The University of the State of New York

The State Education Department
State Review Officer
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No. 18-124

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 Suffern Central School District

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, by Michael K. Lambert, 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 from the decision of an impartial hearing officer (IHO) that granted respondent's (the district's) motion to dismiss her due process complaint notice. The appeal must be sustained in part and, for reasons explained more fully below, the matter is remanded to an IHO for further administrative proceedings.

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 a prior administrative appeal, based upon a due process complaint notice dated September 28, 2017, in which the matter was remanded back to the IHO who issued a decision dated February 3, 2018 (IHO 1), in order to provide the parent with an opportunity to clarify her claims with respect to a June 2017 CSE meeting and IEP, and to place those claims in a due process complaint notice upon which an impartial hearing could be held (see Application of a Student with a Disability, Appeal No. 18-016).[1] Subsequently, the parent filed a due process complaint notice dated April 13, 2018 concerning the failure of the district to provide a free appropriate public education (FAPE) to the student for the 2016-17 and 2017-18 school

[1] The SRO's decision provided that in the event the IHO who issued the February 3, 2018 decision was not available, another IHO should be appointed in accordance with the district's rotational selection procedures and State regulations (see Application of a Student with a Disability, Appeal No. 18-016).

years, as well as the four prior school years, which was assigned to a new IHO for a decision (IHO 2) (IHO Ex. 4). In a decision dated September 10, 2018, IHO 2 determined that the parent was not entitled to tuition reimbursement for the student's unilateral placement at Barnstable Academy (Barnstable) during the 2016-17 and 2017-18 school years, denied the parent's request to look beyond the two year statute of limitations, and found that the parent's request that Barnstable be added to the New York State list of approved special education schools was not within IHO 2's jurisdiction (id. at p. 19). The parent filed an appeal of IHO 2's decision dated October 22, 2018 with the Office of State Review, and my decision in that appeal is also being issued contemporaneously with this decision under the caption Application of a Student with a Disability, Appeal No. 18-106.

A. Due Process Complaint Notice

By due process complaint notice dated August 29, 2018, the parent alleges that the district failed to offer the student a FAPE for the 2018-19 school year based on procedural and substantive violations particularly with respect to the IEP developed by the CSE on June 20, 2018 (see IHO Ex. 3). For relief, the parent sought, among other things, pendency at Barnstable or provision of home educational services until an appropriate placement could be made for the 2018-19 school year (id. at pp. 4-5). The parent also sought an order requiring that the district and their attorneys "follow the timeline requirements as prescribed by the [New York State] Department of Education" (id. at p. 6).[2] Additionally, the parent realleged multiple claims and facts that were found in her April 13, 2018 due process complaint notice concerning the student's early education at the district's schools from September 2010 - December 2012 (id. at pp. 2-3). The parent also requested relief previously sought in her April 13, 2018 due process complaint notice including "[r]eimbursement of tuitions paid for 2016-2018" and "[r]eimbursement of [t]uitions paid [for] 2013-2016, due to the fact that the district violated 8 NYCRR [] 200.5(j)(1)(i)," as well as an order that the district provide the parent with a "viable list of Free and Low Cost Legal and other relevant [s]ervices available in the area" (id. at pp. 5-6). The parent also asserted that the district continued to refuse to allow her to review and/or correct the student's disciplinary records, a request she made on April 13, 2018 (id. at p. 3).[3]

B. Events Post-Dating the Due Process Complaint Notice

A third IHO was appointed to preside over the impartial hearing in this proceeding (IHO 3). By letter dated September 7, 2018, the district moved to dismiss the August 29, 2018 due process complaint notice as insufficient as a matter of law, and on the bases of res judicata and statute of limitations (see IHO Ex. 1 at p. 1). The district argued that the due process complaint notice must contain certain basic information in order to give the district proper notice of the dispute and a full and fair opportunity to respond including: (i) the name of the student; (ii) the address of the residence of the student; (iii) the name of the school the student is attending; (iv) a description of the nature of the problem of the student relating to such proposed or refused initiation or change, including facts relating to such problem; and (v) a proposed resolution of the

[2] This matter is addressed in Application of a Student with a Disability, Appeal No. 18-106.

