The University of the State of New York

The State Education Department
State Review Officer
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No. 18-022

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:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail Eckstein, Esq.

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) determining 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 2017-18 school year. The IHO determined that the student's pendency placement was established pursuant to the student's September 2016 individualized education program (IEP). The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an 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

At the time of the impartial hearing, the student was attending a 12-month program in a 12:1+1 special class (Tr. p. 94). Although the student reportedly has acquired some cognitive/readiness skills, his skills are inconsistent (Parent Ex. E at p. 9). Additionally, the student has limited language and uses little spontaneous language throughout the day (id. at p. 10).

On September 13, 2016, a Committee on Preschool Special Education (CPSE) convened to develop the student's IEP for the 2016-17 school year (Parent Ex. A). Having found the student eligible for special education and related services as a preschool student with a disability, the September 2016 CPSE recommended a 12-month State-approved nonpublic preschool program, including a 10:1+2 special class with related services consisting of two 30-minute sessions per

week of 1:1 occupational therapy (OT), three 30-minute sessions per week of 1:1 speech-language therapy, and two 45-minute sessions per week of home-based 1:1 speech-language therapy (Parent Exs. A at p. 1; B).

On March 24, 2017, a CSE convened for an annual review of the student's program and to develop his first school-aged (kindergarten) IEP (Tr. pp. 12, 32; Parent Ex. H at pp. 1-2). In an undated letter written subsequent to the March 2017 CSE meeting, the parent requested the CSE reconvene to address her concerns regarding the student's speech-language needs and the assigned public school site (Parent Ex. H at pp. 2-3). According to the parent, the CSE reconvened on May 26, 2017 to discuss her concerns (IHO Ex. I at pp. 5-6; see Tr. p. 12; Parent Ex. G).[1]

On August 11, 2017, the CSE reconvened (Dist. Ex. 13; see Tr. p. 13). The August 2017 CSE recommended a 12:1+1 special class for all academic subjects in addition to related services consisting of one 30-minute session per week of 1:1 OT, one 30-minute session per week of small group (2:1) OT, and three 30-minute sessions per week of 1:1 speech-language therapy (Dist. Ex. 13 at pp. 15-16).

A. First Due Process Complaint Notice

By due process complaint notice dated August 15, 2017, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year (see generally IHO Ex. I). As relevant to this appeal, the parent requested that the district "re-implement [PROMPT] therapy into [the student's] kindergarten IEP" (id. at p. 6).[2] On September 13, 2017, the parties convened an impartial hearing to determine the student's pendency placement (Tr. pp. 1-37). During the hearing, the parties discussed that the student was not currently attending school and the parent indicated that she would send him to the public school site recommended by the district, even though she disagreed with the recommended 12:1+1 special class placement, rather than have the student continue not to receive services (Tr. pp. 21-22, 31-33). In a decision dated September 13, 2017, the IHO determined that the student's pendency placement included two 45-minute sessions per week of speech-language therapy provided outside of school, using PROMPT therapy, and directed the district to fund the services (IHO Ex. II at pp. 2-4).[3]

B. Second Due Process Complaint Notice

By due process complaint notice dated December 5, 2017, the parent alleged that the August 2017 CSE failed to offer the student a FAPE for the 2017-18 school year (IHO Ex. III at pp. 4, 7). As relevant to this appeal, the parent requested that her complaints be consolidated and

[1] Neither the March 2017 nor May 2017 IEPs was entered into evidence at the impartial hearing prior to the interim decision on pendency at issue on appeal.

[2] Although not defined in the hearing record, PROMPT is generally used as an acronym for "Prompts for Restructuring Oral Muscular Phonetic Targets" (see, e.g., E.C. v. Bd. of Educ. of City Sch. Dist. of New Rochelle, 2013 WL 1091321 [S.D.N.Y. Mar. 15, 2013]).

[3] The IHO further noted that to the extent that the parent agreed with the other recommendations made by the district for the 2017-18 school year, such program and services also constituted part of the student's pendency placement (IHO Interim Order at p. 3).

that the student's pendency placement "be amended to reflect" a nonpublic school placement "as last agreed upon" by the parties and set forth in the September 2016 IEP (id. at p. 8). The parent further requested that the district authorize the student's placement in a State-approved nonpublic school for purposes of pendency "to provide the [s]tudent access to the non-public school status [he] had prior to these proceedings" (id.). By order dated December 8, 2018, the IHO consolidated the parent's due process proceedings (IHO Ex. IV at pp. 2-3).

