The University of the State of New York

The State Education Department
State Review Officer
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No. 18-064

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 Westhampton Beach Union Free School District

Appearances:

Kevin A Seaman, Esq., attorney for respondent

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 his request for a change in pendency. 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 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 three prior administrative appeals (Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Accordingly, the parties' familiarity with the facts and procedural history through the prior administrative appeals is presumed and will not be repeated in detail.

On March 5, 2018, a CSE convened to consider an in-district placement recommendation (Mar. 5, 2018 CSE Meeting Tr. p. 8; see Application of a Student with a Disability, Appeal No. 17-079).

A. Due Process Complaint Notice

On March 7, 2018, the parent filed a due process complaint notice (Due Process Compl. Notice). At the time of the filing of the parent's due process complaint notice in the present matter, the student was reportedly receiving academic instruction in the home and related services at a district school pursuant to a 2016 agreement between the parties (see Mar. 28, 2018 Prehr'g Conf. Tr. pp. 6-8, 10-11; Apr. 11, 2018 Prehr'g Conf. Tr. p. 54).

The parent alleged that the district denied the student a free appropriate public education (FAPE) (Due Process Compl. Notice at p. 2).[1] Specifically, the parent claimed that the district's CSE was not fair or impartial and predetermined the student's recommended placement and, further, that the CSE chairperson had personally deprived the student of a FAPE (id. at p. 1). The parent also contended that the district had denied the student rightful access to the general education curriculum by refusing to modify its policies and procedures and refusing to modify the general education curriculum to meet the student's needs and had failed to develop an IEP that would enable the student to access the general education curriculum or participate in the general education community (id.). The parent claimed that the district failed to offer sufficient special education, including supplementary aids and services, for the student to receive a FAPE in the least restrictive environment (LRE) (id.). The parent also asserted that the district failed to consider the continuum of services or meaningfully explore the possibility of implementing the student's IEP at a placement within the district (id.). The parent alleged that the district's recommended placement was not the student's LRE (id.). The parent also contended that the district's policies, procedures, and practices violated the student's right to a FAPE in the LRE (id.). Additionally, the parent alleged that the district conducted an inappropriate out-of-district observation of the student without parental consent and in an inappropriate forum (id. at p. 2). As relief, the parent requested compensatory damages, compensatory educational services, and an order requiring the district to implement the student's program in the parent's preferred placement, as well as "reimbursement for attorney fees" (id.).

In an answer dated March 19, 2018, the district sought dismissal of the parent's due process complaint notice contending that the parent was attempting to relitigate claims related to the 2016-17 school year, which had been adjudicated by prior IHOs and SROs, resulting in directives that had been implemented by the March 2018 CSE (Answer to the Due Process Compl. Notice at p. 2; see also Mar. 28, 2018 Prehr'g Conf. Tr. pp. 33, 36-37).[2]

B. Facts Post-Dating the Due Process Complaint Notice

During a March 28, 2018 prehearing telephone conference, the scope of the hearing was discussed and the IHO directed the district to submit its motion to dismiss and for the parent to

[1] The parent also alleged that the district violated Section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a) (Due Process Compl. Notice at p. 2).

[2] Although the district's answer to the parent's due process complaint notice referenced three exhibits, the exhibits were not included with the hearing record filed with the Office of State Review; however, it can be inferred from the context of the district's answer to the due process complaint notice that the exhibits are duplicative of documents attached to the district's memorandum to the IHO (compare Answer to the Due Process Compl. Notice, with District's Prehr'g Memo.).

submit a brief outlining his position, if desired, by April 20, 2018 (Mar. 28, 2018 Prehr'g Conf. Tr. pp. 46-49, 52-53). In addition, during the conference, the parent reported that the student's then-current placement was pursuant to an agreement of the parties and consisted of related services provided daily at an in-district school and home-based services (id. at pp. 7-8, 10-11). Specifically, the parent stated that the student took the bus in the morning and received physical therapy, occupational therapy, adapted physical education, and speech-language therapy and returned home at ten in the morning (id. at p. 7). The parent further stated that the student received five hours of home-based 1:1 instruction from a special education teacher and two hours of home-based after-school 1:1 services from a second special education teacher (id. at pp. 7-8).