[3] This matter is also among the issues addressed in Application of a Student with a Disability, Appeal No. 18-106.

problem to the extent known and available to the party at the time (8 NYCRR 200.5[i][1]) and that the parent's due process complaint failed to do so—thus giving notice and requesting a determination on sufficiency from IHO 3 pursuant to 8 NYCRR 200.5[i][6] (id. at pp. 1-2).

The district also argued that the parent's claim for tuition reimbursement for the 2016-17 and 2017-18 school years should be dismissed on the basis of res judicata as the claim was brought in the due process complaint notice before IHO 2 and subsequently ruled upon (IHO Ex. 1 at p. 2). Similarly, the district argued that the parent's claim for tuition reimbursement for the period of 2013 – 2016 should be dismissed on the basis of the claim being brought outside the applicable two-year statute of limitations, as well as res judicata because this claim too was brought in the due process complaint notice before IHO 2 and subsequently ruled upon (id. at pp. 2-3). The district asserted that the parent's request to "[h]ave [the] [d]istrict provide the information they have been withholding from the parent which was required to be provided to the parent," is unclear and should be dismissed—to the extent the parent is referring to the student's disciplinary records, the district does not know what records that the parent believes she has been denied access to, and any correction to such records must be done in accordance with FERPA, rather than IDEA (id. at p. 3). The district further asserted that the student is not entitled to pendency at Barnstable or home-based educational services because the district maintains that the student's pendency program is an in-district program reflected in the student's IEP, and despite the parent's disagreement with the recommendations made by the CSE, there has "clearly at no time been an agreement between the parties" regarding a different placement; as such the parents claim must be dismissed (id. at p. 3). Finally, the district argues that that the parent's request on "multiple occasions" to have the district provide the parent with a "viable list of Free and Low Cost Legal" and other relevant services available in the area should be dismissed as the parent provided no basis to support the conclusion that the district failed to provide this information, and in any event, that the district has provided this information to the parent (id. at p. 3).

In addition, according to the district's counsel, IHO 3 was provided a written copy of IHO 2's decision on September 11, 2018 (see Ans. at ¶ 1).[4] In a letter dated September 12, 2018, the parent requested that the district's motion to dismiss be denied, and that IHO 3 order the district to pay the cost of the student's tuition at Barnstable for the 2018-19 school year in accordance with pendency (IHO Ex. 2).

C. Impartial Hearing Officer Decision

By decision dated October 3, 2018, IHO 3 found that while part of the parent's due process complaint notice "might be vague, i.e., to '[h]ave [the] [d]istrict provide the information they have been withholding from the parent which was required to be provided to the parent,'" it nonetheless provided all the information required by State regulations (as referenced above under 8 NYCRR 200.5[i][1]) and was therefore sufficient (IHO Decision at p. 1).[5] IHO 3, however, dismissed the

[4] The decision states that IHO 2's decision was emailed to the parent and to IHO 3 on September 12, 2018 (IHO Decision at p. 2).

[5] As IHO 3 found the parent's due process complaint notice to be sufficient and the district did not cross-appeal that finding, the issue will not be addressed upon appeal.

parent's due process complaint, finding that the issues presented of "[r]eimbursement of tuitions paid for 2016-2018" and "[r]eimbursement of [t]uitions paid [for] 2013-2016[,] due to the fact that the [d]istrict violat[ed]" 8 NYCRR 200.5[j][1][i],[6] were decided in IHO 2's decision (id. at p. 2).[7] IHO 3 also found that the parent's requested remedy of having the district update and provide a copy of the Free and Low Cost Advisory Services list to the parent was already accomplished (id.). IHO 3 further noted that IHO 2 denied the parent's request to look beyond the two year statute of limitations and found the district's claim of res judicata and statute of limitations to be persuasive as reasons for dismissing the parent's due process complaint notice (id.). Finally, IHO 3 stated that rather than bringing another due process complaint notice for the same issues, the parent might rather file an appeal of IHO 2's decision,[8] and noted that the parent's August 2018 due process complaint notice had been filed prior to the issuance of IHO 2's decision (which formed the basis of IHO 3's res judicata determination), which may have caused some confusion (id.).

IV. Appeal for State-Level Review

The parent appeals, asserting that IHO 3: (1) failed to consider that the student was denied a FAPE for the 2010-11, 2011-12, and 2012-13 school years; (2) failed to consider the district's misreporting of behavioral and academic progress "in an attempt to cover the fact that [the student] was not being given an IEP with the appropriate support needed to educate him," and that this should be considered in tolling the statute of limitations in relation to the claims for those years; (3) improperly referred to the April 2018 due process complaint notice and IHO 2's decision; (4) failed to decide whether the student was provided a FAPE for the 2016-17 and 2017-18 school years or the parent's concern that the IEP placement was overly restrictive; (5) failed to address the issue of whether the student was offered a FAPE for the 2018-19 school year; (6) failed to address the parent's request for pendency; (7) failed to address the financial hardship being placed on the parent due to the district's denial of a FAPE for the 2018-19 school year; (8) failed to address equitable considerations in the matter; (9) failed to allow a due process hearing; and (10) erred in the determination that the district had made a good faith effort to correct the deficient list of "Free or Low Cost Legal or other Services available in the area." For relief, the parent requests that an SRO order the district to: (1) provide an appropriate IEP as recommended by the student's developmental pediatrician; (2) remove any notes and goals not relevant to the placement from the student's IEP; (3) add at least one hour of reading support per week with the reading specialist to

[6] 8 NYCRR 200.5[j][1][i] states: "Timeline for requesting an impartial hearing. The request for an impartial due process hearing must be submitted within two-years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, except that the two-year timeline shall not apply to a parent if the parent was prevented from requesting the impartial hearing due to specific misrepresentations by the school district that it had resolved the problem forming the basis of the complaint or the school district's withholding of information from the parent that was required to be provided to the parent under this Part or under Part 201 of this Title."

[7] The decision states that IHO 2's decision (under NYSED number 508448) was dated September 2, 2018, however, the decision was dated September 10, 2018.

[8] As noted above, and in IHO 3's decision, the parent has filed an appeal of IHO 2's decision, a decision upon which has been issued today by the undersigned in Application of a Student with a Disability, Appeal No. 18-106.

the student's IEP; (4) reimburse the parent for tuition costs for all of the student's unilateral placements for the 2013-14, 2014-15, 2015-16, 2016-17, and 2017-18 school years; (5) pay for the student's pendency placement at Barnstable for the 2018-19 school year; (6) provide a corrected list of Low Cost Legal and other relevant services in the area to the parent; (7) discontinue its policy of "[d]o not respond"; and (8) discontinue its policy of misreporting behavioral incidents. The parent attached a number of documents to the request for review.[9]

In an answer, the district responds to the parent's request for review by generally denying the parent's allegations and asserting that IHO 3 properly dismissed the parent's due process complaint notice. In particular, the district states that that there is no legal or factual basis for tolling the statute of limitations or for an order directing the district to pay for Barnstable during the pendency of the proceedings. Additionally, the district argues that the parent's request for review should be dismissed as the pleading fails to comply with the form and content requirements of the practice regulations in Part 279 and that the district is unable to "specifically and meaningfully" respond to the parent's allegations due to the omissions. The district further argues that the undersigned should not consider the additional documents that were attached to the parent's request for review that were not admitted into evidence at hearing. Finally, the district alleges that IHO 3's determination on the issues of res judicata and statute of limitations should be final and binding as the parent failed to state any legal or factual bases challenging them and that IHO 3's findings and determinations are fully supported by the hearing record.

V. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

I will first address the district's assertion that the parent's request for review must be dismissed for failing to comply with the form requirements for pleadings (8 NYCRR 279.4[a]; 279.8[a][2]-[3]). The first three and one half pages of the pro se parent's request for review are concise statements that purport to number and identify the rulings of IHO 3 with which she disagrees. While her allegations may not be as artfully drawn as those that might be prepared by a skilled attorney practicing in the field of special education law, the numbered issues identify the parent's areas of dissatisfaction with particular points in IHO 3's decision in clear sentences which are not difficult to follow. While the parent refers to several exhibits attached to her request for review rather than "to specific portions of the hearing record"—as there was no hearing in which evidence could have been admitted, and to IHO 2's decision—requesting that it be reversed, when

[9] As noted herein, the district objects to the additional evidence attached to the parent's request for review. Generally, documentary evidence not presented at an impartial hearing is 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; Application of a Student with a Disability, Appeal No. 08-003; 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]). Here, there was no impartial hearing and, given the disposition of the matter and the issues presented for review, the evidence offered by the parent is not necessary to render a decision. However, the IHO and the parties should address the parent's proffered evidence and rectify any record issues before reaching a final decision upon remand.

IHO 2's decision is being appealed in a separate proceeding—thus, rendering her request for review similar to the one she filed in Application of a Student with a Disability, Appeal No. 18-106, that is, less than pristine; but once again, as I stated in that case, such a high standard is not required, especially from a pro se parent. Again, it is a functional pleading and, as a matter within my discretion, I reject the district's argument that the request for review must be dismissed for noncompliance with Part 279. With respect to the last two and one half pages of the parent's request for review, once again, I will accept this section of her request for review primarily as factual argument in support of her enumerated claims on pages one through four, noting two additional claims of error on the part of IHO 3 (related to equities and financial hardship) other than the enumerated ones, that are noted above.

2. Res Judicata

The district asserts that many of the parent's claims were settled in IHO 2's decision and are therefore barred by the doctrine of res judicata.

The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B. v. Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *4 [S.D.N.Y. Jan. 13, 2012]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19, 2006]). Res judicata applies when: "(1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding" (K.B., 2012 WL 234392, at *4; see Grenon, 2006 WL 3751450, at *6).[10] Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. 2013]). Additionally, while the IDEA allows a parent to file "a separate due process complaint on an issue separate from a due process complaint already filed" (20 U.S.C. § 1415[o]; 34 CFR 300.513[c]), "consolidation of multiple issues into a single complaint where such issues are known at the time of the filing of the initial complaint" are encouraged (Due Process Procedures for Parents and Children, 70 Fed. Reg. 35782 [June 21, 2005]).

The administrative record shows that the following issues taken from the August 2018 due process complaint notice and presented on appeal were already adjudicated in IHO 2's determination, or were claims which were, or could have been, raised in the prior proceeding: (1) that the statute of limitations limited the consideration of issues to those that accrued on or after April 13, 2016; (2) the issue of whether the student was offered a FAPE for the 2016-17 and 2017-18 school years; (3) the issue surrounding the parent's access to the student's educational records; (4) the issue surrounding the district's updating (and providing to the parent) its list of "Free or Low Cost Legal and other relevant Services;" and (5) the issue of the district working with the State Education Department to consider adding Barnstable to the list of approved, out of state non-public schools (see IHO Decision Ex. 4). Upon remand, these issues therefore are precluded from

[10] It has been noted in IDEA jurisprudence that "[a]lthough courts were initially hesitant to use res judicata in the administrative setting, the doctrine has consistently been applied to administrative hearings that reach a final judgment on the merits" (Theodore v. D.C., 772 F. Supp. 2d 287, 293 [D.D.C. 2011]).

being relitigated by the parent. While IDEA does not preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed (34 CFR 300.513[c]), it does not allow a parent to file multiple due process complaints to relitigate the same issues before new impartial hearing officers. The parent's permissible path is to seek redress though a direct appeal of IHO 2's decision, which she has in fact done (see 34 CFR 300.513[b]). From there, the parent's avenue for pursuing any further relief on these claims is to seek judicial review of my decision issued in Application of a Student with a Disability, Appeal No. 18-106, the proceeding in which her claims were first raised and addressed.

While the IHO correctly determined that some of the parent's claims were already adjudicated, there are several that were not. As such, this matter must be remanded to the IHO to make determinations based on issues described below.