C. Impartial Hearing Officer Decision

On December 27, 2017, the parties reconvened the impartial hearing to address the parent's request to revisit the student's pendency placement, and concluded the hearing on pendency on January 12, 2018, after two additional days of proceedings (Tr. pp. 38-128). By decision dated January 18, 2018, the IHO found that the September 2016 IEP constituted the student's pendency placement (IHO Decision at p. 4). Accordingly, he directed the district to provide the student with a "10:1:2 or similarly sized special class program consistent with the [September 2016] IEP or defer the matter to the [district] Central Based Support Team (CBST) for such a placement" (id.). The IHO further ordered that if the matter was deferred to the CBST, the district would be required to issue an authorization for the parent to place the student in a nonpublic school and the first nonpublic school to accept the student would form the basis for his pendency placement (id.).

IV. Appeal for State-Level Review

The parent appeals. The parent alleges that the district's "haphazard proposal" to implement the student's pendency placement was "not consistent with the preschool IEP and constitute[d] a change in the [s]tudent's [p]rogram." She further alleges that the IHO erred by not specifying the timeline within which the district was required to implement the pendency order. As relief, the parent requests that the district be required to identify a nonpublic school placement for the student and issue an "authorization" for the student to attend a nonpublic school that replicates the program set forth in the preschool IEP. Finally, the parent requests an award of compensatory services to make up "for the number of months that the [s]tudent's [p]endency placement has been jeopardized."

In an answer, the district generally denies the parent's allegations and requests dismissal of the request for review. The district alleges that the request for review was not served within the time period for initiating an appeal. Additionally, the district alleges that the matter should be dismissed for want of jurisdiction, as the parent is not challenging the IHO's determination of the student's pendency placement but is instead arguing that the district is not properly implementing the IHO's decision. The district agrees with the IHO's determination that the September 2016 IEP was the basis for the student's pendency placement.[4]

[4] The district also asserts that the parent failed to number the paragraphs in her request for review, as required by the practice regulations. Part 279 of the Practice Regulations was amended, effective January 1, 2017, and while the former regulations mandated that "pleadings shall set forth the allegations of the parties in numbered paragraphs" (8 NYCRR 279.8[a][former 3]), that requirement was not carried through into the regulations as amended (see 8 NYCRR Part 279). The regulations as amended neither require nor preclude the use of numbered paragraphs; however, they now require that each issue raised on appeal be separately numbered (8 NYCRR 279.8[c][2]). The request for review sets forth numbered issues in accordance with the practice regulations.

In a reply, the parent reasserts the arguments raised in her request for review and also asserts that the school the student is currently attending is not a safe environment for him.

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 T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 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. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 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. of Montgomery County, 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. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). 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"]). The pendency provision does not require that a student remain in a particular site or location; rather, "it guarantees only the same general level and type of services that the disabled child was receiving" (T.M., 752 F.3d at 170-71; 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, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) 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, 452 [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 [OSEP 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). 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 student's parents that a change in placement is appropriate (20 U.S.C. § 1415[j]; 34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-85 [2d Cir. 2002]; A.W. v Bd. of Educ. of Wallkill Cent. Sch. Dist., 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 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 [2d Cir. 2002]). 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 Evans, 921 F. Supp. at 1189 n.3; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (S.S., 2010 WL 983719, at *1; Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

VI. Discussion

A. Preliminary Matters

1. Timeliness of Appeal

As set forth below, the parent's appeal must be dismissed for non-compliance with the regulations governing practice before the Office of State Review. An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). State regulation provides an SRO with the authority to dismiss sua sponte an untimely request for review (8 NYCRR 279.13; see Application of the Board of Educ., Appeal No. 17-100 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service in a timely manner]; Application of the Dep't of Educ., Appeal No. 12-120 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; Application of the Bd. of Educ., Appeal No. 12-059 [dismissing a district's appeal for failure to initiate the appeal in a timely manner with proper service]; Application of a Student with a Disability, Appeal No. 12-042 [dismissing a parent's appeal for failure to properly effectuate service in a timely manner]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing a parent's appeal for failure to timely effectuate personal service upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing a parents' appeal for failure to timely effectuate personal service upon the district]).

The parent failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of the State regulations. The IHO rendered his decision on January 18, 2018 (Jan. 18, 2018 IHO Decision at p. 5). The parent was therefore required to serve the request for review on the district no later than February 27, 2018, 40 days from the date of the IHO decision.[5] The parent's affidavit of service indicates that the parent served the district by personal service on February 28, 2018. Accordingly, the request for review was untimely.[6]

Because the parent failed to properly initiate the appeal by effectuating timely service upon the district, and there is no basis asserted in the request for review on which to excuse the untimely personal service of the request for review on the district, the appeal is dismissed (8 NYCRR 279.13; see New York City Dep't of Educ. v. S.H., 2014 WL 572583, at *5-*7 [S.D.N.Y. Jan. 22, 2014] [upholding SRO's decision to reject petition as untimely for being served one day late]; B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 2013]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012]; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *4-*5 [Sept. 25, 2009] [upholding dismissal of a petition served three days late]; Keramaty v. Arlington Cent. Sch. Dist., 05-CV-0006, at *39-*41 [S.D.N.Y. Jan. 25, 2006] [upholding dismissal of a petition served one day late], adopted [S.D.N.Y. Feb. 28, 2006]).

2. Additional Evidence

The parent has attached the following documents to her request for review: (1) February 2018 emails between the parent's advocate and the district; (2) an August 2017 social history update; and (3) a November 2014 bilingual psychological evaluation. 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]). Even if the appeal was timely commenced, none of the offered evidence is necessary for purposes of rendering a decision regarding the student's pendency placement.

3. Reply

Next, the parent's reply was filed with the Office of State Review solely by facsimile. Initially, filing by facsimile or electronic mail is not permitted and the parent's reply has accordingly not been considered (8 NYCRR 279.6[b]; see 8 NYCRR 279.4[e]; 279.5[c]).

[5] I note that in addition to an appeal from an IHO's interim decision on pendency, pursuant to 8 NYCRR 279.10(d), a party may seek review of "any interim ruling, decision or refusal to decide an issue" in an appeal from the final decision of an IHO. However, the regulations do not provide a party with an extension of time to file an appeal from an interim decision through the time to file an appeal from the IHO's final decision (see Application of a Student with a Disability, Appeal No. 13-041 & 14-008).

[6] The request for review indicates that the January 18, 2018 interim decision on pendency "was issued on January 19, 2018" and dated January 19, 2018. The copy of the decision received by the Office of State Review is dated January 18, 2018, and the parent in her reply asserted that the IHO's decision was "dated mid-January 2018."

Moreover, a reply is restricted by State regulation to addressing "any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal." (8 NYCRR 279.6[a]). However, the parent's reply does not address any such issues but instead impermissibly rehashes arguments set forth in the request for review and seeks to introduce new claims, including claims relating to the appropriateness of the district's implementation of the student's pendency placement based on additional information not included in the request for review. Furthermore, the parent did not verify her reply or submit proof of service, as required by State regulation (8 NYCRR 279.6[b]; 279.7[b]). Accordingly, in addition to the parent's failure to properly file the reply with the Office of State Review, I will not accept or consider the reply as a result of the parent's failure to comply with the practice regulations governing the permissible scope of a reply, verification, and proof of service (8 NYCRR 279.8[a]; see 8 NYCRR 279.6[a], [b]; 279.7[b]).

B. Pendency

Turning next to the parties' assertions on appeal, to the extent that the parent is requesting that an SRO order the district to implement the IHO's pendency order, the district correctly asserts that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a], [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]). However, while this matter must be dismissed on procedural grounds and it is unnecessary to reach the merits of the parties' claims, considering that it is possible that the parties will continue to have the same disagreement and continue to litigate the student's pendency placement, it may be helpful to discuss some of the issues raised by the parties as they determine how to implement the student's pendency placement for the remainder of the school year.

The IHO found that the pendency provisions of the IDEA required the district to place the student in a 10:1+2 special class placement or "similarly sized special class program" in accordance with the September 2016 IEP (IHO Decision at p. 4). Under the circumstances, the remaining issue is the parties' dispute over whether a 12:1+1 special class placement constitutes a sufficiently similar program to that recommended in the September 2016 IEP for the purposes of pendency or if the district was required to implement a 10:1+2 special class placement (see Tr. pp. 86-88, 96-100, 103-12). As explained in greater detail below, the evidence in the hearing record does not establish the similarity of the programs.

As noted above, the district is obligated to maintain the student's then-current educational placement during the pendency of the proceedings (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]). However, the pendency provision does not require a student to receive services at the same school site or location, or from the same service providers; instead, it "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). Whether a student's educational placement has been maintained under the meaning of the pendency provision depends on whether the educational program is "substantially and materially the same"

as the student's educational program for the prior school year (Letter to Fisher, 21 IDELR 992 [OSEP 1994]; see Application of a Student with a Disability, Appeal No. 16-020). OSEP identified a number of factors that must be considered in determining whether a move from one location to another constitutes a change in educational placement, including: whether the educational program in the student's IEP has been revised; whether the student will be educated with nondisabled peers to the same extent; whether the student will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement is the same option on the continuum of alternative placements (Letter to Fisher, 21 IDELR 992 [OSEP 1994]). Student-to-staff ratio is also a relevant factor in determining whether a student's program has changed (M.K. v. Roselle Bd. of Educ., 2006 WL 3193915, at *14-*15 [D.N.J. Oct. 31, 2006]; Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 60-61 [D.N.H. 1999]; Application of a Child with a Disability, Appeal No. 05-028). State regulations define a change in program as "a change in any one of the components" of an IEP, which include the size of the special class in which a student is recommended to receive services (8 NYCRR 200.1[g]; 200.4[d][2][a], [b][2]). Furthermore, at least one district court has held that, absent direct evidence of similarity in the hearing record, a 6:1+1 special class with the additional service of a 2:1 shared aide was not sufficiently similar to a 6:1+3 special class to constitute a comparable program (G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *7-*8 [S.D.N.Y. Jan. 31, 2012]).[7]

