The University of the State of New York

The State Education Department
State Review Officer
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No. 21-230

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Brian Davenport, Esq.

New York Legal Assistance Group, attorneys for respondent, by Laura Davis, 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 district) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining the student's pendency (stay put) placement during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student for the 2021-22 school year. The appeal must be sustained in part.

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

Given the limited nature of the appeal and scant hearing record, the parties' familiarity with the detailed facts and procedural history of the case is presumed and will not be recited here. Briefly, the student has received diagnoses of autism spectrum disorder, mixed receptive-expressive language disorder and specific learning disability with impairment in reading (Parent Exs. A at pp. 1-2; B at p. 2).[1] He attended public school in the district for the 2011-12 through 2015-16 school years where he received integrated co-teaching (ICT) services in an "ICT class"

[1] Although the parent's exhibits do not appear to have been formally admitted into evidence (see Tr. pp. 1-19), the IHO Decision's exhibit list includes them under the heading of admitted exhibits as the Jan. 27, 2016 IEP (Ex. A) and the Sept. 10, 2021 due process complaint notice (Ex. B), and they will be referenced as such parent exhibits herein (IHO Decision p. 4).

and full-time paraprofessional services as well as occupational therapy (OT), physical therapy (PT), counseling and speech-language therapy (Parent Exs. A at pp. 1-2, 7-8, 11; B at p. 2). The student's last agreed-upon IEP (dated January 27, 2016) was to be implemented during the latter portion of the 2015-16 school year and the 2016-17 school year through January 24, 2017 (Tr. p. 12; see Parent Exs. A at pp. 1, 11; B at pp. 1-2). Subsequently, the parent enrolled the student in the Children's Academy for the 2016-17 school year, and the parties entered into settlement agreements for the student's attendance every school year from 2016-17 through 2020-21 (Tr. pp. 3, 4, 10; Parent Ex. B at p. 2).

The CSE convened on March 8, 2021 to formulate the student's IEP for the 2021-22 school year (Parent Ex. B at pp. 1, 2). A prior written notice (notice of recommendation) dated May 27, 2021 was generated as a result of the March 2021 CSE meeting which notified the parent that the district had recommended a 12:1+1 class in a District 75 school with the related services of counseling, speech-language therapy, OT and PT (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated September 10, 2021, the parent alleged that the district denied the student a FAPE for the 2021-22 school year (see Parent Ex. B).

The parent contended that while the district developed an IEP for the student on March 8, 2021, she did not receive a copy of it, although she received a copy of the prior written notice (Parent B at pp. 1, 2). The parent alleged that the recommended 12:1+1 class in a District 75 school did not provide the student with a FAPE for the 2021-22 school year because, among other things, the student "could not make meaningful academic and social/emotional progress in a class with such a large student-to-teacher ratio" (id.). The parent further contended that the student has made progress at the Children's Academy where he is in a small class with a low student-to-teacher ratio in a program that includes academic studies and related services (id. at p. 3). As relief, the parent requested tuition at the Children's Academy for the 2021-22 school year and transportation to and from the school (id.).

As relevant to the issue of pendency, the parent argued that the Children's Academy represents the student's "operative placement" as he enrolled there as a "10 year old 5th grader for the 2016-17 school year," and that his last agreed upon IEP for the 2015-16 school year "recommended placement in an ICT class at [the public school] which [the student] was then attending" and that "[t]hat IEP, developed more than six years ago, does not maintain the status quo" (Parent Ex. B at pp. 1- 2).

B. Impartial Hearing Officer Decision

After a prehearing conference on September 29, 2021, the parties proceeded with a hearing on pendency that concluded on October 12, 2021, after a total of two days of proceedings (see Tr. pp. 1-19). In an interim decision dated October 12, 2021, the IHO initially noted the parties' positions on pendency, stating that the district's argument was that the "last agreed upon IEP and placement is found in the IEP from the 2015-16 school year which had the student attending a [d]istrict school [t]hus, pendency at the [p]rivate [s]chool is inappropriate," while the parent argued that the "operative placement" here "resides in the [p]rivate [s]chool due to the multiple years of attendance with the settlement agreement of the [d]istrict" (IHO Decision at p. 2).

In finding pendency at the Children's Academy, the IHO noted that the "reality of the present situation" is that the 2015-16 school year "IEP is now nearly six (6) years dated" and in reviewing case law on the topic, referenced Angamarca v. NYC Department of Education, 2020 WL 1322052 (S.D.N.Y. Mar. 20, 2020), reconsideration denied, 2019 WL 3034912 (S.D.N.Y. Jul. 10, 2019) in particular, for the proposition in sum that "it is unreasonable to conclude that a five year old placement could constitute the basis for a now appropriate placement" (IHO Decision at p. 3). The IHO found that the parent was "correct in making significant factual distinctions between the present case and the case of Ventura de Paulino"[2] concluding that "[t]he present case is one in which the traditional 'operative placement' standards clearly apply" (id.). In finding the student entitled to pendency, the IHO further noted that the purpose of pendency is "to provide stability and consistency" and that the student "was attending the [p]rivate [s]chool at the time" that due process was commenced (id.) The IHO ordered the district to provide tuition and costs at the Children's Academy during pendency, retroactive to September 10, 2021, the filing of the due process complaint notice (id.).

IV. Appeal for State-Level Review

The district appeals and argues that the case law relied upon by the IHO has been abrogated by the Second Circuit, contending that Ventura de Paulino is the "prevailing case law that governs the issue of pendency" and that the IHO erred in relying on Angamarca, which preceded the Court's decision in Ventura de Paulino, calling it an "outlier." The district further argues that the central holding of Ventura de Paulino is that "the school district, not the parent, has the authority to decide how to provide an educational program" in quoting the Court's statement that "what the parent cannot do is determine that the child's pendency placement would be better provided somewhere else, enroll the child in a new school, and then invoke the stay-put provision to force the school district to pay for the new school's services on a pendency basis."

On the issue of the parent's argument for pendency at the private school on the "theory of operative placement," the district argues that the Court in Ventura de Paulino stated that this "effectively renders the stay-put provision meaningless by denying any interest of a school district in resolving how the student's agreed-upon educational program must be provided and funded." The district also references the Court's recalling that the term "operative placement" has its "origins" in cases where a school district attempts to move a child to a new school without the parents' consent or where there is no previously implemented IEP, in arguing that the Court "did not provide any exception to these situations where operative placement may otherwise be applicable" and that "[t]here is no allowance for operative placement when the previously implemented IEP is six years old," so that the "rationale underlying the decision in Angamarca has been abrogated" by Ventura de Paulino.

Finally, the district contends that the IHO's reasoning that Ventura de Paulino does not apply here due to "significant factual distinctions" is "groundless." The district argues that: (1) both cases involve situations where the parents seek pendency in their unilaterally-chosen private schools but there never was any express or implied consent by the district; (2) in Ventura de Paulino, the district and the parent had previously agreed that the educational program would be provided at iHope while in this appeal, similarly, the district and the parent had previously agreed

[2] Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519 (2d Cir. 2020).

that the educational program would be provided according to the 2015-16 IEP; (3) the distinction in Ventura de Paulino where the parent was seeking to transfer the student from one private school where pendency had been established to another private school, from the situation in this appeal where the parent is "seeking to escape from the pendency placement in the [district] program" to a private school, is "entirely inconsequential" and "irrelevant;" (4) the fact that the 2015-16 IEP was created six years ago "changes nothing"; and (5) the parties' prior year settlements for tuition at the Children's Academy do not establish pendency or otherwise manifest the district's consent.

As relief, the district requests that the IHO's pendency order be reversed, that the parent's pendency request be denied, and that a finding be made that pendency lies in the IEP for the 2015-16 school year as the last agreed upon placement.

In an answer, the parent argues that the IHO Decision finding that the Children's Academy is the student's operative placement should be affirmed. The parent maintains that the district's contention that there was "no dispute" that "pendency lies in the [2015-16] IEP" is inaccurate, the parties did not reach agreement on the student's pendency placement, and no pendency order was previously issued. The parent contends that pendency lying in the 2015-16 IEP would disrupt the student's educational status quo, as a third grade ICT class at a district elementary school is not "substantially similar" to a small ninth grade class at the Children's Academy which provides speech-language therapy throughout the school day, and the district placement could not provide "the same general level and type of services" that the student receives at the Children's Academy.

The parent argues that Ventura de Paulino is distinguishable, as the Court's decision described the facts therein as being "somewhat unusual" and was based on "the circumstances presented" including: (1) two students who attended iHope, a private school for children with brain injuries, during the 2017-18 school year; (2) who then transferred to iBrain, another school for children with brain injuries, for the 2018-19 school year; and (3) on the day they transferred to iBrain, their parents requested pendency. In other words, the parent argues, attendance at iHope was immediately followed by enrollment at iBrain with the parents arguing that the programs at the two schools were "substantially similar" and further the parties had previously agreed that the students' pendency placements should be provided at iHope, and, as such Ventura de Paulino represents a different set of circumstances than those in this appeal, in which, among other things, the Children's Academy was not a "new" school but one that the student had attended since 2016, the parent did not invoke pendency until September 2021, three months into the student's sixth year at the Children's Academy rather than on his first day, and no pendency order was previously issued. Thus, the parent contends that the district incorrectly argues that the distinctions between this appeal and Ventura de Paulino were inconsequential and irrelevant, that Ventura de Paulino is inapposite as the facts differ materially, and that Ventura de Paulino did not have to consider the issue of "stability and consistency" because in holding that pendency was at iHope, the Court maintained the status quo and the same would not be true in this appeal if the 2015-16 IEP placement was found to be the student's pendency placement.

The parent further argues that the IHO Decision was well-reasoned and should be affirmed as it undertook the same analysis as the courts in Angamarca and Hidalgo v. NYC Department of Education, 2019 WL 5558333 (S.D.N.Y. Oct. 29, 2019) , reconsideration denied, 2021 WL 76209 (S.D.N.Y. Jan. 8, 2021) in analyzing the relationship between the stay-put provision and "operative placement" with regard to outdated, last agreed upon IEPs. The parent notes that each of the courts in Angamarca and Hidalgo considered whether a 2014-15 IEP was the basis for pendency for a

student who had attended iHope during the 2016-17 and 2017-18 school years and transferred to iBrain in the 2018-19 school year, but found that iHope in each case was pendency—each court finding respectively that, in considering an IEP that was five years old, determining pendency under the "operative placement" was more "reasonable" or "better aligns" with the purpose of the stay-put provision which is to maintain the educational status quo. The parent concludes that the IHO's analysis and decision were in accord with the stay-put provision of the IDEA and an appropriate application of operative placement, that the district's interpretation of Ventura de Paulino is "draconian" in not allowing for the application of operative placement even in pendency cases involving a long-outdated last agreed-upon IEP, and that this interpretation which allows for no exceptions disrupts the status quo rather than preserves it. The parent requests that the appeal be dismissed.

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 v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. for 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, 86 F. Supp. 2d at 366; 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).

Recently, the Second Circuit has further explained that a parent may not unilaterally move a student to a preferred nonpublic school and still receive pendency funding, 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 (Ventura de Paulino, 959 F.3d at 532-35). 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.).

VI. Discussion – Pendency

A. Operative Placement

As noted above, the parties' dispute on appeal is whether the student's pendency lies in the IEP for the 2015-16 school year as the then current educational placement, that is, the services identified in the "most recently implemented IEP" or "[the placement at the time of] the previously implemented IEP, or whether the unilateral placement at Children's Academy should have become the student's stay-put placement under an "operative placement" theory as found by the IHO and as argued by the parent to maintain the status quo due to multiple years of attendance (Mackey, 386 F.3d at 163).

Initially, parent's argument that there are numerous factual distinctions between this appeal and the facts of Ventura de Paulino is accurate, though not all are relevant to the disposition of the appeal. And while the Angamarca and Hidalgo cases appear to be more factually on point in considering last agreed upon IEPs that were multiple years old and perhaps outdated, it must be acknowledged that they preceded the Second Circuit's decision in Ventura de Paulino which gave clearer direction on the issue of pendency

> The stay-put provision therefore was enacted as a procedural safeguard in light of the school district's broad authority to determine the educational program of its students. The provision limits that authority by, among other things, preventing the school district from unilaterally modifying a student's educational program during the pendency of an IEP dispute. It does not eliminate, however, the school district's preexisting and independent authority to determine how to provide the most-recently-agreed-upon educational program. As we have recognized, "[i]t is up to the school district," not the parent, "to decide how to provide that educational program [until the IEP dispute is resolved], so long as the decision is made in good faith. [citation omitted]

(Ventura de Paulino, 959 F.3d at 534).

However, with respect to the district's arguments, to the extent that they can be read to argue that Ventura de Paulino "abrogated" application of the "operative placement" in all cases, I disagree. While the application of "operative placement" is the rare case, it still survives under certain circumstances as noted below. With respect to cases such as Angamarca and Hidalgo, I believe that to the extent these cases rely on the operative placement test, they may be outdated as there is no clear test for when an IEP is "too old," and where that line is drawn, for example whether it is two years, or four years, or six years, or more. And that that determination as well, relies on the idea of "appropriateness" to some extent, when stay-put should operate more as an automatic injunction and need not be substantively appropriate. For example, the court in Angamarca, as referenced by the IHO in his decision, found that it was "not reasonable to conclude" that a 5-year old placement was "appropriate now" (Angamarca, 2019 WL 3034912 at 6). While it is understandable that a court would be reluctant to find pendency in an outdated placement that likely is no longer appropriate to address the student's current needs, the creation of an

"appropriateness" standard for pendency is to fall into making stay-put findings on a basis of the substantive adequacy the student's special education programing, which is not supported by the IDEA or the foundational case law on the issue is not a tenable solution. It runs afoul of the principle that "[w]hether the district has failed to provide a child's pendency entitlements is "evaluated independently" from the parents' claim as to the inadequacy of the IEP "because pendency placement and appropriate placement are separate and distinct concepts" (J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 642 [S.D.N.Y. 2011] [quoting Mackey, 386 F.3d at 162 and O'Shea, 353 F.Supp.2d at 459]).

Here, the record indicated that the student attended public school in the district for the 2011-12 through 2015-16 school years where he received ICT services with a full-time paraprofessional and received related services (Parent Exs. A at pp. 1-2, 7-8, 11; B at p. 2). The student's last agreed-upon IEP (dated January 27, 2016) was for the 2015-16 school year (Tr. p. 12; see Parent Ex. A; Parent Ex. B at pp. 1-2). The parent stated in her answer that subsequently, the district developed an IEP for the 2016-17 school year which deferred the student's case to the Central Based Support Team (CBST) for placement in a State-approved nonpublic school (NPS); however, after the CBST failed to locate an appropriate NPS placement, she unilaterally placed the student in the Children's Academy for the 2016-17 school year, and the parties entered into settlement agreements for the student's attendance every school year from 2016-17 through 2020-21 (Tr. pp. 3, 4, 10; Parent Ex. B at p. 2; Answer ¶¶ 7, 8).[3] Thereafter, a March 8, 2021 IEP for the 2021-22 school year was developed, which the parent states she never received a copy of but was informed, by prior written notice, that the CSE had recommended a 12:1+1 class in a District 75 school with related services, which the parent rejected and filed a September 10, 2021 due process complaint notice alleging denial of a FAPE for the 2021-22 school year (see Parent Ex. B). The parent indicated at the impartial hearing that "there has never been a pendency order previous[ly]" and stated in her answer that the parties "did not reach agreement regarding [the student's] pendency placement …(no pendency order previously issued)" (Tr. pp. 16-17; Answer ¶ 17). The parent also confirmed that there has been no unappealed IHO decision that could establish the student's current educational placement for purposes of pendency but that the student's case "has always been settled" (Tr. p. 3).[4]

As relevant to the issue on appeal, the parties do not dispute that the IEP for the 2015-16 school year, dated January 27, 2016, was the student's most recently implemented IEP before the student was unilaterally placed by the parent at the Children's Academy in the 2016-17 school year. (Tr. pp. 12, 13; see Parent Exs. A; B at p. 1; Req. for Rev. ¶ 5; Answer ¶ 6). The operative placement test is not applicable in these circumstances. In its discussion in declining to apply "operative placement" as requested by the parents in Ventura de Paulino, the Court in stated that

> It bears recalling that the term "operative placement" has its origin in cases where the school district attempts to move the child to a new school without the parents' consent, [citation omitted] or where

[3] The parent notes that the district did not offer the student an alternative program for the four years from the 2017-18 through the 2020-21 school years (Answer ¶ 8).

[4] If one were to delve into an "appropriateness" or substantive determination when determining pendency, it bears mentioning that no hearing officer has issued a final determination, and thus there is no basis for concluding that the unilateral placement at the Children's Academy is appropriate.

> there is no previously implemented IEP so that the current placement provided by the school district is considered to be the pendency placement for purposes of the stay-put provision [citation omitted]. Neither circumstance is presented here.

(Ventura de Paulino, 959 F.3d at 536).

Likewise, in this appeal, neither of the above circumstances are present. Moreover, courts have typically only relied on the "operative placement" to determine pendency when there is "no previously-implemented IEP," which is not the case here as the basis for pendency lies in the 2015-16 IEP (see Melendez v. New York City Dep't of Educ., 420 F. Supp. 3d 107, 122-23 [S.D.N.Y. 2019]).

Accordingly, I find that the IHO's rationale which determined that "[t]he present case is one in which the traditional 'operative placement' standards clearly apply" is error must be vacated. However, for the reasons set forth below on independent grounds, I decline to reverse the result of the IHO decision in ordering the district to provide tuition and costs at the Children's Academy during pendency of this matter, retroactive to September 10, 2021, the filing of the due process complaint notice.

B. Settlement Agreements

A settlement agreement between the parties may be sufficient to establish a student's pendency placement depending on various factors (see L.L. v. New York City Dep't of Educ., 2016 WL 4535037, at *7-*8 [S.D.N.Y. Aug. 30, 2016] [discussing factors relevant to a determination whether a settlement agreement establishes a pendency placement]). Here, as the parties acknowledge, the hearing record contains no evidence that the parties agreed to the student's educational placement at the Children's Academy during the 2021-22 due process proceeding or that a prior unappealed IHO decision established the student's current educational placement at the Children's Academy for purposes of pendency (see Schutz, 290 F.3d at 483-84; Murphy, 86 F. Supp. 2d at 366; Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197). However, the district was provided with an opportunity to present its case with regard to stay-put and it has overlooked that a similar lack of evidence fails to establish language explicitly limiting the settlement agreements entered into by the parties for the student's attendance at the Children's Academy, for each school year from 2016-17 through 2020-21, to a single year or definite time period, or establishing that the placement stipulated to was not the student's "then current educational placement," under relevant case law (see Zvi D., 694 F.2d at 906-08 [holding that a stipulation limited to a single school year did not constitute district placement of the student or establish that the placement stipulated to was the student's "current educational placement"]; Arlington Cent. Sch. Dist., 421 F. Supp. 2d at 696-97 [noting that "[a]n agreement in which a board of education agrees to pay tuition to a private school makes that school the child's pendency placement unless the stipulation is explicitly limited to a specific school year or definite time period"], citing Zvi D., 694 F.2d at 908; Evans, 921 F. Supp. at 1187-89 [holding that an agreement to fund the student's attendance at a private school was not bound by a definite time limitation and therefore established pendency in the nonpublic school]; see also K.D. v. Dep't of Educ., 665 F.3d 1110, 1118-21 [9th Cir. 2011] [distinguishing a district's agreement to fund a student's nonpublic school tuition for a limited period of time from an affirmative agreement by the district to place the student at the nonpublic school]; Stanley C. v. M.S.D. of Southwest Allen County Schs., 2008

WL 2228648, at *7-*8 [N.D. Ind. May 27, 2008]; K.G. v. Plainville Bd. of Educ., 2007 WL 80671, at *2 [D. Conn. Jan. 9, 2007]; but see Gabel v. Bd. of Educ., 368 F. Supp. 2d 313, 324-26 [S.D.N.Y. 2005] [determining that a settlement agreement that was limited to a single school year nonetheless established the student's pendency in the nonpublic school, distinguishing its facts from those in Zvi D. and declining to follow its result]).

Here, the district argues in its request for review that "[while] the [district] may have settled the [p]arent's prior years' due process complaints for tuition at Children's Academy, these settlement agreements do not establish pendency or otherwise manifest [the district's] consent"; however, the district offered no documents into evidence or testimony showing that this is the case (see Req. for Rev. ¶ 12; Tr. pp. 1-19; Parent Exs. A; B). It was the district's responsibility to establish that those settlement agreements for the school years from 2016-17 through 2020-21 did not establish pendency at the Children's Academy. The district and the parent agreed to Children's Academy multiple times with the district paying the costs of attendance and if limiting language was added to the settlement agreements, the district has failed to produce it. It is as if the district simply expected the IHO to presume the presence of such limiting language in the settlement agreements, which I decline to do here.

Thus, district has conceded that it previously agreed to pay for the student's placement of the student at Children's Academy. I further note that the parties did not otherwise reach an agreement on an alternative pendency at any point, nor has there ever been a previous pendency order, and suggest that the parties could have entered into an agreement on pendency during those intervening years at any time prior to the filing of a due process complaint notice, at which time the district's obligation to provide pendency services is triggered upon the initiation of due process proceedings (see Doe v. East Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]). I find that the district's apparent policy in this regard has contributed to the confusion created where pendency lies in an IEP that is multiple years old.[5] If there is any lesson to be learned from this case for a parent, it is that a parent should not enter into the due process system expecting that settlements will continue to be available year in and year out where the district has not created IEPs for the years in question and the last-agreed upon IEP between the parties grows ever more stale through the passage of time. Pendency is not a solution to this kind of problem. While some courts have felt that "operative placement" is the solution to circumstances such as those presented in this appeal, I do not agree, particularly because the operative placement test is no longer valid law in

[5] I can understand why the parents, as well as the Angamarca and Hidalgo courts might be reluctant to return a child to the services listed in the last implemented IEP, in circumstances such as these. But the "too old" test, for lack of a better phrase, is not the solution. The Second Circuit has already identified the solution. I note for future reference that if the parent wishes to seek a modification of pendency, she may pursue injunctive relief in federal district court as that is not a power that resides with the State Review Officer. To the extent relevant here, the Court stated, in part, in Ventura de Paulino

> [w]e note, however, that at least one of our sister Circuits has acknowledged that, under certain extraordinary circumstances not presented here, a parent may seek injunctive relief to modify a student's placement pursuant to the equitable authority provided in 20 U.S.C. § 1415[i][2][B][iii]. See Wagner v. Bd. of Educ. of Montgomery Cty., 335 F.3d 297, 302–03 [4th Cir. 2003] [involving a situation in which the pendency placement was no longer available, and the school district had failed to propose an alternative, equivalent placement]"

(Ventura de Paulino, 959 F.3d 519, 534, n. 65).

some Circuit courts,[6] and such analysis also runs the risk of supplanting the purpose of pendency with an appropriateness standard that is not supported by the IDEA. The failure to engage in the process of developing IEPs for the student along the way is at the heart of this problem and the parties are improperly relying on due process litigation as a means of educational planning.

Accordingly, and based upon the above, I will not disturb IHO's ultimate determination that the student's pendency is Children's Academy, albeit not for the reasons described by the IHO.

VII. Conclusion

Having made a determination in this matter upon alternate grounds, that the student's pendency is at the Children's Academy, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

Dated: Albany, New York
January 14, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER

[6] For example, the operative placement test was established by Sixth Circuit in Thomas v. Cincinnati Board of Education, 918 F.2d 618 [6th Cir.1990], but even the Sixth Circuit has since abandoned use of the test due to the evolution of the federal regulations governing IDEA (see N.W. v. Boone Cty. Bd. of Educ., 763 F.3d 611, 617 [6th Cir. 2014]).