The University of the State of New York

The State Education Department
State Review Officer
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No. 21-238

Application of the BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Keane & Beane, PC, attorneys for petitioner, by Stephanie M. Roebuck, Esq.

Ratcliff Law, PLLC, attorneys for respondents, by Jennifer Ratcliff, 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 the interim decision of an impartial hearing officer (IHO) determining the student's pendency 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 IHO found that the student's individualized education program (IEP), dated March 16, 2020, which was developed by the Committee on Preschool Special Education (CPSE) and identified a 12:1+2 special class placement and related services at the Fred S. Keller School (Keller preschool), constituted the student's pendency placement. Respondents (the parents) cross-appeal the IHO's failure to award compensatory educational services and costs related to transporting the student to the Keller preschool for the 2021-22 school year. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school

psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]).[1] 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]).

[1] Similarly, when a preschool 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 CPSE that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804).

III. Facts and Procedural History

Given the limited scope of this appeal, a recitation of the student's educational history is not necessary.[2] Briefly, on March 16, 2020, a CPSE convened and, having found that the student remained eligible for special education as a preschool student with a disability, recommended that, for the 2020-21 school year, the student attend a 12:1+2 special class placement at an approved preschool program together with the following related services: two 30-minute sessions per week of individual, school-based occupational therapy (OT); one 45-minute session per week of individual, home-based OT; two 30-minute sessions per week of individual, school-based physical therapy (PT); and one 45-minute session per week of individual, home-based PT (see SRO Ex. 6A at pp. 1, 10, 12).[3] The student received the recommended program and services at the Keller preschool—a State-approved, nonpublic preschool program—for the 2020-21 school year (see SRO Ex. 6B at p. 1).

On March 16, 2021, a CPSE convened a meeting in anticipation of the student's transition from receiving preschool-age services to receiving school-age services beginning in September 2021 because, as reflected by the evidence in the hearing record, the student turned five years old in July 2021 (see SRO Ex. 6B at p. 1).[4] Finding the student remained eligible as a preschool student with a disability, the March 2021 CPSE recommended a program for July and August (summer) 2021, which consisted of the student's continued attendance in a 12:1+2 special class placement at the Keller preschool, together with the following related services: two 30-minute

[2] Neither party entered any evidence into the hearing record at the impartial hearing, but instead, submitted affidavits and briefs to argue the student's pendency placement to the IHO. The Office of State Review received these documents as part of the administrative hearing record filed by the district; however, the documents filed by the district were unmarked. For ease of reference in this decision, the documents, other than the transcript and the IHO's interim decision on pendency, will be referred to by the numerical designation assigned to each document in the district's certification of the hearing record as follows: the parents' due process complaint notice, dated August 23, 2021 (SRO Ex. 2); the district's letter brief, dated October 8, 2021 (SRO Ex. 4); an affidavit by the district executive director of pupil personnel services (director's affidavit), dated October 7, 2021 (SRO Ex. 5); the parents' brief on pendency (with attachments A, B, and C), dated October 8, 2021 (SRO Ex. 6); an affidavit by the associate director of the Keller preschool (Keller affidavit), dated October 8, 2021 (SRO Ex. 7); an affidavit by the student's mother (parent affidavit), dated October 6, 2021 (SRO Ex. 8); and the parents' rebuttal brief on pendency, dated October 18, 2021 (SRO Ex. 9). In addition, any references to the attachments to SRO Exhibit 6—labeled A, B, and C—will be designated in citations as "SRO Ex. 6A," "SRO Ex. 6B," or "SRO Ex. 6C," with the appropriate page numbers.

[3] For July and August (summer) 2020, the March 2020 CPSE had recommended that the student receive two hours per day of special education itinerant teacher (SEIT) services (delivered at home/school), three 30-minute sessions per week of individual OT (delivered at home/school), and three 30-minute sessions per week of individual PT (delivered at home/school) (see SRO Ex. 6A at pp. 10-11). The agency or school responsible for providing the student's summer 2020 services was not the Keller preschool (id. at p. 11).

