The University of the State of New York

The State Education Department
State Review Officer
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No. 21-239

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 J. Reimels, Esq.

Law Office of Michelle Siegel, attorneys for respondents, by Lesley Berson, 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 respondents' (parents') son'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 appeal must be sustained.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

Due to the interlocutory nature of this appeal, the hearing record is limited with respect to information regarding the student's educational history. Briefly, on April 27, 2017, a CSE convened to review the student's programming and revise the student's IEP for the 2018-19 school year (District Ex. 1 at p. 1). For the 2018-19 school year, the student remained eligible for special education as a student with a learning disability and the CSE recommended that the student attend

a 12:1+1 special class in a State-approved, nonpublic school with related services of one 40-minute session of individual speech-language therapy per week and one 40-minute session per week of speech-language therapy in a group of five (id. at pp. 1, 19, 22). The CSE also recommended that the student receive special education transportation services (id. at p. 19).

According to the parents' post-hearing brief, the April 2017 IEP was implemented for the 2017-18 school year at the Community School, a state-approved nonpublic school (IHO Ex. II at p. 2; Tr. 11-12). The brief indicates that the student attended the Community School "through seventh grade, after which he transferred to Winston Preparatory School" (Winston Prep) (IHO Ex. II at p. 2).

According to an interim order on pendency dated September 24, 2019 (and corrected on October 19, 2019), issued by the same IHO who issued the pendency order in the present proceeding, the parents requested an impartial hearing on September 2, 2019 concerning the 2019-20 school year, and a pendency hearing was held on September 20, 2019 (District Ex. 5 at p. 1). The IHO noted that during the hearing both parties agreed that the last agreed-upon IEP for the student was the April 2017 IEP, which recommended a special class (12:1+1) in an approved non-public school with special transportation (id. at p. 2). The IHO further noted that both parties agreed there was "no placement offer currently in effect" and it was undisputed that the student had attended Winston Prep, a private unilateral placement, for the 2018-19 school year and the 2019-20 school year (id.). The IHO found that because no other pendency placement "ha[d] been identified and in order to maintain stability in the student's education," pendency for the student lay in Winston Prep and, accordingly, she directed the district to fund the student's placement at Winston Prep, and provide special transportation to and from the school, as of the date of the due process complaint notice and during the pendency of the proceeding (id.).

In a subsequent order on pendency, dated December 20, 2020, that was issued in a different proceeding commenced by a due process complaint notice filed by the parents on September 9, 2020, concerning the 2020-21 school year, an IHO ordered the district to once again fund the student's pendency placement at Winston Prep (District Ex. 6). In his decision, the IHO rejected the parents' argument that the prior interim pendency decision dated September 9, 2019 was binding on him pursuant to the doctrines of res judicata and/or collateral estoppel (id. at 11-13). Instead, he determined that because the district had not offered the student a "bricks and mortar" placement for the 2020-21 school year and the last agreed-upon IEP also failed to identify a specific nonpublic school placement for the student, pendency at Winston Prep, which the student had been attending for the prior two years, would provide the educational stability and consistency that was the purpose of the stay-put provision (id. at 8-10). Moreover, the IHO also found that pendency was established based on the substantial similarity between the program at Winston Prep and the substantive program and nonpublic school placement recommended by the parties' last agreed-upon April 2017 IEP (id. at pp. 14-19).

With respect to the 2021-22 school year, on September 9, 2021, the parents filed a due process complaint notice claiming that the district denied the student a free appropriate public education (FAPE), that Winston Prep was an appropriate unilateral placement for the student, and

that the pendency placement for the student during the duration of the proceeding should be Winston Prep (District Ex. 4).

B. Impartial Hearing Officer Decision

The pendency portion of the impartial hearing took place on October 8 and October 19, 2021 (Tr. pp. 1-71). In a discussion held between counsel during the hearing, counsel for the parties indicated that the pendency orders from the prior proceedings were interim orders, that the prior proceedings were settled but there was not "an additional settlement aside from the interim pendency orders that were issued" (Tr. pp. 8-9).

In a decision dated November 4, 2021, the IHO determined that the student's pendency placement was Winston Prep (IHO Decision). The IHO acknowledged that both the parents and the district agreed that the April 2017 IEP was the last IEP agreed to by the parties (id. at p. 2). However, the IHO found that the two prior pendency orders, which were issued subsequent to the April 2017 IEP, should form the basis for pendency (id. at p. 4). The IHO noted that "it d[id] not matter that the substantive issue of the appropriateness of Winston, and the parent[s]' entitlement to funding was never litigated on the merits" and "[d]etermination of pendency is not based upon considerations of appropriateness" (id.). Rather, the IHO reasoned that the specific issue of pendency had been litigated in two prior school years "with decisions favorable to the parent" and the district's "decision not to appeal either decision, allowed the student to remain there with DOE funding;" therefore, the failure of the district to appeal effectively constituted an agreement by the district to the student's pendency placement at Winston Prep (id.). In so determining, the IHO rejected the parents' contention that Winston Prep was substantially similar to the program recommended by the April 2017 IEP and did not find that Winston Prep was the student's operative placement; instead, the IHO solely relied on the two unappealed prior pendency decisions (id.). Accordingly, the IHO ordered the district to fund the student's pendency placement at Winston Prep and special transportation effective from September 9, 2021 through the pendency of the proceeding (id.).

IV. Appeal for State-Level Review

The district appeals. By a request for review dated December 10, 2021, the district argues that the IHO erred in determining that pendency lies at Winston Prep because the relevant legal authority on the issue unequivocally provides that a pendency decision in one proceeding may not serve as the basis for pendency in a future proceeding and, in order to represent an agreement between the parties, an unappealed decision must be on the merits, which would include a determination of the appropriateness of the unilateral placement. The district also argues that there is no requirement for a school district to offer a pendency placement to a student where the parents have already rejected a pendency placement in favor of their own unilateral program where they have placed the student for the pendency of the proceedings. The district further asserts that even if a district placement was unavailable at the beginning of the school year, which the evidence in the hearing record did not support, if the parents wanted the student to stay at Winston for the pendency of the proceeding at district expense, the parents' remedy is to either enter into an agreement with the school district or seek a preliminary injunction in court. Finally, the district

contends that to the extent the parents continue to argue that Winston Prep is the student's operative placement, pendency cannot be based on the student's unilateral placement at Winston Prep because the April 2017 constitutes the last agreed-upon IEP.

The parents submit an answer which consists of various admissions and denials related to the claims raised in the request for review. In pertinent part, the parents admit that when the "2021-2022 school year began, the [district] finally proffered an ostensible school placement for [the student]" (Answer at ¶ 24). The parents do not cross-appeal any of the IHO's findings but instead argue that that the IHO's determination that the student's pendency placement lies in Winston Prep on the basis of the two prior pendency orders should be upheld or, in the alternative, that an SRO should find that Winston Prep constitutes the student's pendency placement on the basis of any of the other grounds set forth in the "Respondents' Brief on Pendency," namely that Winston Prep is the student's "operative placement" or that Winston Prep is substantially similar to the program and placement recommended in the April 2017 IEP.

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]).[1] 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

[1] In Ventura de Paulino v. New York City Department of Education, 959 F.3d 519 (2d Cir. 2020), 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).

appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then-current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], 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).

VI. Discussion

The district argues that the IHO erred by finding that two unappealed pendency orders issued in prior due process proceedings concerning different school years constituted an agreement by the district that Winston Prep was the proper pendency placement for purposes of the current proceeding. As has recently been explained in other State-level review proceedings, a pendency decision in one proceeding may not serve as the basis for pendency in a future proceeding because, in order to represent an agreement between the parties, the unappealed decision upon which pendency may be based must be a decision on the merits, including a determination of the appropriateness of the unilateral placement (see 34 CFR 300.518[d]; 8 NYCRR 200.5[m][2], Ventura de Paulino, 959 F.3d at 536; Schutz, 290 F.3d at 484-85 [explaining that "a final

administrative decision by a state review board, agreeing with a parent's decision about their child's placement, constitutes a 'placement' within the meaning of the pendent placement provision of the IDEA"]; Letter to Hampden, 49 IDELR 197), see also Application of a Student with a Disability, No. 20-165; Application of a Student with a Disability, No. 20-096).

In addition, the two prior pendency determinations were both interim decisions (see Dist. Exs. 5; 6). Accordingly, to the extent that they were not appealed, while parties have the option of interposing an interlocutory appeal of an interim decision on pendency, State regulation also permits an appeal of any interim decisions in an appeal from the final determination of an IHO (8 NYCRR 279.10[d]). As there was no final determination in either proceeding, the interim decisions issued therein cannot be considered as binding unappealed determinations (see Application of a Student with a Disability, Appeal No. 18-123).[2] As previously explained, commencing a proceeding and obtaining an interlocutory order to pay for a new placement selected by the parents—Winston Prep—on non-substantive grounds and then withdrawing the tuition reimbursement claim for Winston Prep on the merits before any administrative or judicial determination on the merits could be conducted will not suffice to bind the district or another tribunal in a subsequent proceeding (see Application of a Student with a Disability, No. 20-165).

Having determined that the two prior interim decisions did not establish pendency in this proceeding, the question turns to what constitutes the student's pendency placement for the duration of this proceeding. Here, the parties agree that the April 2017 IEP was the last agreed-upon IEP (Tr. p. 12). Accordingly, as argued by the district, the last agreed upon April 2017 IEP constitutes the student's placement for the purpose of pendency and the student's pendency program consists of a 12:1+1 special class in a State-approved, nonpublic school with related services of one 40-minute session of individual speech-language therapy per week and one 40-minute session per week of speech-language therapy in a group of five (Dist. Ex. 1 at pp. 19, 22).

