The University of the State of New York

The State Education Department
State Review Officer
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No. 23-023

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 Offices of Neal H. Rosenberg, attorneys for respondent, by Paul Wagenseller, 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 respondent's (the parent's) son's pendency placement during a due process proceeding challenging the appropriateness of the educational program recommended for the student for the 2022-23 school year. The IHO found that the student was not entitled to pendency at the unilateral placement, Manhattan Children's Center (MCC), but was entitled to pendency services of special education itinerant teacher (SEIT) and related services. 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

A full recitation of the facts and student's educational history is unnecessary due to the limited nature of the appeal.

A Committee on Preschool Special Education (CPSE) convened on June 10, 2019, found the student eligible for special education as a preschool student with a disability, and recommended an educational program for the student for the 2019-20 school year (IHO Ex. IV at pp. 1, 3, 21). In particular, the CPSE recommended a 12:1+3 special class with a 1:1 full-time aide in a State-approved preschool, as well as 12-month services (id. at pp. 17-18). For related services, the CPSE

recommended three 30-minute sessions of individual speech-language therapy per week, three 30-minute sessions of individual occupational therapy (OT) per week, and three 30-minute sessions of individual physical therapy (PT) per week (id. at p. 17). Additionally, the CPSE recommended 10 hours per week of "dual recommendation SEIT" for 30- or 60-minute sessions to be delivered in an "early childhood location as selected by the parent" (id.). The student was also recommended for special transportation services (id. at p. 20).

The hearing record does not include any IEPs developed for the student for the 2020-21 or 2021-22 school years. The student was the subject of a prior impartial hearing pertaining to the student's 2021-22 school year (2021-22 proceeding), which resulted in an IHO decision, dated May 20, 2022 (Parent Ex. B at pp. 1, 3, 12).[1] The IHO in that matter noted that the student had been attending a unilateral placement and receiving pendency services based on his preschool IEP of 10 hours per week of SEIT services, three 30-minute sessions of individual speech-language therapy per week, three 30-minute sessions of individual OT per week, and three 30-minute sessions of individual PT per week (id. at p. 10). According to the parent, the unilateral placement the student attended for the 2021-22 school year was Manhattan Star Academy (MSA) (see Parent Ex. A at p. 3).

In the final decision arising from the 2021-22 proceeding, the IHO found that the district did not meet its burden to prove that it offered the student a FAPE for the 2021-22 school year and that the unilateral placement, which included related services, plus 10 hours per week of SEIT services, was appropriate (Parent Ex. B at pp. 10-11). The IHO ordered the district to place the student at MSA for the entire 2021-22 school year, to reimburse the family for the out-of-pocket costs for the "child's placement (inclusive of costs, if any, of all items that would routinely be included on the student's IEP pursuant to law and regulation, such as related services, augmentative equipment, and special education transportation)," and for the district to pay directly any outstanding amount unpaid for the program and services (id. at p. 11). Moreover, the IHO ordered the district to continue to fund 10 hours per week of SEIT services (id.).

A CSE convened on May 17, 2022 to develop the student's educational program for the 2022-23 school year (IHO Ex. V at pp. 26, 28). The CSE found the student eligible for special education as a student with autism and recommended that the student attend a 6:1+1 special class in a specialized school with adapted physical education three times per week, a full-time daily 1:1 paraprofessional, and 12-month school year services (id. at pp. 1, 20-22, 26). For related services, the May 2022 CSE recommended four 30-minute sessions of individual OT per week, four 30-minute sessions of individual PT per week and four 30-minute sessions of individual speech-language therapy per week (id. at pp. 20-21). The CSE also recommended specialized transportation services (id. at p. 26).

In a letter to the district, dated June 17, 2022, the parent informed the district that she had yet to receive a school location letter identifying the particular public school to which the district assigned the student to attend for the 2022-23 school year (IHO Ex. I at p. 1). In addition, the parent stated her disagreements with the recommendations made by the May 2022 CSE (id. at pp. 1-3). The parent informed the district that she had unilaterally placed the student at MCC and

[1] The hearing record contains duplicative copies of the May 20, 2022 IHO decision (see Parent Ex. B; Dist. Ex. 1). For the purposes of this decision, only the parent exhibit will be cited.

stated her intent to seek reimbursement from the district for the costs of the student's tuition for the 2022-23 school year (id. at p. 3).

A. Due Process Complaint Notice

By due process complaint notice dated July 5, 2022, the parent asserted that the May 2022 IEP was "procedurally and substantively inappropriate, inadequate, and not reasonably calculated to offer the student an opportunity to make academic, social, or emotional progress," which resulted in a denial of a free appropriate public education (FAPE) (Parent Ex. A at p. 1). Generally, the parent argued that the CSE was not validly composed, failed to review the appropriate documents and evaluations, failed to adequately describe the student's needs, and failed to include sufficient annual goals that could be met in a district program (id. at pp. 1, 2-3).

The parents contended that any district specialized school would have been inappropriate for the student (Parent Ex. A at p. 2). The parent asserted a district specialized school would not allow the student to be adequately placed either academically or socially with appropriate peers or provide him with the necessary support (id.). Moreover, she argued that the student required more attention than a paraprofessional could provide because a "paraprofessional is not a teacher, and will not provide any additional or modified instruction to help [the student] learn" (id.). The parent contended that the student would not make progress and would regress in the program recommended by the CSE (id.).[2] The parent also asserted that the student required a "dual mandate program" consisting of continued SEIT and related services in addition to the school program (id.).

Further, the parent claimed that she never received a school location letter to inform her of the public school that the district assigned the student to attend (Parent Ex. A at p. 1).

The parent asserted that MCC was an appropriate unilateral placement for the student and requested tuition and related services reimbursement/funding for the costs of the student's program (Parent Ex. A at p. 3).

Finally, the parent requested pendency services (Parent Ex. A at pp. 3-4). Specifically, the parent requested the district fund the student's tuition at MCC, as well as 10 hours of 1:1 SEIT and related services consisting of three 30-minute sessions of individual speech-language therapy per week, three 30-minute sessions of individual OT per week, and three 30-minute sessions of individual PT per week (id.). The parent indicated that the May 20, 2022 IHO decision arising from the 2021-22 proceeding was the basis for pendency (id. at p. 3). The parent acknowledged that the May 2022 decision ordered tuition at a different school, MSA, but asserted that MCC was substantially similar to MSA (id. at pp. 3-4).

B. Impartial Hearing Officer Decision

After a prehearing conference on August 11, 2022, an impartial hearing date devoted to determining the student's stay-put placement during the proceedings was held on September 13,

[2] The parent noted, "in the past," CSEs had recommended referring the student's placement to the central based support team (CBST) to identify an appropriate State-approved nonpublic school, but that the May 2022 CSE deviated from this and, instead, recommended a less restrictive and less supportive program, which the parent asserted was "especially egregious" (Parent Ex. A at p. 2).

2022, followed by three status conferences (Tr. pp. 1-85).[3] The IHO issued an interim decision on pendency dated January 5, 2023 (IHO Decision at p. 9).

The IHO found that the parties mutually agreed that the student's pendency was based on the May 2022 unappealed IHO decision (IHO Decision at p. 6). However, the IHO determined that the student was not entitled to district funding for the tuition at MCC as part of the pendency placement (id.). The IHO held that the hearing record was "devoid" of any evidence that the previous school was "rendered futile or inaccessible" (id. at p. 7). The IHO also found that the two schools were not substantially similar and that the parent switched schools at her own financial risk (id.).

While finding that the student's pendency placement did not include district funding of the student's attendance at MCC, the IHO determined that the district was obligated to fund pendency of 10 hours of SEIT services per week plus related services of three 30-minute sessions of individual speech-language therapy per week, three 30-minute sessions of individual OT per week and three 30-minute sessions of individual PT per week (IHO Decision at pp. 7-9). Regarding these services, the IHO held that the district's objection to pendency focused solely on the school as the district did not assert the related or SEIT services were "either specially tailored or exclusively recommended for the Student only in conjunction with his educational placement" (id. at p. 8). The IHO found that, upon the filing of the due process complaint notice, the student "was automatically entitled, by operation of pendency based on the unappealed 2022 [finding of fact], to continue to receive District funding for Related Services and ten (10) periods of SEIT" (id.). Based on the foregoing, the IHO ordered the district to fund SEIT and related services during the pendency of the proceedings (id. at p. 9).

IV. Appeal for State-Level Review

The district appeals. Initially, the district asserts that even though the IHO correctly found that MCC was not pendency, she should have not used the substantially similar standard.

Additionally, the district argues that the IHO erred by granting pendency funding for SEIT and related services. The district acknowledges that the basis for pendency is the May 2022 IHO decision but argues that the pendency placement consisted of the whole program of MSA, SEIT, and related services. The district contends that, when the parent moved the student to MCC, the parent rejected the entire pendency program and was not entitled to funding for a portion of those services. The district argues that "pendency is not divisible nor is it an a la carte system in which funding can be provided for some portion of the pendency program." Moreover, the district asserts that the IHO erred in stating that it was not opposed to dividing pendency as it argued during the hearing that a parent cannot "cherry pick" which portion of the pendency program to implement. The district also contends that this was not a situation in which it was required to offer pendency services since the services were delivered by private providers, separate from the school program. The district argues that the parent is attempting to obtain pendency in a manner that was foreclosed by the Second Circuit in Ventura de Paulino. The district asserts that the parent "effectively usurped the authority of the" district to determine how to provide the last-agreed upon educational

[3] Subsequent to the pendency hearing, the parties submitted briefs outlining their positions on the issue of pendency (see IHO Exs. II; III).

program and that a parent should not be able to circumvent the school's authority. The district asserts that by enrolling the student at MCC with SEIT and related services, the parent did so at her own risk and must seek retroactive funding.

In an answer, the parent responds to the district's allegations with general admissions and denials. The parent concedes that the IHO improperly used the substantially similar standard and that the student's pendency placement cannot be MCC. However, the parent argues that the IHO did not err in finding that SEIT and related services should be funded through pendency as these services were not directly tied to the school placement itself. The parent contends that the pendency placement was a "dual mandate" for the unilateral placement plus SEIT and related services and that she is not attempting "to divide the pendency program at its core." The parent asserts that the inclusion of these services was "an important part of the Student's overall education program" and that pendency must allow for related services regardless of the change in the unilateral placement. Moreover, the parent argues that the district is required to offer pendency services in this case because these services were provided separately from the school. The parent opines that the fact these services were received outside of the unilateral placement "bolsters" the argument that they are a separate component of the overall program. The parent asserts that she is not seeking a fundamental change in the pendency program as she is only seeking the continuation of SEIT and related services.

V. Applicable Standards—Pendency

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents and 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. 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 [OSEP 2007]).

VI. Discussion

The parties agree that pendency is based on the May 2022 finding of fact (Tr. pp. 24, 26; see also IHO Exs. II at p. 2; III at p. 1). Under that decision pendency would be MSA with related services of three 30-minute sessions of individual speech-language therapy per week, three 30-minute sessions of individual OT per week, and three 30-minute sessions of individual PT per week and 10 hours per week of 1:1 services from a special education teacher (Parent Ex. B at p. 10). There is also no longer a dispute between the parties that the student's pendency placement did not include district funding of the student's tuition at MCC.[4] However, the parties disagree as to whether the student can continue to receive part of those pendency services after the parent moved the student from MSA to MCC.

[4] As neither party has appealed the IHO's determination that the parents could not invoke the pendency provision to require the district to fund the student's tuition at MCC, this finding has become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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). The Court further stated that "what the parent cannot do is determine that the child's pendency placement would be better provided somewhere else, enroll the child in a new school, and then invoke the stay-put provision to force the school district to pay for the new school's services on a pendency basis" (id. at 534). The Court found that when a parent does so they "effectively 'seek a "veto" over school choice rather than "input"—a power the IDEA clearly does not grant them'"(id.).

A pendency placement includes the general type of educational program including the classes, individualized attention, "and additional services a child will receive" (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]). Pendency is not a divisible, a-la-carte program that may change at any given time as such a practice would undermine the "status quo" concept so prevalent in stay-put jurisprudence (see Application of a Student with a Disability, Appeal No. 21-014, Application of the Dep't of Educ., Appeal No. 19-039; Application of a Student with a Disability, Appeal No. 18-139 cf. N.E. v. Seattle Sch. Dist., 2015 WL 12564236, at *4 [W.D. Wash. Oct. 27, 2015] [finding that a "multi-stage" IEP cannot be treated as divisible for purposes of pendency, explicitly rejecting the "divide-and-conquer" approach to determining the pendency placement] , aff'd sub nom., 842 F.3d 1093 [9th Cir. 2016]). Thus, when the parent moved the student to MCC, she rejected the entirety of the pendency placement.

Even if it was appropriate for a parent to invoke pendency for only portions of a student's stay-put placement, the hearing record is not sufficiently developed regarding whether those services are truly divisible from the school placement in this instance. According to the May 2022 IHO decision arising from the 2021-22 proceeding, the student received related services "inclusively as part of the unilateral placement's program" although the IHO did not further elaborate on the specifics of the delivery of the services (Parent Ex. B at p. 11). Consistent with this, a program description included in the hearing record indicates that MSA offered OT, PT, and speech-language therapy (Parent Ex. C). However, during the impartial hearing, the parent's attorney stated that the student received related services outside of school while attending the unilateral placement at MCC newly chosen by the parent (Tr. pp. 57-58). Yet, the evidence in the hearing record indicates that MCC offers adaptive physical education and related services of OT and speech-language therapy (Parent Ex. D at p. 3; see Tr. pp. 46, 52). It is unclear how the student received SEIT services when attending MSA;[5] however, according to the parent's attorney the student received SEIT services outside of school while attending MCC (Tr. p. 58).[6] To the extent

[5] The 2019 CPSE IEP that originally recommended the SEIT services apparently served as the student's pendency placement for the duration of the 2021-22 proceedings (see Parent Ex. B at p. 10). The June 2019 CPSE recommended the SEIT services be delivered in "an early childhood location" (IHO Ex. IV at p. 17). While there is no doubt that the student would not be attending "an early childhood location" during the 2021-22 school year given the student's age, it is unclear if the program for the 2021-22 school year, which now serves as the basis for the student's' pendency during the present matter, continued a similar formulation where the 1:1 special education teacher services were delivered in a school or center-based location rather than in the student's home.

[6] During the impartial hearing, the IHO requested that the parent provide "a list" of the providers delivering SEIT and related services outside of MCC, the number of hours, and the rates (Tr. p. 57); however, there is no such list included in the hearing record on appeal.

that at least the related services were delivered as part of the unilateral placement of the student at MSA, this further supports the conclusion that the parent's decision to move the student constituted a rejection of the pendency placement in its totality including services presumably provided directly by MSA.

Based on the foregoing, in this instance, the parent may not reject a portion of the student's pendency placement (i.e., by moving the student from MSA to MCC), but invoke pendency to obtain funding for a different portion of the student's unilateral placement (i.e., the SEIT and related services). Although, the parent claims that these facts are distinguishable from other cases where a parent seeks to request only part of the pendency placement because the SEIT services were being provided outside of school, the parent points to no record evidence that this was the manner in which the student's program was delivered pursuant to the May 2022 IHO decision or authority to support a finding that, in any event, this would obligate the district to pay for partial pendency services. As discussed above, the parent moved the student's educational placement and, therefore, rejected the pendency placement. When the parent unilaterally enrolled the student at MCC and unilaterally obtained additional SEIT and related services, the parent did so at her own financial risk and can only obtain retroactive reimbursement for the cost of the student's tuition and related services from the district after the IEP dispute is resolved if the services offered by the board of education were inadequate or inappropriate, the placement and services selected by the parent were appropriate, and equitable considerations support the parents' claim (Ventura de Paulino, 959 F.3d at 526; see Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70). As such, the IHO's finding that the district must fund SEIT and related services as pendency is reversed.

VII. Conclusion

As discussed above, there is no dispute that pendency lay in the May 2022 IHO decision arising from the 2021-22 proceeding and included the student's attendance at MSA and receipt of SEIT and related services or that the parent rejected the pendency placement of the student at MSA and unilaterally placed the student at MCC. However, by rejecting the student's pendency placement at MSA, the parent effectively rejected the entirety of the stay put placement and may not obtain district funding for SEIT and related services pursuant to pendency.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's interim decision dated January 5, 2023 is modified by reversing that portion which found that the district was required to fund the student's SEIT and related services pursuant to pendency.

Dated: **Albany, New York**
April 21, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER