

Special Education Fact Sheet

Pendency (The *Stay Put* Provision)

What is pendency?

Pendency is the student's right to stay in his or her current educational placement throughout the period in which an impartial hearing or mediation is being heard (the *due process proceedings*) and until all appeals are completed.

According to the federal law,

During the pendency of any proceedings conducted pursuant to [the Individuals with Disability Education Act ("IDEA")], unless the State or local educational agency and parents otherwise agree, the child shall remain in the then-current educational placement of the child... until all such proceedings have been completed.

Can pendency include services, or is it just the classroom placement?

Yes. Pendency can be the provision of services and/or continuation of a placement in a particular classroom. The logic behind pendency is that, to avoid multiple changes, the student's current level of services should remain unchanged until the final determination of an appropriate alternative is made by agreement of the parties or an order by an impartial hearing officer or judge.

What is the *then-current educational placement*?

Courts have held that a child's "then-current educational placement" is "the last agreed upon placement when the due process proceeding is commenced." In most cases, the current educational placement will be the placement listed on the last unchallenged Individualized Educational Program ("IEP"). It can also be a placement ordered by an impartial hearing officer, state review officer or judge. If your child attends a non-public school, the non-public school can be your child's pendency placement.

Can my child’s pendency placement be a private school?

Yes. If your child’s current placement is a private school, he or she should remain in the private school.

What happens if I lose my due process hearing?

All students are entitled to pendency during the course of the due process proceedings, regardless of the merits of the case. Pendency is a right even if your case is ultimately successful.

Which actions trigger pendency?

Pendency, also known as the stay put provision of the IDEA, is triggered when a parent formally requests an impartial hearing or mediation. This request should always be done in writing. Although the law suggests that pendency is an automatic right, some hearing officers in New York City hold a “pendency hearing” as part of the hearing or as a preliminary conference. The New York City Department of Education (“DOE”) has taken the position that it cannot apply pendency without an order from the impartial hearing officer. Mediators cannot issue pendency orders.

When you request an impartial hearing, include a request for an order of pendency during the pendency of the proceedings.

Federal law indicates that pendency applies during the length of any proceedings conducted pursuant to the IDEA. Some will argue that mediations are insufficient to trigger pendency. Since impartial hearings and mediations are proceedings authorized by the same section of the federal law, the law suggests that requesting either mediation or an impartial hearing triggers pendency. Additionally, DOE’s Standard Operating Procedures Manual states that mediation triggers pendency.¹

Once pendency is triggered, how long will my child stay in the pendency placement?

A child stays in his or her pendency placement throughout the mediation or impartial hearing and any appeals. Pendency ends when you reach an agreement in mediation or receive a final decision from an impartial hearing officer, state review officer, or judge and neither party appeals the decision within the time given for appeals to be filed.

Pendency also ends if you reach an agreement with the DOE before a decision is made in the due process proceeding. For instance, if you request an impartial hearing and the DOE then

¹ See <http://schools.nyc.gov/NR/ronlyres/5F3A5562-563C-4870-871F-BB9156EEE60B/0/03062009SOPM.pdf>, pgs. 11, 126.

makes a placement offer that you accept the “then-current placement” changes from the old placement to the new one.

Who is responsible for paying for tuition or services during pendency?

The school district must continue to pay for services and/or tuition throughout the due process proceedings. The district may only stop paying if you reach an agreement with them on a new placement and/or services, or if a hearing officer, state review officer or judge issues a final decision indicating that the current (pendency) placement or services are no longer appropriate.

Can the school ask me for reimbursement of pendency payments if I lose my due process hearing?

No. If you lose your case, your child is still entitled to funding for private school or services while the case is being decided. If you decide to appeal the case, pendency remains until all appeals are completed. This means that the district is required to pay regardless of whether you win or lose your case.

What happens if I decide on my own to remove my child from his or her pendency placement?

If your child’s pendency placement is a public school and you take him or her out of that placement and unilaterally place him or her in a private school without authorization from the DOE, you are financially responsible for the tuition. The federal law emphasizes that the parent is the one who bears the risk that a judge or hearing officer will determine that a private school placement was not necessary to provide a child with a disability a Free Appropriate Public Education and will accordingly not award tuition reimbursement. Please see our private school fact sheet for more information.

Is my child entitled to pendency from pre-kindergarten to kindergarten?

Yes. The pendency provisions apply even when a child is transitioning from preschool to a school-aged program. However, a child whose pendency placement is a preschool may not be able to stay in the preschool once he or she is school-aged. Pendency requires that the child receive the same *type* of services and program that was on the IEP (Individualized Educational Program), but the services can be implemented in another school that serves school-aged children. A child will be placed in a school-aged program that is as similar as possible to the preschool program in which the child was placed. If the preschool the child attended also has a state-approved school-aged program, the child may receive services in the school-aged program as his or her pendency placement.

What does pendency look like?

A student is in an Integrated Co-Teaching (CTT) in a public school² with the related services of speech therapy and counseling. At an IEP meeting:

- IEP team determines that she no longer needs speech therapy, but continues the child in the Integrated Co-Teaching class. The parent requests mediation for speech therapy to continue.
 - ◆ *Pendency service is speech therapy.*
- IEP team determines that she needs a more restrictive setting and creates an IEP that has the same services but recommends a 12:1 ratio classroom. The parent objects to the class as overly restrictive, and files for an impartial hearing to maintain the student in the CTT class with additional services.
 - ◆ *Pendency service is the CTT class.*
- IEP team determines that the child no longer has an education-related disability and declassifies the student as a child with a disability. The parent argues that the child still needs the support of special education and requests an impartial hearing to keep the IEP for another year.
 - ◆ *Pendency service is the CTT class and the related services.*

TIPS

- **Keep a notebook**
 - **Record all phone conversations and in-person conferences and meetings**
 - **Keep all the papers you received from the DOE**
 - **Keep letters and envelopes**
 - **If documents are not dated, note the date you received the document on the back of the document or envelope**
- **Send all communications by certified mail or hand deliver them, asking the receiver to initial and date your copy**
- **Always**
 - **Keep a copy of everything you give to the DOE**
 - **take the name of the DOE person you're dealing with**
 - **If you can, get title, office, and detailed contact information**
 - **write it all down for future use**

***DUE TO THE GENERAL NATURE OF THE INFORMATION PRESENTED, THIS FACT SHEET SHOULD NOT BE REGARDED AS LEGAL ADVICE. ***

7/11

² The same analysis will apply if the child was placed in a private school by the DOE (through the Central Based Support Team (CBST)) or through an impartial hearing decision or stipulation of settlement with the DOE.