The University of the State of New York

The State Education Department
State Review Officer
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No. 18-142

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
Staten Island Legal Services, attorneys for petitioners, by M'Ral Broodie-Stewart, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, 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. Petitioners (the parents) appeal, 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 the parents' request to fund the student's attendance at the Eden II School (Eden II) as part of the student'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 2018-19 school year. For reasons explained more fully below, this matter must be remanded to the 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 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[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, according to the parents, the student attended preschool "under the Eden II Programs umbrella" for the 2017-18 school year (Tr. p. 3; Parent Ex. B at p. 2).[1]

[1] Due to the status of this matter as an interim appeal disputing a pendency determination, at the time of the parents' request for review, there had been no testimonial evidence and very little documentary evidence entered

A Committee on Preschool Special Education (CPSE) convened on May 9, 2018 and developed an IEP to be implemented from May 10, 2018 through August 30, 2018 (see Parent Ex. A at pp. 1-2).[2] Finding that the student remained eligible for special education and related services as a preschool student with a disability, the May 2018 CPSE recommended a 12-month school year program in a 6:1+3 special class placement together with five 30-minute sessions per week of individual speech-language therapy (id. at pp. 1, 13-14). In addition, the May 2018 CPSE recommended the use of a "[d]ynamic [d]isplay speech generating device" as assistive technology devices or services, to be used daily in the "[c]lassroom, [h]ome [and] [r]elated [s]ervices ([a]ll [s]chool [d]omains)" (id. at p. 13). The May 2018 CPSE also recommended an "Approved Special Education Program" as the location at which to implement the student's IEP (id. at p. 16).

According to the parents, in June 2018, a CSE met as part of the "turning 5 process" and developed an IEP for the student for the 2018-19 school year, which recommended a 6:1+1 special class in a district specialized school, and with which the parent disagreed (see Tr. p. 4; Parent Ex. B at pp. 2-3). Accordingly, the parents unilaterally placed the student at Eden II (see Parent Ex. B at p. 3).[3]

A. Due Process Complaint Notice

By due process complaint notice dated August 30, 2018, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (see Parent Ex. B at pp. 1, 3).[4] The parents asserted that the student's IEP did not accurately reflect his present levels of performance because the statement of the student's "academic assessment contradict[ed] a school progress report" and "inaccurately reflect[ed] [the student's] mastery of letters" (id. at p. 3). The parents also noted that the present levels of performance "inaccurately reflect[ed] the family's home language" (id.). Next, the parents contended that the alternate assessment designation in the student's IEP had not been "discussed" at the meeting, and the parents did not receive a "translated version" of the IEP, which limited their "ability to participate in the special education process" (id.). In addition, the parents asserted that the recommended 6:1+1 special class placement was not sufficient to meet the student's needs because, given the student's "maladaptive behaviors and lack of safety awareness," this student-to-teacher ratio was "too large" (id.). The parents indicated that the student required a "smaller ratio in a highly structured environment" in order to allow the student to remain in "constant visual range and within

into the hearing record; accordingly, some of the factual background is derived from allegations in the due process complaint notice or representations made by the parents' attorney at the impartial hearing (see generally Tr. pp. 1-9; Parent Exs. A-B).

[2] The May 2018 CPSE IEP entered into evidence was incorrectly paginated, as it identifies two different pages as "A8" (see generally Parent Ex. A).

[3] Eden II has been approved by the Commissioner of Education as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

[4] The parents submitted the August 30, 2018 due process complaint notice to the district via email dated September 4, 2018 (see Parent Ex. B at p. 4). In addition, it appears that the parents and their attorney failed to enter a complete copy of the due process complaint notice into evidence (see generally Parent Ex. B).

arm's length of staff at all times" (id.). The parents further alleged that the IEP limited the student's use of the recommended "communication device to the school building," which would "severely inhibit his ability to communicate effectively with his family and community" (id.).

Finally, the parents asserted that the district public school to which the student had been assigned (assigned public school site) was not appropriate because it could not implement the student's IEP (see Parent Ex. B at p. 3). In particular, the parents noted that the IEP required a "highly structured environment and a quiet classroom free of . . . distractions, to maximize his attending skills and ability to focus on program materials" (id.). The parents indicated that the "classrooms" at the assigned public school site were "visually overwhelming and seem[ed] cluttered by cabinets, tables and lockers" (id.). Moreover, the parents noted that the "related services rooms [were] noisy with more than ten children receiving services simultaneously" (id.).

As a final point, the parents indicated that the "Eden II School" was an appropriate placement for the 2018-19 school year (Parent Ex. B at p. 3).

B. Impartial Hearing Officer Decision

On October 17, 2018, the parents' attorney and the district's representative appeared at an impartial hearing and, on that date, presented their respective positions and arguments concerning the student's pendency (stay-put) placement and services (see Tr. pp. 1-9). The parents' attorney argued that the May 2018 CPSE IEP formed the basis for the student's pendency program and services, and the district's representative agreed with this assertion (see Tr. pp. 4-6; see generally Parent Ex. A). The parents' attorney stated that, at the time of the impartial hearing, the student was attending Eden II in a "school-age" program as the parents' selected unilateral placement, which the parents' attorney further asserted was the same location where the student had received his preschool special education programs and related services as set forth in the May 2018 CPSE IEP (see Tr. pp. 4-5, 6; see also Parent Ex. A at pp. 1, 13-14, 16). The parents' attorney explained that the student previously attended Eden II's preschool program, and therefore, the student had transitioned from Eden II's preschool program to the school-age program (see Tr. pp. 3-4, 6). More specifically, the parents' attorney stated that the student was attending a 6:1+3 special class placement at Eden II and received speech-language therapy services, as well as the use of an augmentative communication device (see Tr. pp. 4, 6).

While agreeing with the parents' position argued by their attorney that the May 2018 CPSE IEP constituted the basis for the student's pendency placement and services—namely, a 6:1+3 special class placement together with five 30-minute sessions per week of individual speech-language therapy—the district representative disagreed with the parents' position that the district was required to fund the student's pendency program and services at Eden II (see Tr. pp. 5-6; Parent Ex. A at pp. 1, 13-14). On this point, the district representative asserted that Eden II, as the parents' selected unilateral placement for the 2018-19 school year, could not be considered the student's pendency placement because tuition reimbursement at Eden II was the "ultimate issue" to be resolved (Tr. pp. 6-7).

In an undated and unsigned interim decision, the IHO found that the May 2018 CPSE IEP formed the basis for the student's pendency placement and services as the last-agreed upon IEP between the parties (see Interim IHO Decision at pp. 3-4). The IHO also concluded, without

explanation, that the parents' request for "payment and reimbursement on a unilateral placement at Eden II [was] premature" (id.). The IHO ordered the district to continue to fund (retroactive to the date of the due process complaint notice, August 30, 2018) the following as the student's pendency placement and services: four 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a group, three 60-minute sessions per year of parent counseling and training services, an "assistive technology device of a dynamic display speech generating device to be used in school," and adapted physical education (id. at p. 4).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in denying the parents' request to fund the student's attendance at Eden II as part of his pendency placement and services.[5] In support of their request, the parents attach four documents to the request for review as additional evidence for consideration on appeal (see generally Req. for Rev. Exs. A-D).[6] As relief, the parents seek to overturn the IHO's decision and to order the district to fund the student's attendance at Eden II as a part of his pendency placement and services.

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision in its entirety.[7]

[5] The parents' attorney is reminded that State regulations governing practice before the Office of State Review require all pleadings to have, among other things, "pages consecutively numbered" (8 NYCRR 279.8[a][3]); here, the request for review fails to include any page numbers (see generally Req. for Rev.).

[6] 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]). Upon review, three of the documents attached to the request for review—designated as Exhibit A (Interim IHO Decision), Exhibit B (May 2018 CPSE IEP), and Exhibit D (transcript of impartial hearing held on October 17, 2018)—were either already entered into evidence at the impartial hearing or were submitted as part of the administrative hearing record on appeal. Thus, it is not now necessary to consider, or enter, the parents' proffered documents identified as Exhibit A, Exhibit B, or Exhibit D into evidence.

[7] The district objects to the consideration of the parents' additional evidence identified as Exhibit C, which is purported to be a copy of the student's 2018-19 IEP (the district mistakenly refers to this document as Exhibit B in its answer) (compare Answer ¶¶ 19-20, with Req. for Rev. Exs. B-C). Given the date of the IEP, it appears that the parents could have offered a copy of the document as evidence at the impartial hearing and the parents fail to explain why it was not offered at that time in the request for review. In addition, a copy of the student's 2018-19 IEP is not relevant, in this case, to determine the student's pendency placement and services especially given that the parties agreed that the May 2018 CPSE IEP formed the basis for such services. Therefore, as the 2018-19 IEP is not necessary to reach a decision in this matter, I decline to exercise my discretion to consider, or enter, this document into the hearing record as evidence.

In a reply, the parents respond to the assertions made in the district's answer, and attach additional documentary evidence to the reply for consideration on appeal (see generally Reply Exs. E-I).[8]

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]; T.M., 752 F.3d at 170-71; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187

[8] State regulation limits the scope of the parents' reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer, . . . , or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, neither the request for review nor the district's answer includes any of the necessary conditions precedent triggering the parents' right to compose a reply. In addition, even if the parents were entitled to prepare and serve a reply, the parents' attorney failed to timely serve the reply (see 8 NYCRR 279.6[a], 279.11[a]-[b]). Here, the parents were required to serve the reply no later than December 19, 2018 and, based upon the affidavit of service, the parents' attorney served the reply on December 20, 2018 (see Reply Aff. of Serv.; 8 NYCRR 279.6[a], 279.11[a]-[b]). For these reasons, neither the reply nor the additional documentary evidence submitted with the parents' reply will be considered on appeal (see 8 NYCRR 279.6[a]). Assuming for the sake of argument that the parents' attorney timely served the reply, the additional evidence attached to the reply, namely Exhibit E ("Pendency Hearing Request" and email exchanges), Exhibits F and G (email exchanges), Exhibit H (affidavit by "Clinical Coordinator for Eden II Programs"), and Exhibit I (complete copy of due process complaint notice), all pertain to information available to the parents and their attorney prior to the first impartial hearing date (October 17, 2018) (see generally Reply Exs. E-I). The parents' attorney argues in the reply that the additional evidence should be considered on appeal in light of the district's "two new arguments" asserted for the first time on appeal, which the SRO should deem waived for failing to raise these arguments before the IHO (Reply ¶¶ 2, 4, 17-19). However, the parents' attorney misconstrues the caselaw cited in support of this argument (see Reply ¶ 4). In M.G. v. New York City Department of Education, the court found that the district's failure to raise the statute of limitations—an "affirmative defense"—at the "initial due process hearing," resulted in a waiver of that argument on appeal (15 F. Supp. 3d 296, 306 [S.D.N.Y. 2014]). Here, the district's arguments that (1) the parents failed to provide the district with an opportunity to implement a pendency placement or a substantially similar pendency placement, and (2) the parents failed to demonstrate that Eden II program was substantially similar to the student's preschool program, do not constitute "affirmative defenses" as contemplated by the court in M.G.; therefore, the application of the waiver principle is inapposite.

[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 & 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 T.M., 752 F.3d at 171 [holding 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 while his administrative and judicial proceedings are pending. Instead, it guarantees only the same general level and type of services that the disabled child was receiving"], citing Concerned Parents, 629 F.2d at 756; see also 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. of Pawling Cent. Sch. Dist. 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).

Once a pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Schutz, 290 F.3d at 484-85; New York City Dep't of Educ. v. S.S.,

2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; Murphy, 86 F. Supp. 2d at 366).[9]

VI. Discussion

Turning to the parties' dispute, the parents argue that the IHO—while correctly identifying the applicable legal standards to determine pendency—conflated the question of whether the student was entitled to tuition reimbursement or payment of tuition at Eden II under pendency as opposed to his right to an award of tuition reimbursement for Eden II based upon whether the student's contested IEP offered a FAPE.[10] The parents point to caselaw in support of their contention that the IHO erred in denying their request to order the district to pay for the student's tuition for Eden II as part of his pendency placement and services.

The district argues that the parents' appeal must be dismissed because the parents failed to give the district an opportunity to implement the student's pendency placement or a substantially similar program. In addition, the district contends that the parents are not entitled to tuition reimbursement or funding for the student's attendance at Eden II as part of pendency because the parents failed to establish the student's preschool program was substantially similar to the program provided at Eden II.

As noted above, the Second Circuit has described three variations concerning the definition of "then-current educational placement": (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, 653 Fed. App'x at 57-58, quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71; see E. Lyme Bd. of Educ., 790 F.3d at 440; Susquenita Sch. Dist., 96 F.3d at 83;

[9] 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 (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, 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 v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 61 [D.N.H. 1999] [holding that when a student has aged out of a particular 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]).

[10] The parents initially assert that the IHO's interim order on pendency mistakenly directed the district to provide the student with related services and assistive technology services based on the contested 2018-19 IEP, as opposed to the special education program, related services, and assistive technology services in the May 2018 CPSE IEP (see Req. for Rev. ¶¶ 19-20, 24-26). In its answer, the district concurs with the parents' assertions (see Answer ¶ 16 n.2). Consequently, the IHO's order directing the district to fund four 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a group, three 60-minute sessions per year of parent counseling and training services, an "assistive technology device of a dynamic display speech generating device to be used in school," and adapted physical education (Interim IHO Decision at p. 4) is hereby vacated and will not be further addressed.

Letter to Baugh, 211 IDELR 481). Here, the parties agreed—and the IHO found—that the student's May 2018 CPSE IEP was the student's last-agreed upon and implemented IEP for the purposes of establishing pendency (see Tr. pp. 4-5; Interim IHO Decision at pp. 3-4; see generally Parent Ex. A). Thus, the only legal question that remained for the IHO to determine was whether the student's educational placement at Eden II was substantially and materially similar to the student's educational program under the May 2018 CPSE IEP such that the parents may be entitled to an award of payment of the student's tuition costs at Eden II under pendency.

While the legal ramifications of determining whether the parents are entitled to tuition reimbursement or funding of the student's attendance at Eden II as part of his pendency placement or services as a substantially and materially similar program require careful consideration, there were no conceptually difficult fact questions to resolve in this case to make this determination. Notably, however, the hearing record is devoid of any evidence to establish whether the student is actually receiving a particular intervention or service or not because the parents' attorney failed to present any witnesses with personal knowledge about the services or interventions provided to the student at preschool or at Eden II, and the parents' attorney similarly failed to present any documentary evidence to establish these facts (see generally Tr. pp. 1-9; Parent Exs. A-B). Instead, the parents' attorney attempted—through her own unsworn statements—to establish these facts at the impartial hearing (see Tr. pp. 1-9) and, thereafter, attempted to submit additional evidence with the reply to establish the pertinent facts on appeal.

Both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; see, e.g., E.T. v. Bureau of Special Educ. Appeals, 2016 WL 1048863, at *12-*13 [D. Mass. Mar. 11, 2016] [considering additional evidence regarding a purported settlement agreement not accepted by the IHO]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

While SROs have considered the factor of whether the additional evidence was available or could have been offered at the time of the impartial hearing, this factor is not necessarily dispositive in every case (Application of a Student with a Disability, Appeal No. 08-030). This factor serves to encourage full development of an adequate hearing record at the first tier to enable an IHO to make a correct and well-supported determination, and to prevent the party submitting the additional evidence from "sandbagging"—that is, withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Walkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). That factor is of significant weight in this instance, where the parents' attorney, now on appeal, attempts to submit an affidavit with their reply purporting to establish facts critical to an analysis of the legal question posed in this matter. Given that State regulations do not allow any further pleadings (see 8 NYCRR 279.6[a]), the district is now without an opportunity—consistent with due process—to challenge any of the information the parents now ask an SRO to consider in support of their request for payment of the student's Eden II program as part of his pendency placement. In addition, the submission of the affidavit,

and in particular at this juncture, deprived the parties of the opportunity to develop a complete hearing record, and similarly deprived the IHO from making a "correct and well-supported decision." Thus, as noted previously, in addition to the fact that the parents' attorney offers no rationale for why the information now sought to be provided through this affiant could not have been provided at the time of the impartial hearing, the parents' attorney's attempt to submit this new evidence on appeal offends due process, adds to the conclusion that the affidavit will not be considered on appeal, and weighs heavily in the decision to remand the matter to the IHO.[11]

Turning to the legal question posed in this matter, 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). The United States Department of Education's Office of Special Education Programs has 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). This is precisely the pendency issue posed to the IHO, and the IHO failed to engage in any analysis of this question in the interim decision (see generally Interim IHO Decision).

In light of the foregoing, the matter must be remanded for further administrative proceedings. This is especially true where, as here, the hearing record is bereft of any evidence on the factual and legal issues to be resolved and where, as here, the IHO failed to engage in any analysis whatsoever in reaching the pendency determination (see generally Tr. pp. 1-9; Parent Exs. A-B; Interim IHO Decision). Absent such evidence, a meaningful review of the parties' dispute is not possible with the current state of the hearing record. Therefore, it is appropriate to remand this matter to the IHO for a determination consistent with this decision and based upon sufficient evidence and a complete hearing record (see Educ. Law § 4404[2]; Cruz v. New York City Dep't of Educ., 2019 WL 147500, at *10-*11 [S.D.N.Y. Jan. 9. 2019] [remanding matter to IHO to supplement hearing record and to issue a pendency determination]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]; see generally Application of a Student with a Disability, Appeal No. 18-116]).

[11] To be clear, while State regulation indicates that an IHO "may take direct testimony by affidavit in lieu of in-hearing testimony," the same State regulation requires that the "witness giving such testimony shall be made available for cross-examination" (8 NYCRR 200.5[j][3][xii][f]).

VII. Conclusion

In summary, the matter is remanded to the IHO to complete the hearing record in accordance with this decision and render a determination regarding whether the educational placement provided by Eden II is substantially similar for purposes of the student's stay-put placement and whether the district is obligated to fund the student's attendance at Eden II as part of the stay-put placement.

IT IS ORDERED that the matter is remanded to the same IHO who issued the undated and unsigned interim order on pendency to address the remaining fact issues related to reaching a determination of whether there is substantial similarity between the student's former educational placement in his preschool program and his current educational placement in Eden II no later than 20 days from the date of this decision.

Dated: **Albany, New York**
January 11, 2019

CAROL H. HAUGE
STATE REVIEW OFFICER