The parents have failed to cross-appeal from the IHO's finding that Winston Prep was not substantially similar to the placement recommended by the April 2017 IEP and her declination to find that Winston Prep constituted the student's operative placement. Moreover, even if such claims had been properly raised by the parents in a cross-appeal, to the extent that the parents continue to assert that Winston Prep is the student's pendency placement under either a "substantial similarity" theory or an "operative placement" theory, such arguments are misplaced.

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

[2] If the facts had been different and the IHO in the prior proceeding had issued a "consent order" that reflected that the parties themselves had agreed that Winston Prep should serve as the student's pendency placement going forward, I might have found that the IHO's interim order was persuasive evidence that implicated a different rule, namely that "unless the State or local educational agency and the parents otherwise agree," the student shall stay in the then current educational placement (20 U.S.C. § 1415[j]). However, to the contrary, the interim decisions in this matter reflect that the district did not agree to modify the student's stay put placement (see Dist. Exs. 5; 6).

> new school without the parents' consent, [citation omitted] or where 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 April 2017 IEP (see Melendez v. New York City Dep't of Educ., 420 F. Supp. 3d 107, 122-23 [S.D.N.Y. 2019]).

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

> If a parent disagrees with a school district's decision on how to provide a child's educational program, the parent has at least three options under the IDEA: (1) The parent can argue that the school district's decision unilaterally modifies the student's pendency placement and the parent could invoke the stay-put provision to prevent the school district from doing so; (2) The parent can determine that the agreed-upon educational program would be better provided somewhere else and thus seek to persuade the school district to pay for the program's new services on a pendency basis; or (3) The parent can determine that the program would be better provided somewhere else, enroll the child in a new school, and then seek retroactive reimbursement from the school district after the IEP dispute is resolved
>
> (Ventura de Paulino, 959 F.3d 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.). Here, the parents decided to enroll the student at Winston Prep for the 2021-22 school year and to

seek reimbursement from the school district as relief for the district's alleged denial of FAPE to the student for that school year. At that juncture, it cannot be said that the district failed to implement pendency by not having a State-approved nonpublic school available to implement the student's pendency programming as of the time of filing the due process complaint notice. At the time, the parents had already sent a 10-day notice of unilateral placement on August 25, 2021 informing the district that absent an appropriate non-public school placement, the parents intended to reenroll the student at Winston Prep for the 2021-22 school year and to seek public funding for his placement there during the 2020-2021 school year (Parents Ex. E).

Additionally, even if I were to assume, for the sake of argument, that the parent was correct that the primary holding of De Paulino does not apply under the circumstances of this case and that a test of substantial similarity should apply instead, the IHO did not err in her factual findings that Winston Prep for the 2021-22 school year was not substantially similar to the April 2017 IEP, the program that the parent asserted was the basis for pendency (see IHO Decision at p. 3-4). The IHO found that the student's classes at Winston Prep consisted of twelve students and one teacher with the addition of a one-to-one service each day provided by a teacher who addressed speech-language goals with the student, but that the student did not receive speech-language therapy (id.).

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][a], [b][2]). While these factors, in many instances, are specific to district programs, they are instructive in this current circumstance.

Under this standard, as noted by the IHO, the 12:1 class ratio is an indication that the class the student attended at Winston Prep was not substantially similar to the 12:1+1 special class called for by the pendency programming, as well as the lack of speech-language services (see 8 NYCRR 200.1[g]; 200.4[d][2][a], [b][2]).

Accordingly, the student's pendency lies in the April 2017 IEP and consists of a 12:1+1 special class in a State-approved, nonpublic school with related services of one 40-minute session of individual speech-language therapy per week and one 40-minute session per week of speech-language therapy in a group of five and special transportation. In addition, if the parents wish to transfer the student back to public schooling to avail themselves of a publicly funded pendency placement they may do so, and in that instance the district should have a reasonable opportunity

to implement the pendency placement in this matter. The parties should move forward to address the merits of the parents' substantive allegations during a hearing, rather than as part of the pendency dispute.

VII. Conclusion

Based on the foregoing, the IHO's September 24, 2020 interim decision determining that Winston Prep was the student's pendency placement must be reversed. If the parent reenrolls the student in public schooling instead of private schooling during the pendency of these proceedings, the district shall promptly arrange for the student's placement in a State-approved nonpublic school in a 12:1+1 special class with related services consisting of speech-language therapy and special transportation.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's interim decision dated November 4, 2021 is modified by reversing that portion which found that Winston Prep was the student's stay put placement during the pendency of this proceeding.

Dated: **Albany, New York**
February 9, 2022

STEVEN KROLAK
STATE REVIEW OFFICER