B. Issues for Remand

1. 2018-19 School Year

To the extent that IHO 3's decision determined that the parent's claims for the 2018-19 school year must be dismissed on the principle of res judicata, IHO 3 erred. A review of IHO 2's decision shows that the 2018-19 school year was not addressed at all. As discussed above, the parent asserts in the August 2018 due process complaint notice that the district denied the student a FAPE for the 2018-19 school year. Therefore, the parent's issues that directly concern the student's recommended educational program and placement for the 2018-19 school year are subject to record development and review by IHO 3, upon remand. The IHO may find it helpful to hold a pre-hearing conference to clarify the parent's claims or allow the parent to further amend her due process complaint notice regarding issues related to the 2018-19 school year.

C. Pendency

On appeal, the parent alleges that the IHO failed to address her request for pendency and, as relief, requests that the district pay for the student's pendency placement at Barnstable for the 2018-19 school year and until such time as an appropriate IEP is provided, under the IDEA's "stay put," or pendency provision, while the district asserts that there is no legal or factual basis for an order directing the district to pay for Barnstable during the pendency of the proceeding. In the interest of judicial economy, I will address this matter before the case is taken up on remand.

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]). An educational agency's obligation to maintain stay-put placement is triggered when an administrative due process proceeding is initiated (E.

Lyme, 790 F.3d at 445). When triggered, there are numerous ways that the terms of the stay-put placement may be established. First, a school district and parent may simply reach an agreement as to the services and programing that the student shall receive while a proceeding is pending (20 U.S.C. § 1415[j] ["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"] [emphasis added]). Where the parents and school district cannot agree upon the stay-put placement, the focus shifts to identifying the "last agreed upon" educational placement as the then-current educational placement (E. Lyme, 790 F.3d at 452; A.W. v. Bd. of Educ. Wallkill Cent. Sch. Dist., 2015 WL 3397936, at *3 [N.D.N.Y. May 26, 2015]).[11]

"Where the parents seek a change in placement, however, and unilaterally move their child from an IEP-specified program to their desired alternative setting, the stay-put rule does not immediately come into play" (M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 [3d Cir. 2014]). "[A]n administrative ruling validating the parents' decision to move their child from an IEP-specified public school to a private school will, in essence, make the child's enrollment at the private school her 'then-current educational placement' for purposes of the stay-put rule. Having been endorsed by the State, the move to private school is no longer the parents' unilateral action, and the child is entitled to 'stay put' at the private school for the duration of the dispute resolution proceedings" (M.R., 744 F.3d at 119; see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 484 [2d Cir. 2002]; see also Murphy, 297 F.3d at 201).

In this case, the district does not have the legal obligation to pay for the student's cost of tuition or related services under the pendency provision because there is no evidence that it has either (a) agreed to fund the student's tuition costs at Barnstable in this or any prior school year (see Schutz, 290 F.3d at 483-84; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]); or (b) is bound by a prior unappealed IHO decision in the parent's favor (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, in my decision dated today in Application of a Student with a Disability, Appeal No. 18-106, I declined to find Barnstable was appropriate for the student,

[11] 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]).

thus rendering the pendency provisions of 34 CFR § 300.518[d] that address favorable outcomes in State-level appeals inapplicable. As none the necessary conditions existed at the time the parent filed her August 2018 due process complaint notice, and my decision in Application of a Student with a Disability, Appeal No. 18-106 was not rendered in the parent's favor, Barnstable is not the student's pendency placement, and the district is not required to pay for the student's tuition at Barnstable under the pendency provision. Should a question arise about which otherwise services constitute the student's last agreed upon educational placement, the IHO 3 should address that matter promptly with the parties and issue a ruling if necessary.

VII. Conclusion

This matter is remanded back to the IHO to further develop the hearing record and make determinations upon the merits of the parent's assertions concerning the student's IEP and unilateral placement related to the 2018-19 school year.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's Decision dated October 3, 2018, is hereby modified, by reversing so much thereof as dismissed the parent's due process complaint notice, and

IT IS ORDERED that the matter is remanded back to the IHO who issued the October 3, 2018 decision for further development of the hearing record and in accordance with this decision, and

IT IS FURTHER ORDERED that in the event the IHO who issued the October 3, 2018 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
November 23, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER