The University of the State of New York

The State Education Department
State Review Officer
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No. 22-134

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

Appearances:
Gulkowitz Berger, LLP, attorneys for petitioner, by Shaya M. Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining the student's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2022-23 school year. The 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) or a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 4402, 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3; 200.4[d][2]; 200.16). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present

State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

In this case, the hearing record is sparse with regard to the student's educational history. Based on the evidence in the hearing record, the student received services through the Early Intervention Program, and in May 2020, began receiving services pursuant to the CPSE (see Dist. Ex. 1 at p. 1). The student attended preschool in a classroom consisting of one teacher, one

assistant teacher, and 18 students (id.).[1] On May 3, 2021, a CPSE convened and developed an IEP (May 2021 CPSE IEP); finding the student remained eligible for special education as a preschool student with a disability, the CPSE recommended that the student receive 10 hours of individual special education itinerant teacher (SEIT) services, speech-language therapy (two 30-minute sessions in a small group), and occupational therapy (OT) (one 60-minute session individually) for "July/August 2021 Only" (Parent Ex. B at p. 1).[2, 3] According to the May 2021 CPSE IEP, the student's services were authorized on May 3, 2021 (id. at p. 2).

Shortly thereafter, on May 10, 2021, a CSE convened for a meeting to prepare for the student's transition from receiving CPSE (preschool) services to receiving CSE (school-age) services and to develop an IEP for the 2021-22 school year (kindergarten) (May 2021 CSE IEP) (see Dist. Ex 1 at pp. 1, 4, 17-18). Finding the student eligible to receive special education as a student with autism, the May 2021 CSE recommended that the student receive integrated co-teaching (ICT) services for instruction in English language arts (ELA), mathematics, social studies, and sciences (id. at p. 13).[4] In addition, the May 2021 CSE recommended the following as related services: one 30-minute session per week of counseling services in a group of two; two 30-minute

[1] The hearing record reflects that the parent was the director of the preschool the student attended, and she was also his preschool teacher (see Dist. Ex. 1 at pp. 1-2).

[2] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf; "Approved Preschool Special Education Programs Providing [SEIT] Services," Office of Special Educ. [June 2011], available at http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; see Educ. Law § 4410[1][k]). Thus, to the extent that the parent or her attorney refer to the individual special education teacher services the student continued to receive as a school-aged student during the 2021-22 school year at the charter school or the as the services that the parent seeks as part of the student's pendency placement or thereafter as SEIT services, it is inconsistent with State regulation and policy for a school district to deliver a service designed exclusively for preschool students to a school-aged student. Additionally, as special education teacher support services—or SETSS—are not defined by State regulations, the special education program identified in State regulation that the student received at the charter school in kindergarten most closely resembles is direct consultant teacher services, which similar to SEIT services, is programming delivered by a certified special education teacher (see 8 NYCRR 200.1[m][1]; 200.6[d]).

[3] As defined, in relevant part, by State statute concerning preschool students, a "child shall be deemed a preschool child through the month of August of the school year in which the child first becomes eligible to attend school pursuant to section thirty-two hundred two of this chapter" (Educ. Law § 4410[1][i]; see Educ. Law § 3202[1] [indicating, in part, that a "person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without payment of tuition"]). In this case, the student turned five years old in February 2021 (see Parent Ex. A at p. 1). Consequently, since the student became eligible to attend public school when he turned five years old in February 2021, he remained a preschool student through August 2021.

[4] The student's eligibility for special education and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

sessions per week of individual OT; two 30-minute sessions per week of speech-language therapy in a group of two, and four 60-minute sessions per year of parent counseling and training (id. at pp. 13-14). Although the May 2021 CSE noted in the IEP that the student then-currently received a 12-month program, the CSE did not recommend a 12-month school year program for the 2021-22 school year (id. at pp. 4, 14). The May 2021 CSE also noted in the IEP the parent's "concern with the school she want[ed] to register for and if that school ha[d] the services [the student] need[ed]" (id. at pp. 2, 19). At that time, the CSE "suggested [that she] take a copy of the IEP to the school to ensure that [the student] g[ot] the services he need[ed] as stated in the IEP" (id.).

On December 1, 2021, a CSE convened and developed an IEP for the student that reflected a projected implementation date of December 15, 2021 and a projected annual review date of December 1, 2022 (December 2021 CSE IEP) (see Dist. Ex. 2 at pp. 1, 28). According to the December 2021 CSE IEP, the student was attending kindergarten at a charter school and was "mandated to receive SETSS (Special Education Teacher Support Services) for ELA [and] [m]ath"—and thereafter reported the student's progress in ELA and math with SETSS (id. at pp. 1, 5-6). In addition, the IEP reflected that the student was also mandated to receive related services consisting of counseling services, OT, speech-language therapy, and parent counseling and training (id. at p. 1).

Finding that the student remained eligible for special education as a student with autism, the December 2021 CSE recommended that the student receive SETSS in ELA (five periods per week) and in mathematics (five periods per week), and that, similar to the May 2021 IEP, he continue to receive related services consisting of one 30-minute session per week of counseling services in a group of two, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of speech-language therapy in a group of three, and three 30-minute sessions per year of parent counseling and training (compare Dist. Ex. 2 at pp. 23-24, with Dist. Ex. 1 at pp. 13-14). Similar to the May 2021 IEP, the December 2021 CSE did not recommend a 12-month school year program for the student (compare Dist. Ex. 2 at p. 24, with Dist. Ex. 1 at p. 14).

As reported in the December 2021 CSE IEP, the parent noted that the student had "transitioned well into school and [wa]s receiving the support that he need[ed]" (Dist. Ex. 2 at pp. 6-7). The IEP also reflected that the student's father "believe[d] that [the student] ha[d] exceeded their expectations on his transition with the school" (id. at p. 7). The IEP noted that the parents were "very happy with the level of support that [wa]s given to [the student] by staff" and that they "were in agreement with the IEP" (id. at pp. 7, 29).

A. Due Process Complaint Notice

By due process complaint notice dated July 5, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A at p. 1). The parent asserted that the student's May 2021 CPSE IEP constituted the last agreed-upon IEP, which included recommendations for a 12-month school year program, 10 hours per week of SEIT services, and related services (id.). The parent noted that she "dispute[d] any subsequent program the [district] developed that removed the extended school year/summer services and/or reduced the services on the IEP," as well as any actions the district may have taken to "deactivate or declassify" the student's eligibility for special education (id.). The parent indicated that the student required the "same special education teacher services and the

same related services each week as set forth on the IEP" (id.). In addition, the parent alleged that she could not locate a provider at the district "standard rates" for the 2022-23 school year, and therefore, she secured a provider "willing to provide the student with all the required services for the 2022-23 school year, however, at rates higher than standard" district rates (id.). As relief, the parent requested a pendency hearing and an order requiring the district to "continue the student's special education and related services under the student's automatic pendency entitlement"; an order awarding 10 hours per week of special education teacher services at an enhanced rate for the 12-month, 2022-23 school year; an order directing the district to fund the student's special education teacher services for 10 sessions per week at an enhanced rate for the entire 12-month, 2022-23 school year; and an order awarding the provision of "all related services on the IEP for the entire 12-month school year," and the issuance of related services authorizations (RSAs) if accepted by the parent's chosen providers or an order directing the district to fund the parent's chosen providers at each provider's rate (id. at p. 2).

B. Impartial Hearing Officer Decision

On August 6, 2022, the parties participated in a prehearing conference before the IHO, which the IHO reduced to a prehearing conference summary and order, dated August 11, 2022 (see generally Pre-Hr'g Order). The impartial hearing resumed on August 9, 2022, and concluded on August 19, 2022, after three total days of proceedings (see Aug. 9, 2022 Tr. pp. 1-74).[5] At the impartial hearing held on August 9, 2022, the parties and the IHO discussed how to proceed with the parent's case (see Aug. 9, 2022 Tr. pp. 4-9). Ultimately, the IHO and the parties agreed to proceed, first, with the pendency portion of the impartial hearing, and then proceed to the merits of the parent's case, after the start of the 2022-23 school year in September, in order to discover whether the charter school the student would attend had a "SETSS group available" for the student (see Aug. 9, 2022 Tr. pp. 9-13). With respect to pendency, the parent's attorney indicated that the "real issue" regarding pendency focused on whether it was a 12-month school year program or a 10-month school year program (Aug. 9, 2022 Tr. pp. 9, 21-22).

When the impartial hearing resumed on August 19, 2022, the parties entered evidence into the hearing record with respect to their positions concerning the student's pendency placement (see Aug. 19, 2022 Tr. pp. 7-8, 27). The district asserted that the student's December 2021 CSE IEP formed the basis for his pendency placement, as the last agreed-upon IEP, and the student was entitled to five periods per week of SETSS for ELA and five periods per week of SETSS for mathematics, in addition to related services of counseling (one 30-minute session per week in a small group), OT (two 30-minute sessions per week individually), speech-language therapy (two 30-minute sessions per week in a small group), and parent counseling and training (three 30-minute sessions per year), all over the course of a 10-month school year program (see Aug. 19, 2022 Tr. pp. 9-11; Dist. Ex. 2 at pp. 23-24). The district's attorney also noted that parent exhibit B—the May 2021 CPSE IEP also recommended the student for a 10-month school year program (see Aug. 19, 2022 Tr. pp. 11-12; Parent Ex. B at p. 16). As a final point, the district's attorney directed the IHO's attention to district exhibit 2—the May 2021 CSE IEP—which, according to the attorney,

[5] The transcripts from the impartial hearing in this matter were not consecutively paginated throughout the impartial hearing; for clarity, transcript citations in this decision will refer to the date of the impartial hearing and the page number, such as "Aug. 9, 2022 Tr. pp. 1-74."

reflected that the "parent was aware [of] and agreed to a 10-month [school year] program" (Aug. 19, 2022 Tr. pp. 12-18; Dist. Ex. 2 at pp. 14, 19).

When presenting the parent's position on pendency, the parent's attorney first pointed to parent exhibit B—the May 2021 CPSE IEP—indicating that the district attorney's reference to a 10-month school year program was a "clear typo[graphical]" error on that IEP (Aug. 9, 2022 Tr. pp. 18-19; Parent Ex. B at p. 16). In addition, the parent's attorney argued that the district could not sustain its burden by simply presenting IEPs with notations indicating that the parent agreed to the program, absent witnesses or other evidence, and absent any evidence about what services the student actually received (see Aug. 19, 2022 Tr. pp. 19-21). The parent's attorney also argued that there was no evidence that a 10-month school year program had been explained to the parent or her agreement with a 10-month school year program; instead, the opposite existed and the parent's affidavit in lieu of direct testimony, as well as any further testimony, would reflect her understanding of the student's program (see Aug. 19, 2022 Tr. pp. 21-22). Overall, the parent's attorney asserted that the student's May 2021 CPSE IEP formed the basis for the student's pendency placement (see Aug. 19, 2022 Tr. p. 22). In response to a question by the IHO, the parent's attorney expressed her belief that the student's May 2021 CPSE IEP had been the last implemented IEP and that the programs in subsequently developed IEPs had "never" been implemented (Aug. 19, 2022 Tr. p. 22).

Next, the impartial hearing moved on to the cross-examination of the parent (see Aug. 19, 2022 Tr. p. 27). Referencing paragraph seven in her affidavit, the parent admitted that she had agreed to the recommendations in the December 2021 CSE IEP, which indicated her agreement based on what she believed the district told her at the meeting and her understanding that the IEP provided the same or more services as the "May 2021 IEP" (Aug. 19, 2022 Tr. p. 28; Parent Ex. C ¶ 7). With respect to the May 2021 CPSE meeting, the parent testified that she could not recall whether "it was a meeting just for two months, or if it was a meeting for [10] months" (Aug. 19, 2022 Tr. p. 29). She only remembered that the student had "12-month services" (Aug. 19, 2022 Tr. p. 29). Referencing district exhibit 1—the May 2021 CSE IEP—the parent admitted that she attended this meeting (Aug. 19, 2022 Tr. pp. 31-33). The parent testified that the only concern she expressed at this CSE meeting was whether the charter school the student would be attending "had the service he needed" (Aug. 19, 2022 Tr. pp. 32-33). She also testified that she was "under the impression that [the May 2021 CSE IEP] was for a 12-month program because that's what he already had" (Aug. 19, 2022 Tr. p. 34).

Next, the parent testified that, with respect to the December 2021 CSE IEP, her affidavit, in paragraph six, was referring to the May 2021 CPSE IEP (i.e., "the one with the 12 month services)—and her understanding that the services in the December 2021 CSE IEP would "continue for the 12 months," as the CSE "never specified, they never said 10 months versus 12 months" (Aug. 19, 2022 Tr. pp. 34-35; Parent Ex. C ¶ 6). She testified that she "agreed to the IEP" based on her impression that "it would continue the 12 month services" (Aug. 19, 2022 Tr. p. 35). She testified that she understood that the student would continue to receive SEIT services, OT, speech-language therapy, counseling, and parent counseling and training—all on a 12-month basis (Aug. 19, 2022 Tr. pp. 35-36). The parent's direct testimony by affidavit before the IHO also referenced a due process dispute related to the 2021-22 school year and a January 2022 resolution agreement resolving that case (Parent Ex. C at ¶¶ 3-4).

Next, the parent testified that the December 2021 CSE IEP did not include a recommendation for ICT services, but rather, the May 2021 CSE IEP had included that service as a recommendation (see Aug. 19, 2022 Tr. pp. 36-37). She further testified that the student "never received" ICT services (Aug. 19, 2022 Tr. p. 37). When asked if she recalled the recommendation for SETSS in ELA and mathematics in the December 2021 CSE IEP, the parent agreed, and clarified that it was because the student "had a SEIT" and the CSE "asked what services he was receiving" (Aug. 19, 2022 Tr. p. 37). According to the parent, the December 2021 CSE removed the ICT services and "put the SEIT on it, because that's what he was receiving and it was working, so they wanted to continue what was working" (Aug. 19, 2022 Tr. p. 37). The parent agreed with the recommendation for SETSS in the December 2021 CSE IEP (see Aug. 19, 2022 Tr. pp. 38-39). The parent then testified that no one at the December 2021 CSE meeting told her that the student's program was a 12-month program or that it would be a 10-month program (see Aug. 19, 2022 Tr. p. 39). In addition, the parent testified that she had agreed with the recommendation for ICT services in the May 2021 CSE IEP (see Aug. 19, 2022 Tr. pp. 39-41). She did not recall discussing a 12-month school year program at the May 2021 CSE meeting (see Aug. 19, 2022 Tr. p. 41).

On her redirect examination, the parent admitted that she did not agree to "any program that would not provide SEIT services" (see Aug. 19, 2022 Tr. pp. 41). At that point in the impartial hearing, the parties made closing statements (see Aug. 19, 2022 Tr. pp. 42-46).

In an interim decision on pendency, dated August 23, 2022, the IHO determined that the student's December 2021 CSE IEP formed the basis for his placement for the pendency of this proceeding (see Interim IHO Decision at pp. 1, 7). The IHO based his finding on the fact that the recommendations in the December 2021 CSE IEP—namely, SETSS and other services—had already been provided and "continue[d] to be provided" at the time the parent filed her due process complaint notice in July 2022 (id. at pp. 5-6). Consequently, the IHO ordered the district to provide the student with the services recommended in the December 2021 CSE IEP for a 10-month school year program (id. at pp. 6-7).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by finding that the December 2021 CSE IEP formed the basis for the student's pendency placement. The parent contends that the IHO's finding was factually incorrect because, contrary to the IHO's decision, the May 2021 CPSE IEP was the only IEP implemented for the student and the hearing record did not contain any evidence that the December 2021 CSE IEP had been implemented. The parent further contends that "[o]nly a last agreed to or last implemented IEP can serve as a basis for pendency." As a result, the parent asserts that the May 2021 CPSE IEP—which included a recommendation for a 12-month school year program—formed the basis for pendency in this case. With regard to the services that the student was receiving prior to initiating the July 2022 due process complaint notice, the parent alleged in the request for review that "[t]he services under the May 2021 continued through the end of the 2021-2022 school year under a resolution agreement entered into after Parent had filed a request for an impartial hearing to have the services under the May IEP continue through the end of that year."

As an alternative basis to overturn the IHO's pendency decision, the parent argues that the IHO erred by ordering five periods of SETSS per week, and instead, should have ordered five periods of SETSS per week for ELA and five periods of SETSS per week for mathematics, as mandated in the December 2021 CSE IEP. For relief, the parent requests an order finding that the student's May 2021 CPSE IEP formed the basis for his pendency placement, which should include the following: a 12-month school year program, 10 hours per week of individual SEIT services, and related services of speech-language therapy (two 30-minute sessions per week) and OT (one 60-minute session per week), and funding for any providers the parent obtained.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's interim decision on pendency in its entirety. The district also submits additional documentary evidence for consideration on appeal.

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]).[6] 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

[6] 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).

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).

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. Preliminary Matters—Additional Evidence

After conducting a preliminary review of the administrative hearing record submitted by the district on appeal, I became concerned about the fact that there had been a proceeding challenging the student's programming and/or services for the 2021-22 school year (which could be related to the CSE's programming offered by the May 2021 CSE IEP in some manner), the 2021-22 proceeding had concluded with a resolution agreement that was entered into after the revised December 2021 CSE IEP had been developed, and that nearly six months elapsed thereafter while no due process proceeding was pending. Accordingly, I informed the parties that additional evidence may be relevant and necessary for a full review of the dispute surrounding the student's stay-put placement in order to render a determination in this proceeding.[7] Thus, in a letter to both parties dated November 14, 2022, the undersigned, pursuant to 8 NYCRR 279.10(b), directed the district to submit additional documentary evidence consisting of the parents' due process complaint notice regarding a resolution agreement dated January 2022 that resolved the prior due process proceeding, as well as a copy of the January 2022 resolution agreement. The parties were offered an opportunity to be heard no later than November 17, 2022 regarding whether either party supported or opposed the consideration of such evidence by the undersigned. Neither party opposed the consideration of the additional documentary evidence. As directed, the district submitted copies of the parent's August 2021 due process complaint notice (cited herein as SRO Ex. 1) and the January 2022 resolution agreement (cited herein as SRO Ex. 2).

In the August 2021 due process complaint notice, the parent alleged that the district failed to offer the student a FAPE for the 2021-22 school year, and the parent agreed with the "last program" created for the student in an IEP dated May 3, 2021 (SRO Ex. 1 at p. 1). The parent further noted that she "dispute[d] any other program without the same services" (id.). According to the due process complaint notice, the referenced IEP included recommendations for 10 hours per week of SEIT services and related services (id.). The parent asserted that the student required the same special education and related services in the May 2021 IEP for the "full 2021-2022 school year" (id.). The parent noted that she could not locate a provider at the district "standard rates" for the 2021-22 school year, and, therefore, she secured a provider "willing to provide the student with all mandated special education teacher services for the 2021-2022 school year, however, at a rate higher than standard" district rates (id.). As relief, the parent requested a pendency hearing and an order awarding 10 hours per week of special education teacher services at an enhanced rate for the entire 2021-22 school year; an order directing the district to fund the student's special education teacher services for 10 hours per week at an enhanced rate for the entire 2021-22 school year; and

[7] Both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; see, e.g., E.T. v. Bureau of Special Educ. Appeals, 2016 WL 1048863, at *12-*13 [D. Mass. Mar. 11, 2016] [considering additional evidence regarding a purported settlement agreement not accepted by the IHO]; Application of a Student with a Disability, Appeal No. 18-147; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

an order awarding all the related services on the IEP and the issuance of related services authorizations (RSAs) if required by the parent (id. at p. 2).

To be clear, the parent—albeit in vague and imprecise language in the August 2021 due process complaint notice—raised issues with respect to the May 2021 CSE IEP by asserting that she disputed any other program without the same services, because, at the time of the August 2021 due process complaint notice, the May 2021 CPSE and the May 2021 CSE IEPs were the only IEPs developed for the student. In addition, the parent sought relief that included a pendency placement (10 hours per week of SEIT services) (see SRO Ex. 1 at p. 2). However, when the parties executed the January 2022 resolution agreement—which the evidence shows occurred after the development of the December 2021 CSE IEP and which indicated that the agreement fully resolved the issues raised in the parent's August 2021 due process complaint notice with respect to the 2021-22 school year—the agreement reflected the provision of a bank of 400 hours of SETSS to be paid at an enhanced rate not to exceed $150.00 per hour to be implemented between September 1, 2021 and June 30, 2022 (see SRO Ex. 2 at pp. 1-2). Considering the allegations raised in the August 2021 due process complaint notice and the agreed on relief, consisting of 400 hours of SETSS to be delivered during the 10-month portion of the 2021-22 school year, the January 2022 resolution agreement fully resolved any and all issues the parent had with respect to the 2021-22 school year.

B. Pendency Placement

On appeal here, the parent contends that, contrary to the IHO's decision, the May 2021 CPSE IEP formed the basis for the student's pendency placement. The parent also contends that only a last agreed-upon or a last implemented IEP can form the basis for pendency.

As noted in the legal standard above, the pendency inquiry focuses on identifying the student's then-current educational placement, which, although not defined by statute, 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, 653 Fed. App'x at 57-58, 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 E. Lyme Bd. of Educ., 790 F.3d at 452 [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist., 96 F.3d at 83; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). This case specifically highlights the inherent difficulties in identifying a student's then-current educational placement where there is a dispute as to the program the student was receiving at the time the due process complaint notice was filed. In particular, in this instance, the parent identified the May 2021 CPSE IEP as the student's "last agreed-upon IEP" and asserts that it forms the basis for the student's pendency placement; however, such an argument would necessitate placing a preference on the student's "last agreed-upon IEP" over the placement described in the student's most recently implemented IEP. However, as noted above, a student's then-current educational placement has not been so defined by the courts as a one-size-fits-all "last agreed-upon IEP" test. Here, the IHO relied upon specific language for the test from Mackey and its progeny in the Second Circuit to determine that the student's December 2021 CSE IEP—as the placement described in the most

recently implemented IEP—formed the basis for the student's pendency placement (see Interim IHO Decision at p. 5).