[4] State law defines a preschool student with a disability as a student who is eligible to receive preschool programs and services and "who will not have become five years of age on or before December first of the school year, or a later date if a board established such later date for eligibility to attend school" (Educ. Law § 4410[1][i]). State regulation further describes a preschool student with a disability as a student who "is not entitled to attend the public schools of the school district of residence" due to being under the age of five (8 NYCRR 200.1[mm]; see Educ. Law § 3202[1]). The district in this matter has established December 1st as the eligibility date for a student to be admitted to kindergarten (Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. Policy No. 5140 [adopted July 1, 1987], available at http://go.boarddocs.com/ny/hhcsd/Board.nsf/goto?open&id=BU8Q6Z66C48C).

sessions per week of individual, school-based OT; one 45-minute session per week of individual, home-based OT; and two 30-minute sessions per week of individual, school-based PT (id. at pp. 1, 12-14).[5] The March 2021 CPSE also recommended special transportation to the Keller preschool during summer 2021 (id. at p. 13).

In addition to the CPSE meeting held on March 16, 2021, a CSE—comprised of the same individuals who composed the CPSE—convened a meeting and developed an IEP (school-age, kindergarten) for the 2021-22 school year (to be implemented from September 9, 2021 through June 23, 2022) (compare SRO Ex. 6C at pp. 1, 3, with SRO Ex. 6B at p. 1). Finding that the student was eligible for special education as a student with an other health-impairment, the March 2021 CSE recommended a 12:1+1 special class placement in a district public school, together with the following related services: two 30-minute sessions per six-day-cycle of individual OT and two 30-minute sessions per six-day-cycle of individual PT (see SRO Ex. 6 C at pp. 1, 10-11).[6]

By due process complaint notice dated August 23, 2021, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year, when the student became eligible for special education and related services under a school-aged IEP, based upon various procedural and substantive violations (see SRO Ex. 2 at pp. 1-5). With respect to their request for a pendency placement, the parents asserted that the student's "most recent IEP" formed the basis for the pendency placement, which included the following recommendations: a 12:1+2 preschool class, two 30-minute sessions per week of individual OT, one 45-minute session per week of individual OT, two 30-mintue sessions per week of individual PT, and one 45-minute session per week of individual PT (id. at p. 3).[7] As relief, the parents requested, in part, an order directing the district to reimburse or fund the costs of the student's 12:1+2 preschool class placement at the Keller preschool and related services for the 2021-22 school year, and to award compensatory educational services for any pendency services the student was entitled to but did not receive (see SRO Ex. 2 at p. 5).

On September 20, 2021, the parties proceeded to an impartial hearing (see Tr. p. 1). On that day, the parties discussed the student's pendency (stay-put) placement (see Tr. pp. 1, 4-15). As part of that discussion, the parents' attorney asserted that the 12:1+2 "preschool program" was the student's pendency placement, and as the parents had placed the student at the Keller preschool for the current school year—and since the student had attended Keller "last year"—it was their position that the student should remain at the Keller preschool (Tr. p. 7). The district's attorney confirmed that the Keller preschool was "certified as a special ed[ucation] preschool program," and the student had attended Keller pursuant to the CPSE but did not otherwise assert any position with regard to the student's pendency placement (Tr. p. 8). Thereafter, the IHO and the parties

[5] The March 2021 CPSE did not continue the recommendation from the March 2020 IEP for home-based PT (compare Parent Ex. 6B at p. 12, with Parent Ex. 6A at p. 10).

[6] As noted in the meeting information sections in both the March 2021 CPSE IEP and the March 2021 CSE IEP, the parents expressed indecision about "whether or not they plan[ned] to keep [the student] in preschool for another year" (SRO Exs. 6B at p. 2; 6C at p. 1).

[7] Although not specifically identified by a particular IEP, the special education and related services sought as the student's pendency placement reflected the recommendations in the student's March 2020 CPSE IEP (compare SRO Ex. 2 at p. 3, with SRO Ex. 6A at pp. 1, 10, 12).

developed a timeline for submitting affidavits and briefs in support of their respective pendency placement positions and scheduled additional dates for the continuation of the impartial hearing (see Tr. pp. 8-18). In its brief to the IHO, the district proposed that it would implement the student's stay-put placement (based on the March 2020 CPSE IEP) at a 12:1+1 kindergarten special class in a district public school with additional staffing and that this proposal would not represent a change in the students' educational placement for purposes of pendency (SRO Ex. 4 at pp. 1, 4-5). The parents maintained their position that the student's stay-put placement should be implemented in a 12:1+2 preschool class at Keller (SRO Ex. 6 at pp. 3-5).

In an interim decision on pendency, dated October 27, 2021, the IHO found that the student's March 2020 CPSE IEP—which included recommendations for a 12:1+2 special class placement with school-based and home-based related services and which specifically identified the Keller preschool as the location to implement the IEP—formed the basis for the student's pendency placement (see Interim IHO Decision at p. 11). Ultimately, the IHO found that the student must be placed at the Keller preschool for his pendency placement by the district, and the district must assume "all costs related to special education and related services delivered" at Keller, as well as reimbursing the parents for the tuition costs "paid or owed by [the parents] during the 2021-2022 school year" (id. at pp. 11-12). The IHO also noted that since there was "no automatic entitlement to compensatory related services on a 1:1 basis," an award of compensatory educational services the student "allegedly missed during the 2021-2022 school year, if any, w[ould] be heard during the substantive portion" of the impartial hearing (id. at p. 12).

In reaching these determinations, the IHO considered the district's arguments that it could implement the student's pendency placement in its 12:1+1 special class placement (kindergarten classroom) in a district elementary school because it was substantially similar to the program the student received at the Keller preschool (see Interim IHO Decision at pp. 8-9). According to the IHO, in support of its contention that it was capable of implementing the student's pendency placement, the district argued that it currently had a 12:1+1 special class placement available with "additional staff"—notably, "two and one-half (2.5) aides supporting the required personnel assigned to the class"—as well as the support of a Board Certified Behavior Analyst (BCBA) (id. at pp. 3, 8-9).[8] Moreover, the district had asserted that its proposal to implement the student's pendency placement at the district public school would not constitute a change in the student's educational placement because it "'would not substantially or materially alter [the student's] educational program'" (id. at p. 9). The IHO noted that neither the Keller preschool program nor the district's proposed program "would have [the student] participating in any general education programs or activities" (id.). In addition, the IHO noted the district's argument that the district could "'provide the same general type of educational program and level of services to [the student] as a kindergarten student in the [d]istrict that he previously received" at the Keller preschool and pursuant to the "'last mutually agreed upon IEP'" (id.).

The IHO turned next to examine the parents' arguments in support of finding the student's pendency placement must be at the Keller preschool (see Interim IHO Decision at p. 10).

[8] With respect to the district's assertion that a BCBA assisted and supported the 12:1+1 special class placement at the district elementary school, the IHO parenthetically noted that the "presumptive argument [wa]s that the BCBA would supplant but would be substantially similar to [the student's] receipt of [applied behavior analysis (ABA)] services" (Interim IHO Decision at p. 9). Previously in the decision, the IHO had indicated that, according to the parent's affidavit, the student had received an ABA-based program at the Keller preschool (id. at p. 2).

According to the IHO, the parents' attorney had "concede[d] that pendency [wa]s not a location and that it [wa]s up to the school district to decide how to provide the pendency program" (id.). The parents argued, however, that the district's offer to provide the student's pendency placement in the 12:1+1 special class placement in a public school was nothing short of an attempt to "force the student into the program the parents rejected as inappropriate" and to "avoid providing [the student] with this pendency program"—which, according to the parents, was "'not at all the same as providing the student with identical services at a lower price or in a different building'" (id.). The IHO also acknowledged that the parents correctly argued that the district had not provided any "examples 'where a court deemed a student's pendency program to be in a kindergarten class where the last agreed upon IEP had previously been implemented in a preschool program'" (id.). Thus, as noted by the IHO, the parents argued that the district was "using pendency to unilaterally place the [student] into its preferred program, the program being contested by the [p]arents" (id.).

In analyzing whether the district's 12:1+1 special class placement was substantially and materially similar to the Keller preschool program, the IHO found two "glaring deficiencies" in the district's arguments (Interim IHO Decision at pp. 10-11). First, although the district had alleged that its 12:1+1 special class placement included additional adult support, and therefore, made it similar to the Keller preschool program, the IHO found that there was "no indication" that the additional staff had been "assigned to the classroom in general or to particular student's [sic] in that classroom" (id. at p. 10). Consequently, the IHO concluded that, absent such evidence, it was "impossible to know whether these [wer]e substantially similar programs" (id.).

With regard to the second glaring deficiency, the IHO noted that the parents had provided evidence that the student had received "ABA programming" at the Keller preschool during the 2020-21 school year (Interim IHO Decision at p. 10). According to the IHO, the district had alleged that a BCBA would "provide materially similar services" to the 12:1+1 special class placement offered for the student's pendency placement (id. at pp. 10-11). However, the IHO pointed out that the student's IEPs did not "specify the need for a Behavior Intervention Plan, plans for which BCBA's [sic] [wer]e typically utilized" (id. at p. 11). In addition, the IHO noted that the student's March 2020 CPSE IEP did not indicate the use of a BCBA "or any other 'supports for school personal [sic] on behalf of the student'" (id.). Parenthetically, the IHO further noted however that the student's March 2020 CPSE IEP did not "explicitly state that [the student] [wa]s to receive ABA services" (id.).

In light of the foregoing, the IHO ultimately concluded that there was no evidence to support a finding that the district's 12:1+1 special class placement was substantially similar to the Keller preschool program, "with or without additional paraprofessional services," and in light of the fact that the Keller preschool program used an "ABA methodology" and the district's proposed program used a BCBA (Interim IHO Decision at p. 11). As a result, the IHO found that the March 2020 CPSE IEP formed the basis for the student's pendency placement in a 12:1+2 special class at the Keller preschool and ordered the district to fund such services and to provide transportation (id. at pp. 11-12).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by finding that the student's pendency placement must be implemented at the Keller preschool and funded by the district, which the district further asserts is the same relief the parents are seeking for the unilateral placement of the

student at the Keller preschool for the 2021-22 school year. The district argues that the IHO incorrectly determined that the district's 12:1+1 special class program was not substantially similar to the student's last agreed-upon placement in a 12:1+2 special class program, especially when the district demonstrated that additional staff had been added to the 12:1+1 special class "to make its proposed pendent placement similar to the last agreed upon placement." The district also asserts that the IHO erred by finding that the provision of ABA programming at the Keller preschool was "significant enough so as to find the [d]istrict's proposed pendent placement dissimilar." The district argues that this is especially true given that the IHO also determined that the student's last agreed-upon IEP did not mandate that the student receive ABA services. Relatedly, the district contends that the IHO erred by finding that the BCBA services within the district's program would not provide the student with the same type of discrete trial instruction for academics because there was no evidence to support such a finding. The district also argues that the IHO erred by finding that the Keller preschool program was the student's pendency placement because the student's last-agreed upon IEP included a recommendation for a self-contained special class placement, and the student's current Keller preschool program included nondisabled students in the classroom.

Next, the district argues that the IHO's findings disregarded State law and regulation, which precludes the student, who turned five years old in July 2021, from being eligible for a pendency placement at a preschool as he is no longer eligible for preschool services. The district further argues that, so long as it is done in good faith, a school district retains a "'preexisting and independent authority to determine how to provide the most-recently-agreed-upon educational program,'" not the parents (Req. for Rev. ¶ 12 [emphasis in original], citing Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 534 [2d Cir. 2020]). The district asserts that, although the IHO applied the correct legal standard, the IHO erred by finding that the district's offered pendency placement was not substantially similar to the Keller preschool program.

As two final arguments, the district contends that the IHO erred by relying on evidence that the student received ABA programming at the Keller preschool to support a finding that the Keller preschool was the student's pendency placement and, in contrast, by ignoring evidence that the student's last-agreed upon IEP called for a self-contained special class placement, not an integrated setting, and therefore, precluded the Keller preschool program from constituting the student's pendency placement. As relief, the district seeks to overturn the IHO's decision and to find that the district's proposed program is the student's pendency placement.

In an answer, the parents respond to the district's allegations in the request for review. The parents cross-appeal the IHO's failure to award compensatory educational services for missed home-based OT pendency services, as well as the IHO's failure to award costs for the parents' travel time and expense transporting the student round-trip to Keller during the 2021-22 school year.

As relief, the parents seek a finding that the student's pendency placement consisted of a 12:1+2 class at the Keller preschool, to be funded by the district, together with the following related services: two 30-minute sessions per week of individual, school-based OT; one 45-minute session per week of individual, home-based OT; and two 30-minute sessions per week of individual, school-based PT. In addition, the parents request an order directing the district to provide the student with round-trip bus transportation to the Keller preschool, provide the student with compensatory educational services equal to the amount of home-based OT services the student was not provided since September 2021, provide the student with home-based OT services (one

45-minute session per week, individually), reimburse the parents for the costs of the student's tuition at the Keller preschool incurred since September 2021, and reimburse them for the costs (time and expense) incurred for transporting the student to the Keller preschool since September 2021 "using the IRS's standard mileage rate."

In an answer to the cross-appeal, the district responds to the parents' allegations concerning compensatory educational services and costs for transporting the student, and generally argues to uphold the IHO's findings on these issues.

V. Applicable Standards

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, 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 (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. 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]).[9] 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 to "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).

[9] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

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], 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 student's "then-current educational" placement or 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 Ventura de Paulino, 959 F.3d at 532; Schutz, 290 F.3d at 483-84; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington, 421 F. Supp. 2d at 697; Murphy, 86 F. Supp. 2d at 366; Letter to Hampden, 49 IDELR 197). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings," S.S., 2010 WL 983719, at *1 [emphasis in the original]). And upon a pendency changing event, such changes apply "only on a going-forward basis" (id.). With that said, it has been held that in certain circumstances a court may, on equitable grounds, retroactively adjust a student's pendency placement if a state-level administrative decision in a parent's favor was not issued in a timely manner (see Mackey, 386 F.3d at 164-66; Arlington, 421 F. Supp. 2d at 701; O'Shea, 353 F. Supp. 2d at 457-58; Murphy, 86 F. Supp. 2d at 366-67).

VI. Discussion

A. Pendency Placement

1. Preliminary Matters—Scope of Review

Before turning to the merits of the district's appeal and the parents' cross-appeal, a determination must be made regarding which claims are properly before me. The IHO concluded

that, for the purposes of pendency, the special education program and related services in the student's March 2020 CPSE IEP formed the basis for the student's pendency placement (see Interim IHO Decision at pp. 11-12). The district has not appealed this aspect of the IHO's decision, and affirmatively asserts that the March 2020 CPSE IEP was the last agreed-upon IEP, which included recommendations for the student for the 2020-21 school year (see Req. for Rev. ¶¶ 20, 25).

In contrast, a review of the parents' pleading is somewhat confusing because their arguments appear in some instances to agree with the IHO's finding that the March 2020 CPSE IEP was the last agreed-upon IEP and formed the basis for pendency, but in other instances appear to assert that the March 2021 CPSE IEP was the last-agreed upon IEP for the purposes of pendency. For example, as part of the cross-appeal the parents contend that the IHO erred by failing to order compensatory, home-based OT services as "mandated in both [of the student's] 2020-2021 school year IEP and summer 2021 IEP" (Answer & Cr. App. ¶ 29). Relatedly, the parents assert that the IHO properly ordered the district to make sure the student received the related services "set forth in his 2020-2021 last agreed IEP" (id. at ¶¶ 30, 32). But then, in support of their first defense, the parents assert that the "last agreed-upon IEP [wa]s the summer 2021 IEP created for [the student] in March 2021" (id. at ¶ 33). The parents also rely, in part, on the March 2021 CPSE IEP to support their contention that the student's pendency placement included ABA programming (id. at ¶ 47). Finally, in the request for relief, the parents seek a finding that the "preschool 12:1:2 class at Keller with related services" as set forth in the March 2021 CPSE IEP—namely, two 30-minute sessions per week of individual, school-based OT; one 45-minute session per week of individual, home-based OT; and two 30-minute sessions per week of individual, school-based PT—constituted the student's pendency placement (id. at p. 9; see SRO Ex. 6B at pp. 1, 12-14).

Yet despite the parents' assertions sprinkled throughout their pleading that the student's March 2021 CPSE IEP was the last agreed-upon IEP—in direct contrast to the IHO's finding that the student's March 2020 CPSE IEP was the last agreed-upon IEP—the parents have not cross-appealed the IHO's finding, but instead, specifically limit their cross-appeal to the IHO's failure to award compensatory educational services (OT only) and reimbursement for transportation expenses (see Answer & Cr. App. ¶¶ 28-32).[10] State practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Therefore, to the extent that the parents had the opportunity to cross-appeal the IHO's finding that the March 2020 CPSE IEP was the last agreed-

[10] It should be noted that, in the due process complaint notice, the parents specifically described the student's pendency placement at the special education program and related services in the March 2020 CPSE IEP (see SRO Ex. 2 at p. 3). However, in their brief submitted to the IHO regarding pendency, the parents argued that the March 2021 CPSE IEP—which included recommendations for a 12:1+2 classroom and related services (two 30-minute sessions of individual, school-based OT; one 30-minute session of individual, home-based OT; and two 30-minute sessions of individual, school-based PT)—was the last agreed-upon IEP and formed the basis for the student's pendency placement (see SRO Ex. 6 at pp. 3-4, 6-7). The IHO's interim decision on pendency did not reflect the parents' argument from their brief, but rather looked to the parents' due process complaint notice to describe the special education program and related services sought as the pendency placement (see generally Interim IHO Decision).

upon IEP but did not, this issue will be deemed abandoned and will not be addressed further in this decision (see 8 NYCRR 279.8[c][2], [4]).

2. Student-to-Teacher Staffing Ratio

Having determined that the IHO's finding that the March 2020 CPSE IEP was the last agreed-upon IEP is unchallenged, the next inquiry focuses on whether, as the district contends, the IHO erred by finding that the district's offer to provide the student's pendency placement in a 12:1+1 special class placement at a district public school, which included the support of 2.5 additional adults in the classroom as well as the support of a BCBA, was not substantially similar to the pendency placement arising therefrom.

As indicated by the IHO, the student's last agreed-upon IEP included the following special education program and related services: a 12:1+2 special class placement; two 30-minute sessions per week of individual, school-based OT; one 45-minute session per week of individual, home-based OT; two 30-minute sessions per week of individual, school-based PT; and one 45-minute session per week of individual, home-based PT (see Interim IHO Decision at pp. 2-3, 11-12; SRO Ex. 2 at p. 3; SRO Ex. 6A at pp. 1, 10, 12).

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]),[11] 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]).

[11] As noted above, beginning in the 2021-22 school year, the student was no longer eligible for special education as a preschool student with a disability (see Educ. Law § 4410[1][i]; 8 NYCRR 200.1[mm]; see also Educ. Law § 3202[1]). As for the student's eligibility to continue at Keller in particular, the Keller affidavit indicates that the Fred S. Keller School operates three campuses: one campus—where the student currently attends—consists solely of preschool classes; a second campus consists of one Early Intervention (EI) classroom and the remaining classes are preschool classes; and the third campus consists solely of EI classrooms (see Keller Aff'd at ¶¶ 2-3). In addition, the Keller affidavit indicates that "[n]one of the classrooms at Keller are kindergarten classrooms" (id. at ¶ 3). According to the Keller affidavit, the Keller School has "had students in the past, such as [this student], who, though they [wer]e old enough to attend a school-aged program, attended preschool at Keller for one additional year" (id. at ¶ 9). However, those students' tuition costs were either "paid for privately by their parents or by their school district under pendency" (id.). Based upon this evidence, it appears that the student aged-out of the Keller preschool program and, under normal circumstances, the student would not be allowed to attend the Keller preschool program as a kindergarten student.

On appeal, the district remains willing to implement the student's pendency placement, as previously offered, arguing that the 12:1+1 special class placement is substantially similar to the 12:1+2 special class placement mandated as the pendency placement. 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]).

Under this standard, the change in class ratio from the 12:1+2 special class required under pendency to the 12:1+1 special class placement offered by the district represents a change in the student-to-staff ratio (from two supplementary support personnel assigned to the classroom to one) (see 8 NYCRR 200.1[g]; 200.4[d][2][v][a], [b][2]).[12] However, the district argues that the while the 12:1+1 special class, alone, may not be substantially similar, the hearing record contained sufficient evidence that the district had supplemented the class with additional adult support thereby rendering the special class less dissimilar to the 12:1+2 special class. In her affidavit testimony, the district's director indicated that the 12:1+1 proposed classroom was additionally staffed with 2.5 aides, along with BCBA support to the class (SRO Ex. 5 ¶¶ 4, 6). Contrary to the IHO's finding that the hearing record did not show that the aides were assigned to the class as a whole (as opposed to particular students) (Interim IHO Decision at p. 10), the district director indicated that the 2.5 aides "supported the required personnel assigned to the class" (SRO Ex. ¶ 4).

In finding that the district's proposed classroom was not substantially similar to the class required pursuant to pendency, the IHO cited a district court case, which found that a 6:1+1 special class placement, with the addition of a 2:1 shared aide, did not render that special class placement comparable to a 6:1+3 special class placement (see Interim IHO Decision at p. 7, citing G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *7-*8 [S.D.N.Y. Jan. 31, 2012]). The court in G.R. applied the "comparable services" provisions set forth in the IDEA and its implementing regulations that are used when a student transfers from one school district to another (2012 WL

[12] The continuum of services for school-aged students contemplates that a special class for "students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i] [emphasis added]). Therefore, this definition describes both a 12:1+1 or a 12:1+2 special class.

310947, at *7-*8; see 20 U.S.C. § 1414[d][2][C] [i][I]; 34 CFR 300.323[e]; NYCRR 200.4[e][8][i]); however, the comparable services provisions have not been advanced in any other case involving the stay-put context, at least to my knowledge. Moreover, the court did not go so far as to say that the programs could not be deemed comparable but instead focused on the lack of record support for the conclusion, noting that the SRO in that matter had not cited any portion of the hearing record in concluding that a 2:1 shared aide would render the programs comparable and that the record was complicated by an additional IEP with no explanation as to which program the district was recommending or evidence as to the "comparability" of the second IEP (G.R., 2012 WL 310947, at *8).[13] In contrast, in the present matter, there is an evidentiary basis for the district's proposed program (see SRO Ex. 5). Further, while the court in G.R. did not endorse the SRO's determination that a 6:1+1 special class with a 2:1 shared aide was comparable to a 6:1+3 special class, the court did not, as a result, order the district to fund the student's 6:1+3 special class in his prior school district (as the IHO in the underlying matter had); instead, the court ordered the district to provide the student comparable services. Similarly, as set forth below, the district in the present matter is ordered to provide the student a pendency program that is substantially similar to the March 2020 CPSE IEP, including the 12:1+2 special class. The substantially similar special class should have no more than twelve students, at least one special education teacher, and at least two supplementary school personnel assigned to the class.

3. ABA Methodology

Here, the district contends that the student's last agreed-upon IEP—the March 2020 CPSE IEP—did not require that the student receive ABA programming, and therefore, the IHO erred by finding that the absence of ABA programming within the district's 12:1+1 special class placement weighed against a determination that the district's offered program was not substantially similar to the student's pendency placement.

Overall, neither the case law nor the evidence in the hearing record supports the IHO's determination that the student's pendency placement must include a specific methodology, such as an ABA-based program. Generally, a student's educational placement for purposes of pendency includes "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756); but the IHO did not cite to any legal authority for the proposition that that general type of educational program includes a specific methodology (see generally Interim IHO Decision). In addition, while the evidence in the hearing record reflects that the student attended a 12:1+2 special class placement at the Keller preschool during the 2020-21 school year that utilized the ABA methodology, the evidence does not further explain that statement other than noting that "discrete trials were/are used as part of [the student's] academic instruction" (see SRO Ex. 7 ¶ 4). Moreover—and as specifically determined by the IHO—a review of the student's March 2020 CPSE IEP implemented by the preschool reveals that the IEP does not include any references to the use of a specific methodology with the student in describing his present levels of performance or management needs (see SRO Ex. 6A at pp. 5-6). In addition, the annual goals and the corresponding short-term objectives in the March 2020 CPSE IEP do not

[13] In the underlying matter, the district had not proposed the 2:1 shared aide to make the 6:1+1 special class comparable and, therefore, offered no evidence to support the comparability of this configuration; rather, the SRO had ordered the shared aide, finding that the additional adult support would address the discrepancy between the 6:1+3 special class the student had previously attended and the 6:1+1 special class proposed by the district.

mandate the use of a specific methodology or the use of discrete trials in order for the student to make progress toward achieving the annual goals and objectives (id. at pp. 1, 6-9).

Consistent with the district's argument, the IHO erred by finding that the student's pendency placement required the use of ABA programming in order to be substantially similar to the special education program in the last agreed-upon IEP.

B. Location for Implementation of the Pendency Placement

Having determined that the student's pendency placement consists only of the special education program and related services set forth in the March 2020 CPSE IEP, the analysis now turns to the location within which to implement the student's pendency placement.

While the facts of this matter do not fall squarely within the Second Circuit's decision in Ventura de Paulino, it provides clear direction on the issue of implementing a pendency placement, noting that:

> The stay-put provision . . . 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"

(Ventura de Paulino, 959 F.3d at 534, quoting T.M., 752 F.3d at 171). Thus, contrary to the IHO's finding and the parents' desire for the student's pendency placement to be implemented at the Keller preschool, 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 533-35). The Court further 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).[14]

At this juncture, the district has offered to implement the student's pendency placement in a 12:1+1 special class with additional staff; thus, the district has not refused to implement pendency. The proposed pendency placement does not result in a "fundamental change" in the student's educational program (see Cruz v. New York City Dep't of Educ., 2020 WL 1322511, at *9 [S.D.N.Y. Mar. 20, 2020]). While the parents would prefer that the student receive his pendency placement at Keller, the district is not required to do implement the student's pendency at this particular bricks and mortar location and has the authority to implement the student's pendency placement in a kindergarten program that is substantially similar to the March 2020 CPSE IEP (see Ventura de Paulino, 959 F.3d at 532, 534; see also 8 NYCRR 200.16[h][3][i]). Accordingly, the district is directed to implement the student's pendency placement, consistent with this decision, in a special class placement that has no more than 12 students, at least one special education teacher, and at least two supplementary school personnel assigned to the class, and the IHO's determination requiring the district to fund the student's attendance in a 12:1+2 special class placement at the Keller preschool program pursuant to its obligations pursuant to the pendency is reversed.

VII. Conclusion

Having concluded that the student's pendency placement consists of the special education program set forth in the student's March 2020 CPSE IEP and that the IHO erred by finding that the district must implement, and fund, the student's pendency placement at the Keller preschool, the necessary inquiry is now at an end. I have considered the parties' remaining contentions and find that the issues raised in the parents' cross-appeal concerning compensatory OT services and the reimbursement of transportation costs need not be addressed at this time.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's interim order on pendency, dated October 27, 2021, is modified by reversing those portions which directed the district to implement and fund the student's pendency placement at the Keller preschool; and,

[14] The Court in Ventura 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 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]).

IT IS FURTHER ORDERED that the district shall implement the student's pendency placement consistent with this decision.

Dated: **Albany, New York**
February 7, 2022

SARAH L. HARRINGTON
STATE REVIEW OFFICER