The University of the State of New York

The State Education Department
State Review Officer
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No. 17-036

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 Board of Education of the North Syracuse Central School District

Appearances:
Angel Antonio Castro, III, Esq., attorney for petitioner

Bond, Schoeneck & King, PLLC, attorneys for respondent, Jonathan B. Fellows, 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, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) which denied her request for a determination regarding her son's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2016-17 school year. The IHO determined that the student's pendency placement was not a 6:1+1 special class or a private school of the parent's choice. The appeal must be sustained.

II. Overview—Administrative Procedures

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

In this case, the student has been found eligible for special education and related services as a student with autism and the district has developed IEPs for the student since at least the 2012-

13 school year (Dist. Ex. 4D; see Answer Exs. A; B; C; E).[1] On October 10, 2014, a CSE met to develop an IEP for the remainder of the 2014-15 school year (Answer Ex. E at p. 1). The parent rejected the recommendations of the October 2014 CSE and requested an impartial hearing by due process complaint notice dated October 30, 2014 (Dist. Ex. 5B at p. 1). On May 29, 2015, a CSE convened to develop an IEP for the 2015-16 school year (Dist. Ex. 4D at p. 1). The parent also rejected the recommendations of the May 2015 CSE (Dist. Ex. 5B at p. 1). On November 10, 2015, the parties entered into a resolution agreement, which settled the parent's claims related to the 2014-15 and 2015-16 school years (id. at pp. 1-6). According to the terms of the resolution agreement, for the 2015-16 through 2017-18 school years, the district agreed to directly fund a specified amount toward the costs of the student's tuition at the Vincent Smith School, or another in-State nonpublic school of the parent's choosing, upon proof of the student's enrollment (id. at p. 2). The resolution agreement also provided that the district's obligation to pay tuition would cease if the student was no longer enrolled in a nonpublic school (id. at p. 3). The parties further agreed that the district's payment of tuition pursuant to the agreement would satisfy the district's obligation to provide the student with a free appropriate public education (FAPE) for the 2015-16, 2016-17, and 2017-18 school years (id.).

Pursuant to the resolution agreement, the student attended the Vincent Smith School for the 2015-16 school year (see Dist. Ex. 4B). In an email dated July 5, 2016, the parent informed the district that the student had "successfully completed" the 2015-16 school year at the Vincent Smith School and that she was "planning to change schools" for the 2016-17 school year (Reply Ex. 2). The parent then indicated in a letter dated September 15, 2016, that the student had been asked not to return to the Vincent Smith School based on the school's conclusion that the student required more support than it could provide, that the parent had been unable to find another school to accept the student, and that she required a recommendation from the district in order to enroll the student in a therapeutic residential placement (Reply Ex. 1).

By letter dated September 29, 2016, the district acknowledged receipt of the parent's correspondence and advised that, pursuant to the resolution agreement, the parent was free to enroll the student in any in-State nonpublic school willing to accept the student, and that the district would provide direct funding in the manner described in the agreement (Dist. Ex. 4C at p. 1). As an alternative, the district indicated that the parent could re-enroll the student in the district and

[1] The parent appeals from an interim decision by the IHO that was rendered based entirely on the parties' submissions. No hearing dates had been held at the time, no exhibits had yet been admitted, and no testimony presented. For that reason, citations are to the documents as numbered in the district's letter dated May 23, 2017, transmitting the hearing record to the Office of State Review (Dist. Exs. 1-10). In addition, in response to a request by the Office of State Review (8 NYCRR 279.10[d]), the district submitted additional documentary evidence with its answer (Answer Exs. A-U). Subsequently, counsel for the parent filed a reply without a verification or an affidavit of service, as required by State regulation (8 NYCRR 279.6[b]; 279.7[b]). When filing the documents necessary to complete his submission, counsel for the parent also included another copy of the reply, along with additional documentary evidence, including copies correspondence between the parties and a copy of the June 12, 2017 Interim IHO Decision. While, not marked for identification, the correspondence included with the parent's reply shall be referenced as reply exhibits 1 and 2. The foregoing evidence has been referenced and considered to the extent necessary to render a decision in this matter.

the district would convene a CSE to develop an IEP for the student and consider the parent's request for a therapeutic residential school placement (id.).

