The University of the State of New York

The State Education Department
State Review Officer
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No. 20-171

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Office of Michelle Siegel, attorneys for petitioner, by Jared Stein, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Fiona M. Dutta, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) regarding 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 2020-21 school year. The district cross-appeals from the IHO's determination that awarded special transportation as part of the student's pendency placement. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

Due to the interlocutory nature of this appeal, the hearing record is sparse with respect to information regarding the student's educational history. According to the parent, from kindergarten through fifth grade (2019-20 school year), the student attended a State-approved nonpublic school (NPS) (Parent Exs. A at p. 3; C at pp. 1, 2).

On February 14, 2019, the CSE met to develop an IEP for the student (Parent Ex. B at p. 14). Having found the student eligible for special education as a student with a speech-language impairment, the February 2019 CSE recommended an 8:1+1 special class in a State-approved nonpublic day school (Parent Ex. B at pp. 1, 10, 13). In addition, the February 2019 CSE recommended the following related services: individual counseling services one time per week for 30 minutes; group (5:1) counseling services one time per week for 30 minutes; group (2:1) OT one time per week for 30 minutes; and group (3:1) speech-language therapy two times per week for 30 minutes (id. at p. 10). Further, the February 2019 CSE recommended 12-month programming with the same special education program and related services as during the school year (id. at p. 11). The IEP provided for special transportation services of limited travel time and door-to-door transportation (id. at p. 13). The student attended the NPS for the 2019-20 school year (Parent Ex. A at p. 3).

According to the parent, the CSE convened on March 30, 2020 to formulate the student's IEP for the 2020-21 school year (see Parent Exs. A at p. 3; C at p. 2). The parent indicated that the March 2020 CSE recommended that the student attend a 12:1 special class in a community school (Parent Exs. A at p. 3; C at p. 3).

In a letter to the district dated June 17, 2020, the parent stated her disagreement with the recommendations contained in the March 2020 IEP (see Parent Ex. C). The parent also noted that, although she had not received a prior written notice or a school location letter identifying the particular public school site to which the district assigned the student to attend for the 2020-21 school year, she had "received information from the [district]" regarding a specific school but had been unable to tour the school or assess its appropriateness for the student (id. at p. 3). The parent notified the district of her "intent to seek [district] funding for [the student's] continued placement at [the NPS] for July and August 2020 and The Community School beginning in September during the 2020-2021 school year" (id.).[1]

As reported by the parent, as of September 2020, the student would "age out" of the NPS she had been attending (Parent Ex. A at p. 7).

A. Due Process Complaint Notice

In a due process complaint notice, dated July 6, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Parent Ex. A).

The parent alleged numerous substantive and procedural violations in connection with the March 2020 CSE and resultant IEP (see Parent Ex. A at pp. 3-7). Specifically, the parent argued that the March 2020 CSE recommended an inappropriate placement in a 12:1 community school as the class size and student to teacher ratio was "too large for the student to benefit educationally" (id. at pp. 3-4, 6). In addition, the parent argued that the March 2020 CSE recommendations were predetermined, the CSE was improperly composed as it did not include a special education teacher

[1] The Community School is a nonpublic school that has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

or a regular education teacher, the CSE failed to consider private evaluations obtained by the parent, the IEP did not accurately describe the student's present levels of performance, the annual goals were not specific or meaningful, and the CSE failed to offer adequate levels and frequency of related services (id. at pp. 3-6). Further, the parent argued that the March 2020 CSE failed to recommend 12-month programming and special transportation services (id. at pp. 4-5). Finally, the parent argued that the March 2020 CSE failed to recommend an appropriate "brick and mortar placement" for the 2020-21 school year (id. at p. 7).

In her due process complaint notice, the parent requested that the student's pendency placement consist of the program and services as set forth in the February 2019 IEP (Parent Ex. A at pp. 7-8). The parent requested that, for July and August 2020, the student's pendency be implemented at the NPS she had been attending (id.). Thereafter, because the student would "age out of" the NPS, the parent requested that the student's pendency placement be implemented at the Community School beginning in September 2020, which the parent argued was substantially similar to the NPS (id.). The parent also requested that the student receive special transportation services pursuant to pendency (id.).

As relief, the parent sought direct funding for the costs of the student's attendance at the NPS during July and August 2020 and at the Community School for the 10-month portion of the 2020-21 school year, including special transportation services (Parent Ex. A at p. 9).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 31, 2020 and the portion of the hearing devoted to pendency concluded on September 24, 2020 after three days of proceedings (Tr. pp. 1-42).[2] During the impartial hearing, the parties agreed that the student's pendency placement was based on the February 2019 IEP (see Tr. pp. 14, 17). However, according to the parent's attorney, the NPS the student had been attending had "an age limit," and the student could no longer attend as of September 2020 (Tr. pp. 18, 19). The parent's attorney argued that, because the student could not attend the NPS, "the District would have then had the opportunity to offer a new pendency placement, because the Parent gave timely notice of the need for one in the June ten-day notice letter" (Tr. p. 18). Because the district did not offer a pendency placement, the parent's attorney asserted that the parent placed the student at the Community School (id.). The parent presented one witness on the issue of the substantial similarity of the Community School to the NPS (see Tr. pp. 28-42).

In an interim decision dated September 29, 2020, the IHO determined that the student's pendency placement arose from the February 2019 IEP (IHO Decision at p. 10). Regarding July and August 2020, the IHO found that the district was required to fund the student's continued attendance at the NPS pursuant to pendency retroactive to the filing of the due process complaint notice on July 6, 2020 (id. at pp. 10, 16).

[2] After the district did not appear on August 31, 2020, the IHO held a prehearing conference on September 4, 2020 (see Tr. pp. 1-4). Subsequently, the IHO issued an order on September 4, 2020 setting forth compliance dates, a pendency hearing date, and time frames for the disclosure of evidence (IHO Ex. I at pp. 1-3).

As for the location for the student's pendency placement after September 2020, the IHO discussed authority addressing circumstances wherein a student's "then current educational placement" becomes unavailable during pendency (IHO Decision at pp. 11-12). Based upon this authority, the IHO determined that the issue to be addressed was "whether the Community [S]chool [wa]s a 'similar' placement as the [NPS]" (id. at p. 11). The IHO found that the schools offered different class ratios, with the NPS offering an 8:1+1 special class consistent with the February 2019 IEP and the Community School offering a 12:1+1 special class (id. at p. 12). Further, the IHO found that the student did not receive OT services at the Community School as mandated by the February 2019 IEP (id. at p. 14). The IHO also indicated that the February 2019 IEP mandated speech-language therapy in a group of three but at the Community School the speech-language therapy was offered in a group of four students and could include up to five students (id.). Likewise, for counseling services, the IHO noted that the February 2019 IEP limited the group size to five but the counseling at the Community School was offered in a group of up to eight students (id.).

Thus, the IHO found "that the proposed change of setting or service would significantly depart from the parameters of the special education services to which the parties previously agreed, and potentially could have a substantial, detrimental effect on the Student's learning, if the program and services were not provided as per the 02/14/19 IEP – the very case the Parent is alleging in the main case" (IHO Decision at p. 14).

The IHO further addressed the parent's arguments that "[a] finding of no actual pendency placement is impossible and therefore the Parent's proposed placement is the only pendency placement possibility" and that "[p]endency must have a remedy" (IHO Decision at p. 15). The IHO cited to the holding of the Second Circuit Court of Appeals in Ventura de Paulino v. New York City Department of Education, 959 F.3d 519, 534 (2d Cir. 2020) that parents who are not satisfied with the district's placement may unilaterally place their child at a private school "at their own financial risk" and seek retroactive reimbursement (id.).

Based upon the foregoing, the IHO denied the parent's request for the district to fund placement at the Community School for purposes of pendency (IHO Decision at p. 16). However, the IHO ordered the district to fund the student's special transportation services as per the student's February 2019 IEP (limited time travel and door to door) (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in denying the student's pendency placement at the Community School. The parent also argues that the IHO failed to issue relief addressing the district's refusal to implement pendency. The parent asserts that the IHO erred in failing to identify a "brick and mortar" placement at which the student's pendency could be implemented beginning in September 2020. Finally, the parent alleges that the IHO erred in comparing the student's placement at the Community School to the placement recommended in the March 30, 2020 IEP. For relief, the parent requests that the district be required to fund the student's attendance at the Community School based upon its substantial similarity to the last-agreed upon placement or, alternatively, as relief for the district's failure to implement any stay-put protections for the student.

In an answer, the district generally denies the parent's allegations. The district also cross-appeals portions of the IHO's decision. First, the district argues that the IHO improperly engaged in a "substantial similarity" analysis without a sufficient evidentiary basis to do so in that the parent did not demonstrate that the NPS the student had been attending was unavailable. Further, the district argues that the parent's request that the student receive her pendency placement at the Community School is foreclosed by the Second Circuit's decision in Ventura de Paulino, 959 F.3d 519. Additionally, the district argues that, even if the parent established that the NPS was unavailable, the parent's requested remedy could only be achieved through an agreement with the district or a preliminary injunction. Regarding its obligation to implement pendency, the district argues that once the parent unilaterally placed the student at the Community School, there was "no further obligation" of the district "to identify another pendency placement." Finally, the district cross-appeals the IHO's determination that the student was entitled to special transportation services pursuant to pendency, and more specifically door-to-door transportation services.

In an answer to the district's cross-appeal the parent responds to the district's allegations. Specifically, regarding evidence of the unavailability of the NPS, the parent states that the website of the State Education Department establishes that the NPS is only available to students age five through eleven. The parent also argues that the district never agreed to implement pendency at the NPS and questions the district's representation that it "stands ready and willing to fund Student's return [to the NPS], despite being ineligible by virtue of her age." The parent further takes issue with the district's characterization of the parent's communications to the district regarding her desire for the district to identify a location at which the student could receive her pendency program.

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 Ventura de Paulino, 959 F.3d at 531; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered

the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; 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 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 (Ventura de Paulino, 959 F.3d at 532; 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]; 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).

VI. Discussion

A. Implementation of Pendency Placement

Here, the parents argue that the IHO erred in denying the student's pendency placement at the Community School. According to the parents, the unavailability of the NPS coupled with the district's failure to offer a substantially similar pendency program supports their request for district

funding of the student's placement at the Community School pursuant to pendency, consistent with the holding in Ventura de Paulino.[3]

Ventura de Paulino concerned two cases wherein IHOs had concluded that the parents' unilateral placements of their children at a nonpublic school were appropriate for a prior school year and, upon the district's decision not to appeal those rulings, by operation of law, the district consented to the students' placement at the nonpublic school (959 F.3d at 532). The issue presented was whether a parent could unilaterally move a student to a different nonpublic school and still receive pendency funding (id.). The Court concluded that a parent could not effectuate this unilateral move since it is the district that is authorized to decide how (and where) a student's pendency services are to be provided as per the text and structure of the IDEA and given that the district is the party responsible for funding the pendency services (id. at 533-35). The Court observed that:

> If a parent disagrees with a school district's decision on how to provide a child's educational program, the parent has at least three options under the IDEA: (1) The parent can argue that the school district's decision unilaterally modifies the student's pendency placement and the parent could invoke the stay-put provision to prevent the school district from doing so; (2) The parent can determine that the agreed-upon educational program would be better provided somewhere else and thus seek to persuade the school district to pay for the program's new services on a pendency basis; or (3) The parent can determine that the program would be better provided somewhere else, enroll the child in a new school, and then seek retroactive reimbursement from the school district after the IEP dispute is resolved

(id. at 534). Therefore, the Court concluded that "[r]egardless of whether the educational program that the Students are receiving at [the new nonpublic school] is substantially similar to the one offered at [the prior nonpublic school], when the Parents unilaterally enrolled the Students at [the new nonpublic school] for the 2018-2019 school year, they did so at their own financial risk" (id.).

The Second Circuit specifically declined to consider "any question presented where the school providing the child's pendency services is no longer available and the school district either refuses or fails to provide pendency services to the child" (De Paulino, 959 F.3d at 532 n. 65).[4] It

[3] Although the parent's attorney indicated during the hearing that the student's prior NPS was no longer available to her because it only served students through fifth grade (Tr. p. 19), there is no documentary evidence in the hearing record to support this statement. The district on the other hand did not offer evidence during the impartial hearing that the NPS was available. Ultimately, for the reasons set forth herein, I do not find that the availability of the NPS is determinative of this matter; accordingly, I decline to further opine on the import of the evidentiary question.

[4] The Court in Ventura de Paulino cited Wagner, in which the Fourth Circuit held that 20 U.S.C. § 1415(j) does not impose any affirmative obligations on a school district to seek out alternative placements when a student's then-current educational placement is not functionally available (Wagner, 335 F.3d at 301 [finding that "the question of availability is entirely irrelevant to the task of identifying the child's then-current educational

is under this exception that the parent attempts to fit this matter; however, even if the NPS was not available, the facts do not support a finding that the district refused or failed to provide pendency services to the student.

In a letter to the district dated June 17, 2020, the parent stated her intent to seek funding for the student's continued attendance at the NPS for July and August 2020 and then for her unilateral placement of the student at the Community School for the 10-month portion of the 2020-21 school year (Parent Ex. C at p. 3). The parent's due process complaint notice in this matter is dated July 6, 2020 and requested district funding for the student's attendance at the NPS (for July and August 2020) and for the Community School both pursuant to pendency and as relief on the merits of the parent's claims (Parent Ex. A at pp. 8-9). While the parties disagree as to when the district acquiesced to its responsibility to fund the student's pendency placement at the NPS for July and August 2020, there is currently no dispute that the district was responsible for the same. However, thereafter, as of September 2020, it cannot be said that the district failed to implement pendency by not having a State-approved nonpublic school available given the parent's unilateral placement of the student at the Community School.[5]

placement, and it is only the current placement, available or unavailable, that provides a proper object for a 'stay put' injunction"]). However, the Fourth Circuit noted two situations in which a student's pendency placement could be changed: either by an agreement of the parties or by "a preliminary injunction from the district court, changing the child's placement" (Wagner, 335 F.3d at 302). This follows the long-standing principle that "the stay-put provision in no way purports to limit or pre-empt the authority conferred on courts" (Honig, 484 U.S. at 327; see 20 USC 1415[i][2][C][iii]).

[5] The parent raises several arguments against treating the parent's communications to the district regarding her intent to unilaterally place the student as determinative of this matter. In particular, the parent raises the purpose of the 10-day notice letter and the traditionally equitable context in which such a letter is considered. Indeed, reimbursement for a unilateral placement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). In this instance, the parent's June 2020 letter provided the district with the opportunity to consider the parent's concerns relating to the March 2020 IEP and the proposed assigned public school site (see Parent Ex. C). There is no authority for the parent's position that the district should have come forward and offered the student a location for the student to receive a pendency program in response to the parent's stated intent to unilaterally place the student as a result of her disagreement with the March 2020 IEP. Further, there is no indication in the hearing record that the parent explicitly requested that the district identify a school at which the student could receive pendency services. While I acknowledge the authority cited by the parents for the proposition that pendency is automatic and, therefore, need not be explicitly sought by the parent (see Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 701 [S.D.N.Y. 2006]; see E. Lyme, 790 F.3d at 455; M.R. v. Ridley Sch. Dist., 744 F.3d 112, 123-25 [3d Cir. 2014]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199-200 [2d Cir. 2002]), given the holding in Ventura de Paulino that the parent cannot unilaterally choose the location for the student's pendency, the parent may have been in a better position to reach an accord with the district regarding a nonpublic school at which the student could had received pendency services had the lines of communication on this topic been broached.

Finally, even if I were to assume, for the sake of argument, that the parent was correct that the primary holding of de Paulino does not apply under the circumstances of this case and that a test of substantial similarity should apply instead, the IHO did not err in his factual findings that the Community School for the 2020-21 school year was not substantially similar to the programming that the parent asserted was the basis for pendency (see IHO Decision at pp. 11-14).

Whether a student's educational placement has been maintained under the meaning of the pendency provision may, under certain circumstances, depend 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 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). Student-to-staff ratio is also a relevant factor in determining whether a student's program has changed (M.K. v. Roselle Bd. of Educ., 2006 WL 3193915, at *14-*15 [D.N.J. Oct. 31, 2006]; Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 60-61 [D.N.H. 1999]; Application of a Child with a Disability, Appeal No. 05-028). State regulations define a change in program as "a change in any one of the components" of an IEP, which include the size of the special class in which a student is recommended to receive services (8 NYCRR 200.1[g]; 200.4[d][2][v][a], [b][2]).

In the present matter, the student's last agreed upon placement for purposes of pendency is based on the February 2019 IEP. The special education program recommended by the February 2019 CSE consisted of an 8:1+1 special class at a State-approved nonpublic day school along with the following related services on a weekly basis: one 30-minute session of individual counseling, one 30-minute session of counseling in a group of five, one 30-minute session of OT in a group of two, and two 30-minute sessions of speech-language therapy in a group of three (Parent Ex. B at pp. 10, 13).

At the Community School the student was placed in a 12:1+1 special class (Tr. p. 31). Under the standard set forth above, and as noted by the IHO, the difference in student class ratio, the difference in group size for speech-language therapy and counseling services, and the fact that the Community School does not offer OT are indications that the programs were not substantially similar (see 8 NYCRR 200.1[g]; 200.4[d][2][v][a], [b][2]; see also IHO Decision at pp. 12-14). If the district had attempted to make such changes to the student's program, it would have required substantive changes in the student's IEP (see 8 NYCRR 200.1[i], [qq], [uu]; 200.4[d][2][v]; 200.6[e], [h]). Accordingly, even if I were to apply a substantial similarity test as put forth by the parent, there is not a sufficient basis in the hearing record to overturn the IHO's determination that the two programs were not similar.

Applying Ventura de Paulino to the instant dispute, when the parent unilaterally enrolled the student at the Community School for the 2020-21 school year, she did so at her own financial risk (959 F.3d at 534). Accordingly, the parent's request for funding at the Community School during the pendency of these proceedings is denied.

Finally, if the parent wishes to avail herself of a publicly-funded pendency placement she may do so, and in that instance the district should have a reasonable opportunity to implement the pendency placement in this matter. The parties should move forward to address the merits of the parent's substantive allegations during a hearing, rather than as part of the pendency dispute.

B. Special Transportation

The IHO held that the district was required to fund the "[s]tudent's special transportation services as per the Student's 02/14/19 IEP" including "[l]imited-time travel - not more than 60 minutes" and "[d]oor to door busing" (IHO Decision at p. 16). The district argues that, since the IHO denied funding at the Community School under pendency, it should logically follow that the student is not entitled to door-to-door transportation to and from the Community School under pendency. I agree with the district that, based on the determination that the district is not required to fund the student's attendance at the Community School pursuant to pendency, the district is also not required to fund the student's special transportation pursuant to pendency.

VII. Conclusion

Based on the foregoing, there is no reason to disturb the IHO's September 29, 2020 interim decision denying the Community School as the student's pendency placement; however, the IHO's decision requiring the district to fund the costs of the student's special transportation to and from the Community School must be modified.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's interim decision on pendency dated September 29, 2020 is modified by reversing that part which ordered the district to fund the student's special transportation services pursuant to pendency while the student was attending the Community School.

Dated: **Albany, New York**
January 7, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER