The University of the State of New York

The State Education Department
State Review Officer
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No. 16-003

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

Appearances:
Ferrara Fiorenza PC, attorneys for petitioner, Susan T. Johns, Esq., of counsel

The Law Office of William J. Porta, attorneys for respondent, William J. Porta, 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 from an interim decision of an impartial hearing officer (IHO) which granted the parent's request for stay-put (pendency) placement. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student

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

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

III. Facts and Procedural History

The student has been the subject of prior administrative appeals related to the 2009-10 through 2014-15 school years. As a result, the parties' familiarity with the student's educational history and the prior due process proceedings is assumed and they will only be repeated to the extent relevant to this matter (see Application of a Student with a Disability, Appeal No. 15-065; Application of a Student with a Disability, Appeal No. 15-053; Application of the Bd. of Educ., Appeal No. 14-109).

As relevant to the instant appeal, on August 28, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (Dist. Ex. 26 at pp. 1, 3). Finding the student eligible for special education as a student with autism, the CSE recommended placement in a 12:1+4 special class for one and one-half hours per day (id. at p. 9). The CSE further recommended adapted physical education in a 8:1+1 ratio three times per six day cycle in thirty-minute increments as well as the related services of individual speech-language therapy three times per

six day cycle, occupational therapy (OT) in a "small group" two times per six day cycle, and physical therapy (PT) in a "small group" two times per week (id.).

On May 8, 2014 the CSE convened to develop an IEP for the 2014-15 school year (Dist. Ex. 8 at pp. 1, 3). Finding the student eligible for special education as a student with autism, the CSE recommended placement in a 12:1+4 "BOCES Class in a Public School" for five and one-half hours per day (id. at pp. 9, 11).[1] The CSE further recommended adapted physical education in an 8:1+1 ratio three times per six day cycle in thirty-minute increments as well as related services of individual speech-language therapy five times per six day cycle in thirty-minute increments, OT in a "small group" two times per six day cycle in thirty-minute increments, and individual PT two times per six day cycle in thirty-minute increments (id.).

In a prior due process complaint notice dated September 2, 2014, the parent requested an impartial hearing related to the 2014-2015 school year (the 2014-2015 impartial hearing) (id. at pp. 32, 36, 40).[2] On September 16, 2014 a meeting was held between the parties in order "to figure out what the pendency and placement" would be for the student (Parent Ex. HH at pp. 1-2; see also Parent Ex. EE). During the meeting, the parties agreed to provide the student with the following services: 1) a special education teacher, 2) a teaching assistant, 3) a teacher's aide, 4) speech-language therapy four times per week in thirty-minute increments, and 5) occupational therapy (OT) two times per week in thirty-minute increments (Parent Ex. HH at pp. 1-6, 31, 33).

The 2014-2015 impartial hearing commenced on November 24, 2014 and concluded on January 14, 2015 (Dist. Ex. 8 at p. 97). On February 23, 2015 the IHO issued an interim order on pendency, which determined in pertinent part that pendency for the 2014-2015 school year was agreed to by the parties at the September 2014 meeting (id. at pp. 88-89, 94). In addition, the IHO noted that while the district agreed to provide services at the district elementary school for the 2014-15 school year, it did not agree "to establish a 12:1+4 program for pendency purposes" (id. at pp. 93-94). On April 13, 2015, the IHO issued a final decision in the 2014-2015 impartial hearing concluding that the district offered the student a FAPE for the 2014-15 school year (id. at pp. 96, 125).[3]

On June 2, 2015 the CSE convened to develop an IEP for the 2015-16 school year (the June 2015 IEP) (Dist. Ex. 9 at pp. 1, 3). The CSE convened again on October 2, 2015 in order to develop a second IEP for the 2015-16 school year (the October 2015 IEP) (Dist. Ex. 16 at pp. 1,

[1] BOCES stands for "Board of Cooperative Educational Services" (see Educ. Law §1950).

[2] The September 2, 2014 due process complaint notice was the subject of Application of a Student with a Disability, Appeal No. 15-053 and Application of a Student with a Disability, Appeal No. 15-065. While the student has been the subject of numerous impartial hearings, the impartial hearing related to the September 2, 2014 due process complaint notice is identified as the 2014-2015 impartial hearing for purposes of this decision.

[3] The parent appealed this decision to an SRO, who dismissed the parent's appeal for untimely service (Application of a Student with a Disability, Appeal No. 15-053). Furthermore, because the parent failed to raise any claims related to pendency, the SRO found that the IHO's determination was final and binding on the parties (id.). The parent appealed the SRO's dismissal to the District Court for the Northern District of New York and, on October 23, 2015, the court found that it "lack[ed] subject matter jurisdiction over the merits of plaintiff's claims" concerning the 2014-15 school year (Pet. Ex. 2 at pp. 14-15,17).

3). The June 2015 and October 2015 IEPs both recommended placement in a "BOCES class in a Public School" (Dist. Exs. 9 at p. 12; 16 at p. 12).

A. Due Process Complaint Notice and Impartial Hearing

In a due process complaint notice dated June 24, 2015, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-2015 school year (Dist. Ex. 1 at pp. 1, 4-6). The parent amended her due process complaint notice on August 24, 2015 (Dist. Ex. 3).

The parent filed a second due process complaint notice on October 9, 2015 which included allegations that the district failed to offer the student a FAPE for the 2015-16 school year (Dist. Ex. 5; Parent Ex. X at pp. 1-2, 7-8, 13). Relevant to the instant appeal, the parent argued in the October 9, 2015 due process complaint notice that the IEP for the 2012-13 school year was "[the student's] last agreed-upon IEP and thus his pendency IEP" and further asserted that placement should be in a district public school (Parent Ex. X at p. 1).[4] On October 9, 2015 the IHO issued an interim service order pertaining to the services which would be provided to the student during the instant impartial hearing (Parent Ex. Y at p. 2). The IHO ordered that "while the issue of pendency and the issue [of] FAPE is litigated by the parties" the district shall provide two hours per day of home instruction along with related services to be provided in the student's home, including speech-language therapy, PT, and OT (id.). Furthermore, the related services will "be provided in the home" and such "services shall continue until a final order and decision is issued in this matter and/or a subsequent order terminating same" (id. at pp. 2-3).

On October 19, 2015, the IHO consolidated both due process complaints in the "interest of judicial economy," finding that both complaints "involve[d] common questions of law and fact" (IHO Ex. 4 at pp. 1-2).

An impartial hearing commenced on October 26, 2015 and concluded on December 14, 2015, after seven days of hearings (see Tr. pp. 1-1027).

On October 29, 2015 the district sent a letter to the IHO asserting that he did not have the authority to issue an order "[changing] a student's pendency placement" (IHO Ex. 8 at pp. 1-2). In addition, the district requested the IHO issue an order "determining the pendency placement" (IHO Ex. 8 at pp. 1-2). On November 3, 2015, both parties agreed to "enter into an interim service plan . . . to provide the student services as [the] case continues" (Tr. pp. 224-25). Specifically, the district agreed to provide the student with two hours per day of home instruction by a special education teacher, as well as related services "in coordination with the 2015-16 IEP," as developed on June 2, 2015, to take place in the home, physical education two times per week to take place at the district middle school, and support of the parent in the home to assist with the carryover of the education and to assist her with strategies to involve the student in activities with other similarly-aged peers for up to two hours per week (Tr. pp. 225-29). The IHO declared that his October 9, 2015 order was "no longer valid" based on the agreed upon interim services plan (Tr. p. 255; see IHO Ex. 8 at pp. 1-2). Additionally, the attorneys for both parties agreed with the IHO's conclusion

[4] The hearing record also includes the parent's Memorandum of Law in Support of Pendency dated October 9, 2015 (Parent Ex. Z; IHO Ex. 11). In addition, the district submitted a letter brief regarding pendency on October 22, 2015 (IHO Ex. 5) and the parent's submitted a reply to the district's letter brief on October 26, 2015 (IHO Ex. 7). The parent submitted another letter brief on pendency dated November 11, 2015 (IHO Ex. 12).

that "regardless of how the issue of pendency plays out, [the interim services plan] will continue until the final decision and order is issued in the case that's before me" and "all of those services that were agreed to . . . will be provided until the final decision and order is issued in this case" (Tr. pp. 376-78).

B. Impartial Hearing Officer Interim Decision

In an interim decision dated December 21, 2015, the IHO determined that the student's IEP for the 2012-2013 school year was the last unchallenged IEP and therefore established the student's educational placement for the pendency of this proceeding (Interim IHO Decision at p. 7). In support of this determination, the IHO found that the IHO's decision in favor of the district in the 2014-2015 impartial hearing did not establish pendency because the parent's appeal concerning the 2014-2015 impartial hearing before the "Second Circuit constitute[d] an on going [sic] judicial proceeding for the purposes of pendency" (id. at p. 6). The IHO rejected the district's contention that the parent's failure to "timely appeal" the IHO's final decision in the 2014-2015 to an SRO effectively brought the administrative and judicial review process to an end, or that "the subsequent dismissal of the parent's appeal by the District Court [wa]s 'tantamount to no appeal at all'" (id.).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in determining that the August 2012 IEP constituted the student's pendency placement. The district requests that the decision be annulled in its entirety and that it be determined that the student's pendency placement was created by the April 2015 IHO decision or, in the alternative, the September 2014 agreement between the parties.

The district asserts that the BOCES program is the student's pendency placement based on the IHO Decision issued in the 2014-2015 impartial hearing. The district argues that because an SRO found the parent's appeal of the IHO Decision in the 2014-2015 impartial hearing to be untimely (Application of a Student with a Disability, Appeal No. 15-053), the IHO's determination that the district offered the student a FAPE for the 2014-2015 school year established the student's educational placement going forward. Additionally, the district contends that the IHO erred in finding that the parent's appeal of the district court decision upholding Application of a Student with a Disability, Appeal No. 15-053 to the Second Circuit constituted an ongoing judicial proceeding, asserting that the only issue involved is jurisdictional, "not one pertaining to FAPE." Furthermore, the district argues that the IHO's determination "runs afoul of the purpose of the pendency provision," as it suggests that any appeal by a parent, regardless of whether it is "related to the provision of a FAPE to [a] student, is sufficient to maintain a pendency placement."

As an alternative, the district contends that if the IHO did not agree with the district that the student's pendency placement was created in the April 2015 IHO decision, the IHO should have at least recognized the February 2015 pendency order and the September 2014 agreement of the parties regarding the student's services for the 2014-2015 school year as the student's current educational placement, rather than ignoring the events of the prior school year and effectively "[stretching] back two years to find the pendency placement."

The district further argues that the 2012-13 IEP was previously challenged in a prior administrative proceeding and, thus, cannot be the student's last agreed upon placement. Finally,

the district argues that the IHO erred by ignoring the district's position that the student's 2012-2013 IEP is incapable of implementation because the district no longer operates a 12:1+4 special class.

In an answer, the parent responds to the district's allegations and argues that the IHO correctly determined the student's pendency placement as being the August 2012 IEP.[5] The parent also argues that the parties did not reach an agreement on September 16, 2014 to modify the student's pendency placement from the August 2012 IEP. Additionally, the parent contends that the IHO should have barred the district from presenting evidence or testimony because the district failed to provide a timely five business days disclosure.

V. Discussion

A. Preliminary Matters

1. Scope of Review

First, I turn to the parent's argument that the district should have been precluded from introducing evidence or witness testimony during the impartial hearing "because it failed to provide a timely 5-day disclosure." In this instance, the IHO overruled the parent's objection to the introduction of the district's documentary evidence and accepted the district's evidentiary submissions (Tr. pp. 7-9). State regulations governing the practice of appeals for students with disabilities limit appeals from an impartial hearing officer's interim determination to those involving pendency disputes (8 NYCRR 279.10[d]; see Educ. Law § 4404[4]). In this instance, the parent has not asserted how the IHO's decision impacted his ability to rule on the student's pendency placement. Additionally, the parties submitted numerous briefs related to pendency both before and after the start of the hearing and the parent did not assert this argument in those submissions (IHO Exs. 5, 7, 11-12). Thus, to the extent that the parent asserts that the IHO erred in overruling the parent's objection to the introduction of evidence, this issue is not properly raised in an appeal of an impartial hearing officer's interim determination regarding a student's pendency placement and will not be reviewed or ruled upon in this decision. Should one or both parties appeal from the IHO's final decision, the parent may appeal the IHO's determination at that time.

2. Additional Evidence

On appeal, both parties have submitted additional evidence with their pleadings. 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. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

[5] The Office of State Review received an additional answer from the parent on January 27, 2016, identifying service on the district's attorneys on January 25, 2015. The additional answer was served on the petitioner more than 10 days after the date of service of the petition (8 NYCRR 279.5). Additionally, the parent did not provide an explanation as to the purpose for filing the additional answer or a reason as to why it should be accepted after the time to answer had expired. Accordingly, it will not be considered.

The additional evidence submitted by both parties was either available at the time of the hearing or is unnecessary to render a determination. Indeed, much of the evidence was, in fact, entered into evidence at the impartial hearing. Accordingly, I decline to accept this additional evidence.

B. Pendency

Turning to the merits of the parties' dispute, the district appeals the IHO's interim order on pendency, challenging the IHO's finding that the 2012-13 IEP constituted the student's pendency placement. The district contends that the student's pendency placement is outlined in a May 2014 IEP based upon an unappealed April 2015 IHO decision. While the district correctly argues that the IHO's decision should be reversed, the district's argument that pendency for the 2015-16 school year is established in the May 2014 IEP is not persuasive.

1. Current Educational Placement

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 T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996]; Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]).

Although not defined by statute, the phrase "then-current educational placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (M.G., 982 F. Supp. 2d 246-47; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2002]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015]). The United States Department of Education has opined that a student's then-current educational placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]).

Once a proceeding commences, a student's pendency placement can be changed in one of two ways: (1) by agreement between the parties; or (2) by a state-level administrative (i.e., SRO) decision that agrees with the child's parents that a change in placement is appropriate (34 CFR

300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Bd. of Educ. v. Schutz, 290 F.3d 476, 484-85 [2d Cir. 2002]; A.W. v Bd. of Educ., 2015 WL 3397936, at *6 [N.D.N.Y. May 26, 2015]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Murphy, 86 F. Supp. 2d at 366). An agreement between the parties on placement need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then-current placement (Evans v. Bd. of Educ., 921 F. Supp. 1184, 1189 n.3 [S.D.N.Y. 1996]; 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]).

At the time the parent's due process complaint notice was filed on June 24, 2015, the student received special education pursuant to an agreement reached by the parties on September 16, 2014 (Dist. Ex. 1 at p. 1; see Parent Ex. HH; see also Parent Ex. EE). A review of the hearing record, including the transcript of the September 16, 2014 meeting, indicates that during the September 16, 2014 meeting, the parties' intended to establish an educational placement for the student for the 2014-2015 school year (Parent Exs. HH; JJ; Dist. Exs. 26).[6]

A September 4, 2014 letter from the district to the parent indicates that the district intended to base the student's pendency program for the 2014-2015 school year on the IEP developed for the 2012-2013 school year (Parent Ex. JJ). However, during the September 2014 meeting, the parties agreed to provide the student with services differing from those recommended in the August 2012 IEP (compare Parent Ex. HH, with Dist. Ex. 26). Significantly, whereas the August 2012 IEP included a recommendation for a 12:1+4 special class for one and one-half hours per day, at the September 2014 meeting, the district agreed to provide the student with two adults assisting the student in the classroom at all times, including the services of a teacher's aide and/or teacher's assistant throughout the school day (Parent Ex. HH at pp. 2-3; Dist. Ex. 26 at pp. 8-9).[7] The district also agreed to provide speech-language therapy four times per six day cycle in thirty-minute increments, an increase of one session per cycle from the August 2012 IEP (Tr. pp. 771-72; Dist. Exs. 8 at pp. 432-33; 25 at pp. 18-26; 26; Parent Ex. HH at p. 4). The parties additionally agreed to provide the student with OT two times per six day cycle in thirty-minute increments (Dist. Ex. 8 at pp. 432-33; Dist. Ex. 25 at pp. 1-7; Parent Ex. HH at p. 4).[8] Based on the above information, the result of the parties' September 16, 2014 meeting changed the student's educational placement to include, at a minimum: instruction from a special education teacher at the district elementary school, additional support from a teacher's assistant and/or a teacher's aide, and the related services of speech-language therapy four times per six day cycle in thirty-minute increments and OT two times per six day cycle in thirty-minute increments. Moreover, the evidence in the hearing record reveals that these services were, in fact, implemented during the

[6] In Application of a Student with a Disability, Appeal No. 15-065, an SRO noted the IHO's conclusion that the September 16, 2014 agreement constituted the student's educational placement for the purposes of pendency during the 2014-2015 impartial hearing and remanded the matter to the IHO "to determine the contours of the September 2014 pendency agreement" and whether it was implemented.

[7] During the September 16, 2014 meeting the parties discussed the student's access to regular education students and district staff indicated the student would have access to regular education students during lunch, recess, and some of his adapted physical education (Parent Ex. HH at pp. 9-10).

[8] A copy of the student's schedule for the 2014-2015 school year reflects that he was scheduled for adapted physical education six times per six day cycle in thirty-minute increments (Dist. Ex. 8 at pp. 432-33).

2014-15 school year (Tr. pp. 29, 693-96, 771-72; Dist. Exs. 8 at pp. 432-33; 25 at pp. 1-7, 18-26; IHO Ex. 5 at p. 2; see generally Dist. Ex. 18).

The parent denies that the parties reached an agreement in September 2014. However, as noted above, the educational placement discussed during the September 2014 meeting and implemented during the 2014-2015 school year was markedly different from the program offered in the August 2012 IEP. The parent's conduct during the September 2014 meeting and subsequent enrollment of the student in the district for the 2014-2015 school year indicated that she agreed to at least a portion of the program as described during the September 2014 meeting (Parent Ex. HH at pp. 5, 9-10, 17-18).[9] However, it does appear as though there may have been parts of the placement offered and provided to the student during the 2014-2015 school year that the parent did not agree to accept, specifically related to the student's grouping and access to other students (see Parent Ex. HH at pp. 24-25).[10] As the context of the parties' September 2014 agreement is the subject of an impartial hearing after a remand of Application of a Student with a Disability, Appeal No. 15-065, rather than attempt to sort through the specifics of the parties' agreement and possibly have two separate rulings on the same issue, I will allow the IHO appointed on the remand of Application of a Student with a Disability, Appeal No. 15-065 to make the initial determination as to the content of the parties' agreement.

I next turn to the district's specific arguments on appeal. The district asserts that the IHO's April 13, 2015 decision in the 2014-2015 impartial hearing established the student's pendency because it was not properly appealed. While an unappealed IHO decision may establish a student's pendency placement under certain circumstances (20 U.S.C. § 1415[j]; see Student X, 2008 WL 4890440, at *20, 23; Letter to Hampden, 49 IDELR 197), at the time the parent filed the due process complaint notice in this matter the parent had appealed the April 13, 2015 IHO decision and a determination had not yet been reached as to the timeliness of the parent's appeal (see Application of a Student with a Disability, Appeal No. 15-053). The district contends that because the parent's appeal in Application of a Student with a Disability, Appeal No. 15-053, was

[9] Additionally, the transcript of the September 2014 meeting does not sufficiently indicate that the program being provided by the district was limited to the 2014-2015 school year for it not to have established the student's then-current educational placement (see Evans, 921 F. Supp. at 1188 [agreement to fund private school was not bound by a definite time limitation and therefore constituted student's pendency placement]).

[10] The evidence in the hearing record also suggests that the services delivered to the student from June 2015 to November 2015 may have deviated from the services agreed upon at the September 2014 meeting (Tr. pp. 46, 363-64; see Dist. Exs. 8 at p. 484; 25 at pp. 22-26; see also Dist. Ex. 18; IHO Ex. 5 at p. 2). For example, the parties did not discuss whether the student would be provided with PT at the September 2014 meeting, but a summary of related services in the hearing record identified that PT was provided to the student from November 2014 through June 2015 approximately two times per six day cycle in thirty-minute increments (Dist. Ex. 25 at pp. 8-17; see Dist. Exs. 8 at pp. 432-33; 26 at p. 9; see generally Parent Ex. HH). If any of the agreed-to pendency services were not provided to the student, the parent may be entitled to compensatory services (see E. Lyme Bd. of Educ., 790 F.3d at 456 [awarding reimbursement for unimplemented pendency services]; but see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 643 [S.D.N.Y. 2011] [finding that equitable considerations did not support a compensatory award for a pendency violation where the parents failed to respond to the district's offer to implement pendency services in a timely manner]).

ultimately determined to be untimely it should be treated as a nullity.[11] I am not convinced by the district's argument. The decision to dismiss a petition as untimely is within the discretion of an SRO, and an SRO may accept a late petition for good cause shown (8 NYCRR 297.13). Accordingly as of the commencement of this proceeding, it was not clear whether the parent's petition would be considered and in order to maintain stability and consistency in the education of the student, the IHO's decision did not at that point establish the student's then-current educational placement.

Additionally, the parent brought an action in district court seeking to overturn SRO decisions in Application of the Bd. of Educ., Appeal No. 14-109, Application of a Student with a Disability, Appeal No. 15-053, and Application of a Student with a Disability, Appeal No. 15-065. Pertinently, Application of a Student with a Disability, Appeal No. 15-053 and Application of a Student with a Disability, Appeal No. 15-065 involved complaints regarding the appropriateness of the May 2014 IEP developed for the 2014-2015 school year. The district has not addressed why an "unappealed" IHO decision in one of those matters should change the student's current educational placement, while the other proceeding is still pending with respect to the same IEP and the same school year. It is counter to the purposes of the stay-put provision to have a student's pendency placement change to an IEP that is being challenged in another proceeding (see Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 373 [1985][one purpose of the stay-put provision "was to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings"]).

The district further argues that it cannot place the student in a 12:1+4 special class in the district as part of the student's pendency placement, because the district no longer operates such a class. However, the continued availability of the particular class in the district is not relevant to determining the student's pendency placement (Wagner, 335 F.3d at 301 [section 1415(j) makes no exception for cases in which the "then-current educational placement" is not functionally available]).[12] In the event that the district is unable to provide for the student's current educational placement or believes that such placement may cause irreparable harm to the student, the district may reach an agreement with the parent to change the student's educational placement, or the district may seek a preliminary injunction to modify the student's educational placement (see Honig, 484 U.S. at 327; Wagner, 335 F.3d at 302; M.G., 982 F. Supp. 2d at 249-50).

[11] Ultimately an SRO agreed with the district that the parent's appeal in Application of a Student with a Disability, Appeal No. 15-053 was untimely and dismissed the parent's petition on July 10, 2015, resulting in the parent bringing subsequent appeals to district court and the Second Circuit Court of Appeals, both of which have been dismissed with respect to Application of a Student with a Disability, Appeal No. 15-053 at this point. The parent has appeals pending in district court with respect to Application of the Bd. of Educ., Appeal No. 14-109 and Application of a Student with a Disability, Appeal No. 15-065.

[12] To the extent that the district has argued that sending the student to a 12:1+4 BOCES class is not a change in educational placement, New York regulations define a "change in placement" as "a transfer of a student to or from a public school, BOCES or schools enumerated in articles 81, 85, 87, 88 or 89 of the Education Law or graduation from high school with a local high school or Regents Diploma" (8 NYCRR 200.1[h]). Accordingly a move from a district public school to a BOCES school would constitute a change in educational placement.

2. November 2015 Agreement

As discussed above the student's educational placement for the pendency of this proceeding was the placement agreed to at the September 16, 2014 meeting between the parties. However, a review of the hearing record reveals that the parties reached a subsequent agreement to modify the student's placement on a going-forward basis on November 3, 2015 (Tr. pp. 224-29). The parent agreed with the district's offer to provide the student with home instruction by a special education teacher for two hours per day as well as the related services identified in the June 2015 IEP beginning on November 10, 2015 (Tr. pp. 224-29; see also Dist. Ex. 9). Additionally, counsel for both parties agreed that "regardless of how the issue of pendency plays out," "all of those services that were agreed to . . . will be provided until the final decision and order is issued" by the IHO (Tr. pp. 376-78).[13] As the parties reached an agreement as to the student's placement during this proceeding, it is not clear why the IHO issued an interim decision on pendency, which is intended to set the student's educational placement for the duration of the proceeding, rather than addressing the issue in his final decision. This is troubling as it adds to what is already a quagmire of proceedings and appeals addressing the same or similar issues and highlights the importance of having some consistency in the student's educational program.

VI. Conclusion

Based on the above, the IHO's decision regarding the student's then-current educational placement for purposes of this proceeding must be modified to ensure the purposes of the stay-put provision are met and the student's educational placement remains consistent while the parent's challenges to the May 2014 IEP and April 2015 IHO decision are pending (see Burlington, 471 U.S. at 373; Honig, 484 U.S. at 323; M.G., 982 F. Supp. 2d at 246-47).

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's interim decision dated December 21, 2015, is modified, by reversing the portion which found that the student's then-current educational placement for purposes of establishing pendency was established by the August 2012 IEP; and

IT IS FURTHER ORDERED that the student's then-current educational placement for the pendency of this proceeding is the placement agreed to by the parties during their September 2014 meeting.

Dated: **Albany, New York**
February 12, 2016

STEVEN KROLAK
STATE REVIEW OFFICER

[13] The hearing concluded on December 14, 2015, and pursuant to State regulations, the IHO should have rendered a final decision at this point in time (8 NYCRR 200.5[j][5]; see Tr. pp. 916, 1026).