A. Due Process Complaint Notice

On December 16, 2016, the parent filed a "second amended" due process complaint notice alleging that the November 2015 resolution agreement was "defective" and that the district breached the November 2015 resolution agreement and denied the student a FAPE for the 2016-17 school year (Dist. Ex. 2).[2] The parent requested that the IHO order the district to place the student in an interim alternative educational setting (IAES) during the pendency of the impartial hearing (id. at pp. 4, 7). Additionally, the parent requested that the IHO order the district to facilitate the student's placement in a therapeutic nonpublic school and pay tuition in addition to the amount agreed upon in the resolution agreement (id. at p. 6). Alternatively, the parent requested that the district fund the services of private providers to deliver special education programs and services to the student in his home (id. at pp. 6-7). For the alleged breach of the resolution agreement, the parent sought compensatory educational services (id. at p. 7).

By letter motion and response to the due process complaint notice dated December 19, 2016, the district requested that the IHO dismiss the parent's amended due process complaint, arguing that the parent was attempting to enforce the November 2015 resolution agreement, that an impartial hearing was an improper venue for an enforcement action, and that the IHO did not have jurisdiction to enforce the resolution agreement (Dist. Ex. 5A at pp. 1-4).

B. Facts Post-Dating the Due Process Complaint Notice

A letter from the district to counsel for the parent dated December 23, 2016, reflected that a prehearing conference was held on December 20, 2016 (Dist. Ex. 5D). In this letter, the district offered the student two hours per day of instruction in the district's "AMENDS" program, located at the district's junior high school, for the pendency of the due process proceedings (id.). The district indicated that the student would receive instruction from a certified special education teacher, occupational therapy (OT), and speech-language therapy (id.). The district also agreed to provide transportation for the student to and from the AMENDS program (id.). The letter also indicated that the district planned to convene a CSE during the first two weeks of January 2017 to prepare a new IEP for the student (id.). In the event the parent decided "to obtain instruction on her own," the district offered "to entertain a proposal" to fund the cost (id.).

By letter dated December 29, 2016, the district reiterated its willingness to "provide a program during the pendency of the hearing at the AMENDS program" (Dist. Ex. 5E at p. 1). The district also offered the option of home-based tutoring during the pendency of the proceedings, indicating that the district would pay for a tutor selected by the parent "at the approved District rates" (id.). The district also requested all records from the Vincent Smith School that would be useful to the CSE (id.). With regard to the parent's request for residential placement, the district

[2] The parent filed an "amended" due process complaint notice on December 9, 2016, in which she purported to incorporate by reference due process complaint notices dated November 22, 2013, and October 28, 2014 (Dist. Ex. 1 at pp. 1, 3). Neither of the due process complaint notices purported to be incorporated by reference were included in the record on appeal.

asked the parent to provide documentation supporting her request and a release authorizing district personnel to speak with representatives of the Vincent Smith School (id.).

By letter dated December 30, 2016, the parent indicated that she would not accept the offer of instruction at the AMENDS program because the student was "not ready" for such a placement and it would be "harmful" to the student (Answer Ex. L at p. 1). The letter indicated that the student was currently hospitalized and under psychiatric supervision (id.). In addition, the parent requested tutoring at the hospital for the duration of the student's stay (id. at p. 2). In an e-mail dated January 12, 2017, the district indicated that it would begin providing home-based tutoring (Answer Ex. M).

On February 3, 2017, a CSE convened to develop an IEP for the remainder of the 2016-17 school year (Dist. Ex. 3 at p. 1). The resultant IEP recommended placement in a board of cooperative educational services (BOCES) 8:1+1 special class in a public school, with the related services of small group OT and small group speech-language therapy (id. at pp. 1, 19, 24). The February 2017 CSE also recommended monthly parent counseling and training, supplementary aids and services, testing accommodations, a behavioral intervention plan, and special transportation (id. at pp. 1, 17, 19-24).

By letter dated February 21, 2017, the parent requested that the IHO order a pendency placement for the student to consist of a nonpublic school of the parent's choice, related services as set forth in the May 2015 IEP, and payment be made to counsel for the parent "for disbursement" to a nonpublic school of the parent's choice (Dist. Ex. 4 at pp. 1, 3-4).

The district opposed the parent's request in a letter to the IHO dated February 28, 2017, asserting that the November 2015 resolution agreement did not establish the student's placement for purposes of pendency but indicating that the district would abide by its obligations under the resolution agreement once the parent identified a nonpublic school in which the student was enrolled and to which she wished the district to make payments (Dist. Ex. 5). By letter dated March 3, 2017, the parent submitted a reply to the district's opposition to the IHO (Dist. Ex. 6). In this letter, the parent argued that the student's pendency placement was a nonpublic school of the parent's choosing; however, because the parent had been unable to identify an appropriate nonpublic school in which to enroll the student, the parent requested that the IHO order the district to reimburse the costs of privately obtained services and hold that those services amounted to a nonpublic school of the parent's choosing pursuant to the resolution agreement and constituted the student's pendency placement (id. at pp. 2-3).

On March 27, 2017, the parent filed another amended due process complaint notice, challenging the program and services set forth in the February 2017 IEP and reiterating claims relating to the district's breach of the resolution agreement (Dist. Ex. 7). For relief, the parent requested that the district conduct evaluations, that the CSE include specific information on the student's future IEPs, and that the district provide the student with a 12-month school year program consisting of a 6:1+1 special class with a 1:1 aide and daily 1:1 direct instruction in English language arts and mathematics, as well as resource rom, counseling, and language-based services, in addition to other specified supports (id. at pp. 7-9). The parent also requested tutoring and related services to "compensate for the educational period missed by the Student (during the 2016-17 school year)" and that such tutoring serve as the student's pendency placement (id. at pp. 9-10).

By letter dated April 10, 2017, the district responded to the March 2017 due process complaint notice (Dist. Ex. 8).

C. Impartial Hearing Officer Decisions

The IHO issued an interim decision on April 17, 2017, denying the parent's request for a finding that the student's pendency placement was a nonpublic school of the parent's choice or a 6:1+1 special class with a 1:1 aide (Apr. 17, 2017 Interim IHO Decision at pp. 5-6). In particular, the IHO determined that, because the November 2015 resolution agreement was silent regarding pendency, it did not constitute the student's pendency placement (id. at p. 5). In addition, the IHO found that a 6:1+1 special class was not the student's pendency placement because nothing in the record indicated that it was the "last agreed upon placement" (id. at p. 6). Finally, the IHO indicated that, while "it appear[ed] that the IEP, which preceded the parties' Stipulation of Settlement, may have been the last agreed upon placement," the parties had not provided a copy of that IEP to the IHO (id.). Accordingly, the IHO denied the parent's request for a determination of the student's stay-put placement "without prejudice" (id.).

After this matter was fully submitted, the IHO issued a second interim decision, dated June 12, 2017, adhering to his determination that the resolution agreement did not constitute the student's pendency placement and finding that publicly funded private tutoring services were also not the student's pendency placement (June 12, 2017 Interim IHO Decision at p. 6).[3] The IHO again denied the student's request for a pendency order "without prejudice" (id.).

IV. Appeal for State-Level Review

The parent appeals from the IHO's April 17, 2017 interim decision, requesting that an SRO determine the student's pendency placement from alternatives proposed by the parent. The parent argues that the resolution agreement represents the student's last agreed upon placement, that the failure to use the term pendency in the agreement is not fatal, and that the student's pendency placement is a nonpublic school of the parent's choosing. The parent requests, in the alternative, that an SRO determine that the student's pendency placement is a 6:1+1 special class in a nonpublic school with the related services and supports recommended in the May 2015 IEP, or that the parent be allowed to privately obtain services at district expense as a pendency placement.

In an answer, the district responds with admissions and denials and argues that the parent's appeal should be dismissed. The district agrees that the resolution agreement sets forth the student's last agreed upon placement, an in-State nonpublic school of the parent's choice, but asserts that it has been unable to implement this placement during the pendency of the due process proceedings because the parent has not enrolled the student in such a nonpublic school. The district further argues that a 6:1+1 special class is not the student's pendency placement because such a placement has never been recommended or implemented for the student, and that the district has

[3] In addition to various other documents, the undersigned requested that the district provide information as to whether or not the IHO had revisited the issue of pendency since his April 17, 2017 interim decision, given the IHO's representation that his decision was "without prejudice" (Apr. 17, 2017 Interim Decision at p. 6). At the time of the district's response, the IHO had not yet issued the June 12, 2017 interim decision. Subsequently, the parent provided a copy of the IHO's June 12, 2017 interim decision to the Office of State Review.

never developed or implemented an IEP permitting the parent to hire staff to provide services to the student at district expense. Additionally, the district suggests possible placements that it is willing to implement during the pendency of these proceedings, should the parent agree.

In a reply, the parent argues that the district now concedes that a nonpublic school of the parent's choice as described in the resolution agreement constitutes the student's pendency placement.

V. Applicable Standards

The IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see 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. 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] [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]). The pendency provision does not require that a student remain in a particular site or location (T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; 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, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], quoting Zvi D., 694 F.2d at 906). Although not defined by the IDEA, the phrase then-current educational placement has been found to mean either the placement described in the student's most recently implemented IEP; the placement actually functioning at the time the due process proceeding is commenced; or the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 455-56 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSERS 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the

pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2002]; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]).

VI. Discussion

Before reaching the merits, a note about the procedural posture of this case is warranted. As a consequence of the IHO's issuance of interim decisions dismissing the parent's requests for a finding as to the student's pendency placement "without prejudice" (Apr. 17, 2017 Interim IHO Decision at pp. 5-6; June 12, 2017 Interim IHO Decision at p. 6), there has remained much uncertainty regarding the student's placement during these proceedings.[4] A student's right to pendency automatically arises as of the filing of the due process complaint notice (see 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see also Child's Status During Proceedings, 71 Fed. Reg. 46710 [2006] ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]) and, considering the focus on maintaining the status quo during the proceeding and the time-sensitive nature of a pendency determination, an IHO may and should promptly resolve a pendency dispute (see Murphy, 297 F.3d at 199-200; see also M.R. v. Ridley Sch. Dist., 744 F.3d 112, 124 [3d Cir. 2014]; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 701 [S.D.N.Y. 2006]; "Questions Relating to Impartial Hearing Procedures Pursuant to Sections 200.1, 200.5, and 200.16 of the Regulations of the Commissioner of Education, as Amended Effective February 1, 2014," at p. 7, Office of Special Educ. [Revised Sept. 2016] [noting that, upon a dispute arising regarding pendency, it is incumbent upon the IHO "to render a written decision regarding pendency as soon as possible and prior to determining any other issue relating to the evaluation, identification or placement of a student or the provision of a [FAPE]]" [emphasis added], available at http://www.p12.nysed.gov/specialed/dueprocess/documents/qa-procedures-sep-2016.pdf). While the IHO made a determination as to what the student's stay-put placement was not, he failed to reach a determination as to what the pendency placement was. While it is understandable that the IHO may have felt he had insufficient evidence to reach a finding (Apr. 17, 2017 Interim IHO

[4] Furthermore, the lack of a definitive finding on pendency also raises uncertainty about the finality and appealability of the IHO's interim decision—pendency determinations being the only interim decision permissibly appealed to an SRO during the impartial hearing (8 NYCRR 279.10[d] see Educ. Law § 4404[4])—as well as concerns that multiple and possibly conflicting decisions on the same issue could result from this posture. The IHO's subsequent interim decision highlights this potential risk; however, the June 12, 2017 interim decision also did not make a determination as to what constituted the student's stay-put placement and appears to have been issued based upon a representation by counsel for the parent regarding this appeal (June 12, 2017 Interim IHO Decision at p. 6).

Decision at p. 6), it was the IHO's responsibility to ensure there was an adequate record upon which to permit meaningful review (see, e.g., Application of a Student with a Disability, Appeal No. 14-179; Application of the Dep't of Educ., 11-004; Application of a Child with a Disability, 03-003).

While I considered remanding this matter to the IHO to take additional evidence regarding the student's pendency placement, the same concerns regarding the time-sensitive nature of a pendency determination set forth above, as well as indication in the hearing record that the student was not receiving a special education program or related services for portions of time during the pendency of the proceedings thus far, I elected to solicit the missing evidence from the district, giving the parent an opportunity to respond thereto, and reach a determination on pendency. Thus, in accordance with State regulation providing that a State Review Officer may request additional evidence upon a determination that such evidence may be necessary in order to render a decision (8 NYCRRR 279.10[b]), the undersigned directed the district to supplement the record and provide its position on pendency.