As far as the implementation of IEPs, contrary to the parent's contentions, the evidence in the hearing record demonstrates that, at the time that the student's pendency rights manifested—meaning, when the parent filed the July 2022 due process complaint notice—the December 2021 CSE IEP had been the most recently implemented IEP, not the student's May 2021 CPSE IEP. As noted in the December 2021 CSE IEP, itself, and through the parent's own testimony, the evidence reflects that the student was receiving individual special education teacher services (whether referred to as SEIT services or SETSS) at the charter school even before the December 2021 CSE IEP had been developed with that specific recommendation for services (see Aug. 19, 2022 Tr. p. 37; Dist. Ex. 2 at pp. 1, 5-6, 8). In addition, the December 2021 CSE IEP itself reflects that the student had been receiving—as recommended in both the May 2021 CSE IEP and then continued within the December 2021 CSE IEP—related services of counseling and parent counseling and training (neither of which had been recommended in the May 2021 CPSE IEP), as well as speech-language therapy and OT in the durations and frequencies as recommended in both the May and December 2021 CSE IEPs, and not in the May 2021 CPSE IEP (compare Dist. Exs. 1 at pp. 13-14, and Dist. Ex. 2 at pp. 1, 6-8, with Parent Ex. B at p. 1). As further noted, the ICT services—which had only been recommended in the May 2021 CSE IEP—had never been implemented (compare Dist. Ex. 1 at p. 13, with Parent Ex. B at p. 1, and Dist. Ex. 2 at p. 23-24). Notably, the parent has not presented any evidence that the student was not receiving the services as recommended in the December 2021 CSE IEP.

Additionally, to the extent that the parent now argues the December 2021 CSE IEP should not be found to be the student's then-current educational placement as of the filing of the July 2022 due process complaint notice, the parent was on notice of the December 2021 CSE IEP that was revised during the course of the 2021-22 school year and that school year was fully resolved as a part of the January 2022 resolution agreement. In particular, the parties agreed to 10 hours per week of SETSS that the student was receiving, and further agreed that student would receive 400 hours of SETSS to be delivered during the 10-month portion of the 2021-22 school year (compare Dist. Ex. 2 at p. 23, with SRO Ex. 2 at p. 2). As discussed above, the parent had challenged the May 2021 CSE IEP in the prior proceeding, which only included a recommendation for the 10-month school year (see Dist. Ex. 1 at pp. 13-14, 19; SRO Ex. 1 at p. 1). Accordingly, if the parent had an objection to the exclusion of 12-month services from the student's programming, the parent should have pressed that argument in the prior proceeding, especially when a revised IEP had already been developed that specifically excluded 12-month services on a going forward basis. Furthermore, the parent's delay, while the December 2021 CSE IEP was being implemented in a manner consistent with the resolution agreement, does not lend support to her argument that the December 2021 CSE IEP should not be determined to be the student's then-current educational program when she filed her due process after the end of the 2021-22 school year.

Thus, based on the foregoing, the evidence in the hearing record supports the IHO's finding that the student's pendency placement arose from his December 2021 CSE IEP, as the IEP most recently implemented at the time the parent filed her due process complaint notice in July 2022. I note further that this IEP was in effect and supported by the terms of the resolution agreement reached between the parties and put into effect beginning in January 2022 (see A.S. v. Bd. of Educ.

Shenendehowa Cent. Sch. Dist., 2019 WL 719833, at *8 [N.D.N.Y. Feb. 20, 2019] [noting that an implemented IEP, as modified by a resolution agreement was the student's pendency placement]).

Finally, to the extent that the parent asserts that the IHO's decision ordered an incorrect amount of SETSS based on the December 2021 CSE IEP, the parent's reading of the IHO decision does not appear to be accurate. The IHO expressly ordered that, during the pendency of this proceeding, the district "provide the Student with the services contained in the December 1, 2021, IEP," further identifying one of the services as "SETSS (ELA and math) five times per week" (IHO Decision at p. 6). While the language used in the IHO's ordering clause was not ideal as it could be read as five sessions of SETSS per week split between ELA and math or as five sessions of SETSS per week in ELA and five sessions of SETSS per week in math, the IHO's directive that the district provide the student with the services contained in the December 2021 CSE IEP, which recommended five periods of SETSS per week in each of ELA and math, clarifies the IHO's order and it is apparent that the IHO directed the district to provide the student with a total of 10 periods per week of SETSS as part of the student's pendency program (see IHO Decision at p. 6; Dist. Ex. 2 at p. 23). Accordingly, there is no need to alter the IHO's order.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's finding that the student's December 2021 CSE IEP formed the basis for his pendency placement, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 21, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER