finding that the parent's unilateral placement is therefore inappropriate. To hold otherwise would suggest that parents in these circumstances are required to forgo pendency services in order to assert a viable tuition reimbursement claim; however, the district points to no authority to support such an argument.

#### **D. Progress at Kulanu**

Finally, the IHO also concluded that Kulanu was not appropriate for the student because the hearing record lacked evidence establishing the student made progress in his related services at the school during the 2011-12 school year (IHO Decision at p. 9). In this case, while the hearing record reflects that the student made slow progress during the 2010-11 school year (see Parent Exs. G; H at pp. 1-2; I at p. 1; J-K),<sup>10</sup> it lacks documentary evidence addressing the student's progress at Kulanu during the 2011-12 school year. However, the parent testified that the student has made slow gains at the school, as exemplified by his developing ability to read a simple book in its entirety by the end of summer 2011 (Tr. pp. 60-61). Moreover, although the Second Circuit has indicated that a student's progress in a private school is a relevant factor that may be considered when reviewing whether a private school is appropriate, progress by itself does not suffice to demonstrate that such a placement is appropriate (Gagliardo, 489 F.3d at 115; Stevens, 2010 WL 1005165, at \*8-\*9). Nor is a finding of progress required for a determination that a student's private placement is adequate (G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at \*3 [S.D.N.Y. Aug. 7, 2009]; see also Frank G., 459 F.3d at 364).

Based upon the foregoing, I find that the hearing record establishes that, relative to the 2011-12 school year, Kulanu has identified the student's needs in the areas of academics, social/emotional functioning, fine motor skills, gross motor skills, speech-language development, and vocational skills, and developed a special education program that provides educational instruction specially designed to meet the unique needs of the student, supported by such services as are necessary to permit the student to benefit from instruction (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65). Consequently, I find that the IHO erred in finding that Kulanu was not an appropriate placement for the student for the 2011-12 school year, and that the IHO's finding must be reversed.

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<sup>10</sup> The June 2011 PT annual report indicated that the student made no progress in the area of gross motor skills because his PT did not begin until the end of the 2010-11 school year (Parent Ex. L at p. 1).

## E. Equitable Considerations

Having determined above that Kulanu is an appropriate placement for the student for the 2011-12 school year, I will now consider whether equitable considerations support the parent's claim for \$53,550 in tuition costs at Kulanu (see Parent Ex. N at p.2). Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at \*13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

In this case, the IHO did not reach the issue of equitable considerations because she determined that the parent failed to prove that Kulanu is an appropriate placement for the student for the 2011-12 school year. However, in its answer, the district argues that the parent's claim for direct tuition funding should be denied because Kulanu's tuition for the 2011-12 school year is "excessive and unreasonable," insofar as it does not include funding for the student's 1:1 paraprofessional and his related services, all of which are funded by the district. Although the cost of the student's education at the unilateral placement is a permissible factor for consideration in fashioning equitable relief (see Carter, 510 U.S. at 16), the fact that Kulanu's tuition does not include the student's 1:1 paraprofessional and related services does not, by itself, render the school's tuition unreasonable or excessive, and, considering that the district does not point to any evidence to support its contention, I find its argument unavailing.

With regard to fashioning equitable relief, in a case of first impression, one court has recently addressed whether it has the authority under the IDEA to grant relief it deems appropriate, including ordering a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A.v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct

tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 358-60). The Mr. and Mrs. A. Court held that in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430).<sup>11</sup> Since the parent has selected Kulanu as the unilateral placement, and her financial status is at issue, I assign to the parent the burden of production and persuasion with respect to whether the parent has the financial resources to "front" the costs of Kulanu and whether she is legally obligated for the student's tuition payments (Application of the Dep't of Educ., 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).<sup>12</sup>

In this case, the parent submitted evidence showing that she was legally obligated to pay the student's tuition costs and regarding the financial status of her and her husband including wages of approximately \$20,000, and a lack of income from other sources (Parent Exs. N; M). I also note that the district does not question the parent's inability to front the costs of the student's tuition at Kulanu. Under the circumstances of this case, I find that equitable considerations do not preclude the parent's claim for direct funding of the student's tuition for the 2011-12 school year at Kulanu under the factors described in Mr. and Mrs. A.

## **F. Related Services Pursuant to Pendency**

Next I will address the district's cross-appeal, which asserts that the IHO erred in ordering the district to continue to provide the student with the related services recommended in his May 2010 IEP pursuant to the IHO's September 15, 2011 interim order on pendency "until such time that the school district offers a [FAPE] to him," notwithstanding her determination that Kulanu was an inappropriate placement for the student for the 2011-12 school year (IHO Decision at pp. 9-10). Specifically, the district argues that the IHO lacked authority under the IDEA and federal and State law to compel the district to continue to provide the student's related services under a

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<sup>11</sup> The court in Forest Grove noted that the remedial powers set forth in the statute are also applicable to administrative hearing officers in fashioning Burlington/Carter relief (Forest Grove, 129 S. Ct. at 2494 n.11 see 20 U.S.C. § 1415[i][2][C][iii]).

<sup>12</sup> Although unnecessary to my determination in this case, I note that in Mr. and Mrs. A., the court did not establish what should be considered as part of parents' "financial resources" for purposes of determining their ability to pay the costs of tuition for a private school. For instance, it is unclear whether a determination of a parent's financial resources should take into account only his or her annual wages or whether it should also consider items such as cash or its equivalents that the parent has on hand, the parent's ability to access financing, other investments, the unrealized earning potential of a nonworking parent, or the value of luxury items belonging to the parent just to name a few (see Connors, 34 F. Supp. 2d at 806 n.6 [describing that the calculation of a parent's need should be conducted by drawing from a school's experience in determining a parent's eligibility for financial aid]; Application of the Dep't of Educ., 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

pendency order after the proceedings that gave rise to the pendency order have concluded. For the reasons discussed below, I concur with the district's argument.