Additionally, although State regulations do not require that a student who had previously been identified as a preschool student with a disability remain in a preschool program for which he or she is no longer eligible by reason of age pursuant to Education Law § 4410 (8 NYCRR 200.16[h][3][i]; see 8 NYCRR 200.5[m]), SROs have long noted that the IDEA makes no distinction between preschool and school-age children and consequently, even if a student is no longer eligible to remain in a particular preschool program, the district remains obligated to provide the student with "comparable special education services during the pendency of an appeal from the CSE's recommendation for [the student's] first year of education as a school age child" (Application of a Child with a Handicapping Condition, Appeal No. 91-25; see Henry, 70 F. Supp. 2d at 61 [when a student has aged out of a particular school program, the district "must fulfill its stay-put obligation by placing a disabled student at a comparable facility"]; Application of a Student with a Disability, Appeal No. 16-020; see also Makiko D. v. Hawaii, 2007 WL 1153811, at *10 [D. Haw. Apr. 17, 2007]; Laster v. Dist. of Columbia, 394 F. Supp. 2d 60, 65-66 [D.D.C. 2005]; Letter to Harris, 20 IDELR 1225 [OSEP 1993]).

In this instance, there is no evidence in the hearing record to support the district's claim that a 12:1+1 special class placement is substantially similar to the student's preschool placement. Accordingly, despite the district's assertions at the impartial hearing that a 12:1+1 special class placement could be made to be substantially similar to the student's 10:1+2 class in his preschool

[7] Although G.R. also involved the comparable services provision of the IDEA, regarding transfers of students between school districts (20 U.S.C. § 1414[d][2][C][i][I]; 34 CFR 300.323[e]; 8 NYCRR 200.4[e][8][i]), the court in G.R. was addressing a stay-put placement issue (2012 WL 310947, at *4-*7). The United States Department of Education has stated that "'comparable' services means services that are 'similar' or 'equivalent' to those that were described in the child's IEP" (IEPs for Children Who Transfer Public Agencies in the Same State, 71 Fed. Reg. 46681 [Aug. 14, 2006]), and courts have held that compliance with the pendency mandate requires the provision of comparable services (see M.K., 2006 WL 3193915, at *11, citing Concerned Parents, 629 F.2d at 754).

program with the addition of extra staff (Tr. pp. 109-12), the district did not submit any evidence establishing the similarity of the two programs. Accordingly, the hearing record does not support a conclusion that the 12:1+1 special class placement—with or without additional paraprofessional services—was substantially and materially the same as the student's 10:1+2 special class placement at the State-approved preschool during the 2016-17 school year; precluding a finding that a 12:1+1 special class placement constituted the student's pendency placement (G.R., 2012 WL 310947, at *7-*8).

VII. Conclusion

As the appeal was not timely filed, the IHO's determination that a 10:1+2 special class in a nonpublic school with the related services and supports recommended in the September 2016 IEP constituted the student's pendency placement is undisturbed. In addition, to the extent that the parties continue to disagree over whether the district is implementing the student's pendency placement, the district did not, as of the January 18, 2018 IHO Decision, establish that the 12:1+1 special class placement the student was attending was sufficiently similar to the 10:1+2 special class recommended in the September 2016 IEP to constitute the student's pendency placement. The parties may present additional evidence during the hearing regarding this issue and the IHO may revisit it in his final determination, along with consideration as to whether relief, such as compensatory services, is warranted based on the district's failure to implement the student's pendency placement (see, e.g., E. Lyme, 790 F.3d at 456-57).[8]

Finally, although the parent has not timely appealed from the IHO's decision and her appeal must be dismissed, the district is obligated to implement the student's pendency placement as a matter of law, as the stay put provision operates as an automatic injunction (Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199-200 [2d Cir. 2002]; Zvi D., 694 F.2d at 906).

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 4, 2018

STEVEN KROLAK
STATE REVIEW OFFICER

[8] The district representative's assertion that the student was attending a 12:1+1 special class that included 11 students, one teacher, and three paraprofessionals was not supported by any evidence (Tr. pp. 93-94, 104). The IHO may consider the district's implementation of the student's placement during the pendency of the impartial hearing with respect to whether compensatory services are warranted.