On April 9, 2018, a CSE convened at the request of the parents to review the student's present levels of performance and annual goals for the 2017-18 school year (Apr. 9, 2018 CSE Meeting Tr. p. 3). During the meeting, the parent also requested that the student's pendency placement be changed so that the student could receive lunch and electives within the public school (see id. at pp. 25-26, 109-36).

On April 11, 2018, the parties participated in a second telephone conference with the IHO in response to a request by the parent for a hearing on pendency (Apr. 11, 2018 Prehr'g Conf. Tr. p. 3). During the conference, the IHO determined that a hearing was not necessary and that the parties should address their positions about pendency in the prehearing briefs to be submitted by April 20, 2018 (Apr. 11, 2018 Prehr'g Conf. Tr. pp. 42-43, 45, 67).

The parent submitted a prehearing brief to the IHO dated April 19, 2018.[3] The district submitted a memorandum to the IHO on April 20, 2018.[4]

During the April 11, 2018, telephone conference and in his prehearing brief to the IHO, the parent contended that the student's pendency placement should be changed because it was based on a temporary agreement of the parties and further asserted that case law, decisions of the Commissioner of Education, and State regulations supported his argument (Apr. 11, 2018 Prehr'g Conf. Tr. pp. 6-9, 13, 24-30, 36-37, 39-42; Parent Prehr'g Brief at pp. 20-25). The parent argued that the student should participate in lunch and elective classes at the district school where he received related services as an "appropriate" pendency placement (Parent Prehr'g Brief at p. 25).

[3] The parent's prehearing brief included exhibits (which were not labeled with a letter or number designation), consisting of an August 8, 2015 IEP, a guidance document from the United States Department of Education, and four documents published by the State Education Department.

[4] The district's memorandum included the following exhibits: a prior IHO decision, a prior SRO decision, and the transcript of the March 5, 2018 CSE meeting. The district also submitted the transcript for the April 9, 2018 CSE meeting to the Office of State Review as part of the record on appeal. Additional documents submitted consist of an undated and unsigned document styled as the parent's "Combined Due Process Complaint Notice & Complaint," and an undated "Amended/Renewal Motion" authored by the district, which references additional due process complaint notices filed by the parent on May 23, 2018 and June 7, 2018. The district's amended motion further references four exhibits, which were not submitted to the Office of State Review as part of the hearing record.

C. Impartial Hearing Officer Decision

By interim decision dated June 5, 2018, the IHO denied the parent's request for a change in pendency and determined that the scope of the impartial hearing would be limited to whether or not the March 2018 CSE considered the possibility of an in-district placement during the student's annual review (Interim IHO Decision at pp. 10-11). In her interim decision, the IHO reviewed IHO and SRO decisions previously rendered and held that pendency had clearly been acknowledged in prior proceedings and that the parent's argument for a change in pendency was not persuasive given that the parent had requested and agreed to the pendency placement (id. at pp. 8-10).[5]

IV. Appeal for State-Level Review

The parent appeals, alleging that pendency is flexible in nature, and requests a "limited 'pendency change'" allowing the student to participate in lunch and electives at the location where the student receives related services.

In an answer, the district generally denies the parent's allegations and requests that the IHO's interim order be upheld in its entirety. The district additionally asserts that the parent's request for review fails to comply with State regulations governing practice before the Office of State Review: specifically, that the parent fails to adequately identify the issues for review, the challenged portions of the IHO decision, or the relief sought that can be granted or provide citations to the record on appeal.[6] The district also requests that the parent's request for review be dismissed.

V. Applicable Standards – Pendency

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; 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.

[5] Subsequently, by order dated June 7, 2018, the IHO agreed to consolidate due process complaint notices dated March 12, 2018, and June 6, 2018.

[6] The district has previously asserted similar allegations regarding the form and content of the parent's pleadings in Application of a Student with a Disability, Appeal No. 17-079, Application of a Student with a Disability, Appeal No. 17-015, and Application of a Student with a Disability, Appeal No. 16-040. In the previous appeals, the SROs declined to dismiss the parent's appeals based solely upon the failure to comply with the practice regulations; however, the parent was cautioned that an SRO exercising his or her discretion to dismiss a request for review may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 17-015). The district's valid contentions in this regard notwithstanding, I decline to dismiss the parent's request for review on these grounds, given that the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that it suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058).

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 (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). 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 [2d Cir. 2002]; 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 (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

VI. Discussion

A review of the hearing record, including the documents submitted on appeal, reflects that the IHO correctly denied the parent's request for a change in pendency. In a well-reasoned interim decision, the IHO reviewed IHO and SRO decisions from previous administrative proceedings involving the student and carefully considered the parent's position before correctly reaching the conclusion that the student's pendency placement had been determined by agreement of the parties and acknowledged in prior proceedings (see Interim IHO Decision at pp. 3-10).

During the March 28, 2018 prehearing conference, the parent stated what services comprised pendency and indicated that the student's pendency placement was the result of an agreement between the parents and the school district (Mar. 28, 2018 Prehr'g Conf. Tr. pp. 5-11). In her interim decision, the IHO noted that, during the April 11, 2018 conference call, the parent indicated "that he had unsuccessfully attempted to modify the prior agreement concerning pendency with the [d]istrict and because the [d]istrict did not agree, he wanted a hearing on the issue of pendency" (Interim IHO Decision at p. 7). The parent also cites generally to decisions of the Commissioner of Education from 1993 and 1997 for the proposition that a temporary agreement on pendency can be changed without the consent of the district.

Although the IHO found that the student's pendency during these proceedings was clear, she nonetheless reviewed case law proffered by the parent which "he claimed was relevant to the issue of pendency" (Interim IHO Decision at p. 10). The IHO indicated that she reviewed both parties' submissions and found that there was no basis to grant the parent's request for a hearing on the issue of pendency and further that "[t]he provisions of law and undisputed facts are so clear in this regard, [the parent]'s request borders on frivolous" (id.).

The IHO did not explicitly review the authority cited by the parent in her interim decision. Nevertheless, I agree with the IHO's determination that the parent is not entitled to a change in pendency. The parent's desire to augment the student's pendency placement without the consent of the district does not constitute a pendency changing event.

Once a proceeding commences, a student's pendency placement can be changed in one of two ways pursuant to the IDEA: 1) by agreement between the parties themselves, or 2) by a state-level administrative (i.e., SRO) decision that agrees with the student's parents that a change in placement was 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, 484-85 [2d Cir. 2002]; A.W. v Bd. of Educ. 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, 86 F. Supp. 2d at 366). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings," S.S., 2010 WL 983719, at *1 [emphasis in the original]). And upon a pendency changing event, such changes apply "only on a going-forward basis" (S.S., 2010 WL 983719, at *1). This serves the core purpose of pendency: "to provide stability and consistency in the education of a student with a disability;" moreover, it would contradict this provision to require a district to change a student's pendency services in the middle of an impartial hearing (Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 696 [S.D.N.Y. 2006]; see Evans, 921 F. Supp. at 1187, quoting Ambach, 612 F. Supp. at 233; see also Doe v. E. Lyme, 790 F.3d at 452).

First, in arguing that pendency should be flexible, the parent cites to the requirement noted above that a state-level administrative (i.e., SRO) decision that agrees with the student's parents that a change in placement was appropriate will effectuate a change in a pendency placement (20 U.S.C. § 1415[j]; 34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]). However, the parent cites this requirement as though an SRO could agree that a change in placement is appropriate at any stage of the proceedings; the agreement contemplated by the IDEA and State and federal regulations "is not a decision addressing a stay put motion but rather [pertains to] the overall litigation regarding tuition reimbursement" (A.W., 2015 WL 3397936, at *5; see Schutz, 290 F.3d at 484-85; S.S., 2010 WL 983719, at *1; Murphy, 86 F. Supp. 2d at 366).

Next, the parent points to decisions of the Commissioner of Education for the proposition that pendency should be flexible when "dealing with circumstances where temporary agreements are fashioned to avoid litigation." The two Commissioner's decisions cited by the parent and the line of cases cited therein pre-date the enactment of the 1997 amendments to the IDEA (Appeal of a Student with a Disability, 36 Ed. Dep't Rep.436, Decision No. 13,771 [1997]; Appeal of a Student with a Disability, 33 Ed. Dep't Rep. 16, Decision No. 12,960 [1993]). In each of these cases, the student was initially removed from school by the district and placed on home instruction, after which the parties agreed to home instruction as an interim placement pending a reconvene of the CSE to determine the student's placement. While the students in these cases were receiving home instruction, the parents filed due process complaint notices, and the districts argued in each case that the student's pendency placement was home instruction. The Commissioner of Education resolved this scenario, which resulted in a lack of due process afforded to students with disabilities who were removed from school for disciplinary reasons, by holding that "[w]hen, as here, the parent initially consents to home instruction as an interim placement but then disagrees with the new CSE recommendation and requests an impartial hearing, written notice of the opportunity to return the student to the pendency placement must be provided" (Appeal of a Student with a Disability, 33 Ed. Dept Rep. 16, 19, citing Application of a Child with a Handicapping Condition, 29 Ed. Dept Rep. 489, 495; see also Appeal of a Student with a Disability, 36 Ed. Dept Rept. 436, 439 [holding interim placement of home instruction does not automatically become the pendency placement]).

Since the parent does not argue any specific similarities, I can only assume he is attempting to analogize the agreement he made with the district to provide the student's instruction at home until his claims regarding the appropriate placement for the student could be resolved with the "interim placement" discussed in the cited Commissioner's decisions. However, in those cases, home instruction as an interim placement referred to agreements made after the students had been removed from school, or in other words "a mutually agreed upon interim change in the provision of special education services for reasons other than 'status quo'" which has no effect on a student's right to pendency (Appeal of a Student with a Disability, 33 Ed. Law Rep. 16, 19). In this matter, home instruction was provided at the parent's request and was specifically agreed to as the student's pendency placement (see Application of a Student with a Disability, Appeal No. 17-015).

Further, even if I were inclined to agree with the parent's interpretation of the Commissioner's decisions cited in his request for review, unlike the parents in those matters, the parent does not seek to return the student to the placement he attended prior to the parties' pendency agreement. Rather, the parent is attempting to unilaterally modify the agreed upon pendency placement, which runs contrary to the pendency provision that "unless the State or local

educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child" (20 U.S.C. §1415[j]).[7]

Lastly, to the extent that the parent argues for an appropriate pendency placement in the "best interests" of the student, as set forth above, 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 IHO also discussed the irrelevance of appropriateness and restrictiveness within the context of a pendency placement as set forth in the parent's prior appeal (Interim IHO Decision at pp. 8-10; Application of a Student with a Disability, Appeal No. 17-015 [holding that the IHO erred by weighing the restrictiveness of pendency placements and that the parents had the right to maintain the student in those educational programs as pendency placements—regardless of the restrictiveness—under both State and federal laws and regulations]). Even assuming that the parent's preferred placement for the student during the pendency of the impartial hearing may be in the student's "best interests," the pendency provision of the IDEA "substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships (Zvi D., 694 F.2d at 906; see J.F. v. New York City Dep't of Educ., 2015 WL 892284, at *5 [S.D.N.Y. Mar. 3, 2015] [noting that "equitable considerations do not provide an independent basis for relief" under the IDEA]; Application of the Dept. of Educ., Appeal No. 10-083).

VII. Conclusion

Based on the foregoing, the IHO correctly denied the parent's request for a change in pendency. In the absence of a pendency changing event, the student must remain in his pendency placement for the duration of the due process proceedings.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 11, 2018

STEVEN KROLAK
STATE REVIEW OFFICER

[7] Even if the agreement in the present case was a stipulation entered into to avoid litigation, as the parent characterizes it, the parent's argument would still fail. A resolution agreement could 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 determining whether a settlement agreement establishes a pendency placement]). Further, the parties' accord that an agreement sets forth the student's pendency placement would support 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). Here, the parties entered into an agreement about pendency.