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 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 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 USDOE 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).

In this case, the hearing record indicates that the parties agreed that the student was entitled to receive to those related services enumerated in his May 2010 IEP as his pendency placement (Tr. pp. 8-9; IHO Ex. II at p. 2); subsequently, the IHO issued an interim decision, ordering the district to provide the student with a special transportation paraprofessional, a full-time 1:1 health management paraprofessional, counseling once per week for 30 minutes per session in a 3:1 setting, OT 3 times per week for 30 minutes per session in a 1:1 setting, PT 5 times per week for 30 minutes per session in a 1:1 setting and 3 times per week for 30 minutes per session in a 2:1 setting, and speech-language therapy 3 times per week for 30 minutes per session (Parent Exs. B at pp. 1, 3-5, 10, 12; IHO Ex. II at pp. 2-6).<sup>13</sup> However, as discussed above, the IDEA and State and federal regulations obligate the district to continue to fund the student's pendency placement only through the conclusion of any administrative and/or judicial proceedings (see 20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]); when such proceedings conclude, pendency rights, and the district's obligation under them to maintain a student in his or her pendency placement, terminate, and such termination is not dependent upon a finding that the district offered the student a FAPE (see Mackey, 386 F.3d at 161; Marcus I. v. Dep't of Educ., 2011 WL 1979502, at \*1 [9th Cir. May 23, 2011] [explaining that stay put provision 20 U.S.C. § 1415[j] is designed to allow a student to remain in an educational institution pending litigation, but does not guarantee a student the right to remain in any particular institution because the right to a stay put placement that stems from a given adjudicatory proceeding lapses once the proceeding has concluded]). The pendency provisions do not confer upon an administrative hearing officer the power to extend an interim pendency determination beyond the conclusion of the proceedings which gave rise to the stay put right. It was properly addressed in the interim decision, in which the IHO herself qualified the district's obligation to provide the student with related services under pendency as "beginning effective September 1, 2011 until such time that the due process proceedings have been completed" (IHO Ex. II at pp. 4-5). By contrast, the IHO's final order describes no limitation on the district's obligation to continue to fund the pendency placement services other than "until such time that the school district offers a [FAPE] to

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<sup>13</sup> In her due process complaint notice, the parent included only the 1:1 health management paraprofessional, OT, PT, and speech-language in her request for pendency services (see Parent Ex. A at pp. 2-3), and during the impartial hearing, she indicated that she was not seeking provision of a special transportation paraprofessional; however, the IHO included the special transportation paraprofessional in the interim order (Tr. pp. 5-11).



him," without so much as any indication of who will make such a determination or when the determination must be made, if ever (IHO Decision at pp. 9-10).

In her answer to the district's cross-appeal, the parent asserts that the student remained entitled to receive related services under pendency because, in her due process complaint notice, she challenged only the district's terminations of the student's 1:1 health management paraprofessional and 2:1 PT sessions, and that she agreed to accept all of the related services that were recommended in the April 2011 IEP; consequently, she argues, her acceptance of these related services constituted an "agreement" between the parties to modify the IHO's September 15, 2011 interim decision entitling the student to continue to receive these related services after the conclusion of these proceedings. The parties are not prohibited from agreeing to changes in a student's pendency placement (see 20 U.S.C. § 1415[j]; 34 CFR 300.518[a]), and I note that the parent did not object to those related services that were actually recommended in the April 2011 IEP (see Parent Ex. A). However, I find the parent's argument unpersuasive, as there is neither any evidence contained in the hearing record indicating that the district agreed to modify the student's pendency services to extend beyond the conclusion of these proceedings, nor is there any provision in the IDEA or federal or State law empowering the parties to do so (see Application of a Student with a Disability, Appeal No. 09-125).

In consideration of the foregoing, I find that the portion of the IHO decision directing the district to continue to fund the student's 1:1 paraprofessional and related services at Kulanu pursuant to the September 15, 2011 interim order until such time as the district offered the student a FAPE is inconsistent with federal and State law (see 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]), and must be reversed.

## **VII. Conclusion**

In summary, I find that the IHO erred in finding that the evidence failed to show that Kulanu was an appropriate placement for the student for the 2011-12 school year. I also conclude that equitable considerations support the parent's claim for direct tuition funding from the district for the student's 2011-12 school year at Kulanu. Also, the IHO erred in ordering the district to continue to provide the student with his 1:1 paraprofessional and related services pursuant to the September 15, 2011 interim decision until such time in the future as the district offers the student a FAPE.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations above.

**THE APPEAL IS SUSTAINED.**

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

**IT IS ORDERED** that the IHO's decision dated January 4, 2012, is modified by reversing those portions which determined the parent failed to sustain her burden to establish that Kulanu was an appropriate placement for the student for the 2011-12 school year, and directed the district to continue the student's pendency placement pursuant to the September 15, 2011 interim decision; and

**IT IS FURTHER ORDERED** that the district shall directly pay the student's tuition costs to Kulanu for the 2011-12 school year to the extent that such tuition costs have not already been paid by the parent; and

**IT IS FURTHER ORDERED** that the district shall, upon the submission of proof of payment by the parent, reimburse the parent for any portion of the student's tuition costs at Kulanu for the 2011-12 school year that have been paid by the parent; and

**IT IS FURTHER ORDERED** that, unless the parties otherwise agree, this matter is remanded to respondent's CSE to update the student's evaluative data and conduct a review meeting within 15 days of the date of this decision to develop an appropriate IEP for the student consistent with the IHO's decision dated January 4, 2012.

**Dated:**           **Albany, New York**  
                      **July 05, 2012**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**