Turning to the inquiry of identifying the student's then-current educational placement, given that both the parent and the district point to the resolution agreement as setting forth a placement that might constitute the student's pendency, it shall be examined first. The parent argues that the last agreed upon placement is set forth in the resolution agreement and consists of a nonpublic school of the parent's choice, which the district does not dispute. While the IHO found that the resolution agreement could not constitute the student's pendency placement because it did not include any language addressing pendency, the parties' resolution agreement could generally be sufficient to establish a student's pendency placement depending on various factors (see L.L. v. New York City Dep't of Educ., 2016 WL 4535037, at *7-*8 [S.D.N.Y. Aug. 30, 2016] [discussing factors relevant to a determination whether a settlement agreement establishes a pendency placement]). Further, the parties accord that such document sets forth the student's pendency placement would be supportive of a finding that the agreement constitutes the student's stay-put placement under many circumstances (see Schutz, 290 F.3d at 483-84; Evans, 921 F. Supp. at 1189 n.3). However, there is a more fundamental issue with relying on the resolution agreement to establish the student's placement for purposes of pendency; that is, the agreement did not itself set forth an educational placement but, rather, indicated that the district would fund the cost of the student's attendance at any in-State nonpublic school of the parent's choosing (Dist. Ex. 5B at pp. 2-3). The Second Circuit has interpreted "educational placement" to mean "the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see Luo v. Baldwin Union Free Sch. Dist., 2017 WL 391991 [2d Cir. Jan. 27, 2017]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. Jan. 8, 2014]; R.E., 694 F.3d at 191-92). Under the IDEA's pendency provision, the student is not entitled to the same school site or location or the exact same providers; instead, it only entitles the student to receive the same general type of educational program and "[i]t is up to the school district to decide how to provide that educational program, at least as long as the decision is made in good faith" (T.M., 752

F.3d at 171; Concerned Parents, 629 F.2d at 753).[5] In other words, the language of the resolution agreement is too broad and amorphous to rely upon as setting forth a placement to establish pendency.

On these same grounds, the parent's alternative proposals—that the language in the resolution agreement providing for the student's attendance at an in-State nonpublic school "of the parent's choosing" (Dist. Ex. 4A at p. 3) be read to provide for a pendency placement consisting of either a 6:1+1 special class with a 1:1 aide and related services or a "custom program tailored by a certified teacher"—must fail because the resolution agreement did not set forth such placements. The parent's attempts to read such placements into the broad language of the resolution agreement lends further support to the conclusion that the resolution agreement does not articulate a placement that could be implemented as pendency. Further, as the IHO correctly determined, the parent's request for placement in a 6:1+1 special class does not constitute the student's pendency placement, as the record contains no indication the student ever attended such a placement.[6] Finally, with further respect to the "custom program" proposed by the parent, the district asserts that it has offered to reimburse the parent for the reasonable cost of privately-obtained services from an instructor of her choice. According to the district, the parent has declined to arrange such a program. Without any specifics regarding the services the parent is seeking to have implemented by private providers, or any indication that the requested services would be the same as the student's last agreed upon placement, the parent's proposal cannot constitute the student's pendency placement, either as a last agreed upon placement at the time the proceeding was commenced or as a subsequent agreement between the parties (see Mackey, 386 F.3d at 163).

Next, the district proposes other alternative placements that it is willing to implement as the student's pendency placement. Specifically, the district has offered to provide the student with services pursuant to the February 2017 IEP or at the AMENDS program offered in December 2016 correspondence (see Dist. Exs. 3; 5D; 5E). Neither of these programs has been accepted by the parent and cannot, therefore, constitute an agreement by the parties to change the student's placement during the pendency of these proceedings.

Turning to other sources for identifying the student's then-current educational placement, at the time the parent filed the due process complaint notice on December 9, 2016, the parent

[5] The district has indicated that it is prepared to implement as pendency a nonpublic school of the parent's choice as described in the resolution agreement but argues that the parent has failed to select and enroll the student in an in-State nonpublic school. The district's position seems to shift the burden of implementing a pendency placement to the parent. The district's position is questionable in that it presents a scenario whereby the district circumvents its obligation to implement a pendency placement by either relying on a settlement agreement that is silent on placement or by capitalizing on a predictable impasse that causes the student to receive no pendency services until some action is taken by the parent. However, because of my determination in this matter, it is unnecessary to further address the parent's contention that the student cannot be enrolled in a nonpublic school without the assistance of the school district, and the district's response that it cannot fulfill its obligation to contribute to the costs of the student's tuition until the parent selects and enrolls the student in a nonpublic school.

[6] Although the district does not provide any information regarding the student's placement at the Vincent Smith School, it affirmatively asserts that the student did not attend a 6:1+1 special class there.

asserted that the student was not receiving services (Dist. Ex. 1 at p. 2) and there is nothing in the hearing record to indicate otherwise. Accordingly, the remainder of the inquiry shall focus on identifying the placement described in the student's most recently implemented IEP. Among the additional documents submitted by the district are IEPs dated August 22, 2012, June 5, 2013, September 11, 2013, and October 10, 2014 (Answer Exs. A; B; C; E).

According to the district, the August 2012 IEP is the last agreed upon placement. The August 2012 IEP recommended a "blended" program of a 15:1 special class, direct and indirect consultant teacher services, and related services of speech-language therapy in a small group and individual OT (Answer Ex. A at pp. 1, 11). The August 2012 CSE meeting minutes reflected that the parent was "in agreement" with the CSE's recommendation (id. at p. 1). According to information transcribed or summarized in minutes of subsequent CSE meetings, the student "briefly attended" the program outlined in the August 2012 IEP (Dist. Exs. 3 at p. 4; 4D at p. 1; Answer Ex. B at p. 2; but see Answer Ex. C at p. 6).[7] However, during the February 2017 CSE meeting, the parent objected to the representation that the student attended the district school during that time, indicating that the student attended a parochial school (Dist. Ex. 3 at p. 4).

The June 2013 IEP provided that the student attend a 12:1+1 special class and receive related services of speech-language therapy in a small group and individual OT (Answer Ex. B at pp. 1, 12). According to the June 2013 CSE meeting minutes the parent believed the student required more support and was not in agreement with the CSE's recommendations (id. at pp. 1-2). The meeting minutes indicated that the CSE would reconvene (id.).

The CSE reconvened in September 2013 and developed an IEP recommending homebound instruction (the district argues that this IEP was developed pursuant to the parent's request) (Answer Ex. C at p. 2).[8] The IEP recommended two hours per day of special education instruction, three 30-minute sessions per week of speech-language therapy, and two 30-minute sessions per week of OT (Answer Ex. C at pp. 1-2, 11).[9] The parent challenged the September 2013 IEP in a November 2013 due process complaint notice (see Answer Ex. D).[10] In a decision dated April 11,

[7] The June 2013 IEP indicates that the parent "was not in agreement with school discipline policy" and began home-schooling the student at some point during the 2012-13 school year (Answer Ex. B at p. 2).

[8] A student may receive instruction at home or outside of school for a variety of reasons (see 8 NYCRR 100.10, 175.21[a], 200.6[i]). For example, students may be home schooled by their parents (8 NYCRR 100.10); students with disabilities may receive home or hospital instruction as a placement on the continuum of services (8 NYCRR 200.6[i]; see 8 NYCRR 200.1[w]); or students may receive homebound instruction if they are "unable to attend school because of physical, mental, or emotional illness or injury" (8 NYCRR 175.21[a]; see Educ. Law 3602[1][d]).

[9] The IEP specified that the student would receive indirect consultant teacher services (Answer Ex. C at pp. 1, 11), which are defined in State regulation as "consultation provided by a certified special education teacher . . . to regular education teachers to assist them in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a student with a disability who attends their classes" (8 NYCRR 200.1[m][2]). Notwithstanding the regulatory definition, the IEP specifies that the recommendation was for two hours per day of "homebound instruction" (Answer Ex. C at p. 2).

[10] The November 2013 due process complaint notice was not included in the hearing record.

2014, an IHO dismissed the parent's November 2013 due process complaint notice without prejudice due to the expiration of the timeline for the impartial hearing and the parent's "failure to prosecute her complaint" (Answer Ex. D at p. 9). There is no indication in the hearing record that the parent refiled a due process complaint notice to pursue her challenge to the September 2013 IEP. Subsequent IEPs set forth statements indicating that the student received the homebound instruction described in the September 2013 IEP: the October 2014 IEP indicated that the student had "been on homebound instruction receiving related services" (Answer Ex. E at pp. 1-2, 7), and the May 2015 IEP indicated the student was then receiving unspecified "medical homebound" services (Dist. Ex. 4D at pp. 1, 3).[11] While the district argues against the provision of homebound instruction to the student as a pendency placement given the lack of a medical reason therefor and the "highly problematic" nature of providing the student with instruction in the home, the appropriateness or desirability of a placement is separate from the legal analysis of what constitutes a student's last agreed upon placement (see Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459).

The October 2014 IEP included provision for a "blended program" consisting of a 12:1+1 special class, indirect consultant teacher services, a 1:1 teaching assistant to help the student "transition back from his homeschool and homebound setting," and related services of speech-language therapy and OT in a small group (Answer Ex. E at pp. 1, 2, 13, 15). According to the CSE meeting minutes, the parent disagreed with the CSE's recommendation and notified the district that she was "putting [the student] in a private place" (id. at p. 5). As noted above, according to the student's IEP for the next school year, the student did not attend the program outlined on the October 2014 IEP but instead received "medical homebound" (Dist. Ex. 4D at p. 3). The May 2015 CSE recommended a program similar to the October 2014 IEP but increased the frequency of speech-language therapy and added monthly parent counseling and training (compare Answer Ex. E at pp. 1 13, 15, with Dist. Ex. 4D at pp. 1, 9, 11). The May 2015 CSE meeting minutes reflect that the parent disagreed with the May 2015 IEP (Dist. Ex. 4D at p. 2). The parent challenged the October 2014 and May 2015 IEPs in due process complaint notices that resulted in the November 2015 resolution agreement discussed above (Dist. Ex. 5B at pp. 1-2). Accordingly, the hearing record does not support a finding that either the October 2014 or May 2015 IEPs were implemented and, as such, they may not form the basis of the student's pendency placement. No further IEPs were developed prior to the parent's December 2016 due process complaint notice (see Dist. Ex 1).

Based on all of the foregoing, the evidence in the hearing record indicates that the September 2013 IEP is the last program developed by the district which was implemented for the

[11] However, there are statements from the parent summarized in the October 2014 CSE meeting minutes indicating that the student did not receive speech-language therapy services (Answer Ex. D at pp. 1-3, 5-6).

student (see Answer Ex. C).[12] The September 2013 IEP represents the student's most recently implemented IEP and, further, as outlined above, it appears that the same or a similar program was continued during the 2014-15 school year. This conclusion not only aligns with the evidence in the hearing record but also represents a result that, while perhaps not ideal, comes close to achieving the goals of stability and consistency for the student.

VII. Conclusion

The IHO correctly determined that a 6:1+1 special class in a nonpublic school with the related services and supports recommended in the May 2015 IEP did not constitute the student's pendency placement. I also agree with the IHO, although for different reasons, that the November 2015 resolution agreement did not establish the student's placement for purposes of the pendency provision of the IDEA. The student's pendency placement is that set forth in the last agreed upon IEP, dated September 11, 2013. Finally, while the IHO limited his findings and conclusions of law to the narrow question before him and determined that the parent's requested placement did not constitute the student's pendency placement, the IHO should have made an effort to determine the student's pendency placement.

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 IHO's interim decision, dated April 17, 2017, is modified to include a determination of the student's pendency placement consistent with this decision.

Dated: **Albany, New York**
June 22, 2017

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[12] The record indicates that the student received two hours of home-based instruction per day beginning during or subsequent to January 2017 (Answer Exs. M; N at p. 1). The home-based instruction occurred after the filing of the due process complaint notice and, therefore, cannot represent the student's then-current educational placement at the time the impartial hearing was commenced (M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 247 [S.D.N.Y. 2013] [noting that the then-current educational placement is normally "'the last agreed upon placement at the moment when the due process proceeding is commenced"'], quoting Arlington Cent. Sch. Dist., 421 F. Supp. 2d at 696). While the parties may agree to a change in placement during the pendency of the proceedings, the record does not support a finding that there was such an agreement in the present case (see Dist. Ex. 7 at p. 3). However, to the extent that such services resembled the pendency placement outlined in the September 2013 IEP, evidence relating to the delivery of such services would be relevant if the parent was seeking relief relating to any challenge pertaining to the implementation of pendency.