The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 18-027

**Application of a STUDENT WITH A DISABILITY, by her parents, 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:**
The Patrick Donohue Law Firm, PLLC, attorneys for petitioners, by Patrick B. Donohue, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail Eckstein, 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. Petitioners (the parents) appeal, 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 their daughter'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 2017-18 school year. The IHO determined that the student's pendency placement was not at the International Academy of Hope (iHOPE). 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) 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**

While a full recitation of the student's educational history is unnecessary due to the disposition of this appeal on procedural grounds, the hearing record is sparse with respect to the facts leading up to the parents' due process complaint notice (see Tr. pp. 1-4; Parent Exs. A; D). The student has attended iHOPE since the 2015-16 school year (Parent Ex. A at p. 5).

On March 23, 2016, a CSE convened to develop the student's program for the 2016-17 school year (Parent Ex. D). The March 2016 CSE recommended a 12-month school year program

in a 6:1+1 special class at a State-approved nonpublic school with related services of occupational therapy (OT), physical therapy (PT), speech-language therapy, and vision education, as well as full-time paraprofessionals for health and transportation (id. at pp. 19-21).

The district paid for the student's tuition at iHOPE for the 2016-17 school year pursuant to a stipulation of settlement (Req. for Rev. at p. 4).

On May 1, 2017, a CSE convened to develop the student's program for the 2017-18 school year (Parent Ex. A at pp. 4-5). The student continued to attend iHOPE for the 2017-18 school year (id. at p. 2).

**A. Due Process Complaint Notice**

By due process complaint notice dated November 14, 2017, the parents requested an impartial hearing alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year due to a number of procedural and substantive challenges related to the development of the student's May 1, 2017 IEP and the district's capacity to implement the May 2017 IEP at two prospective public school sites (Parent Ex. A at pp.1-15). The parents sought to have the district directly fund the student's tuition, paraprofessional, related services and nursing expenses at iHOPE as well as other costs associated with her placement for the 2017-18 school year (id. at pp. 16).[1]

In their due process complaint notice, the parents further sought an interim decision on the issue of pendency (stay put) and asserted that the basis for the student's pendency "lies in the March 23, 2016[] IEP," which mandated a 6:1+1 special class placement in an approved non-public school 12-month program, including a 1:1 paraprofessional, as well as related services, assistive technology devices, and special transportation accommodations (Parent Ex. A at p. 2). The parents argued that, as the district did not offer a placement for the student for the 2016-17 school year, they "selected iHOPE because the school specifically serves students suffering from brain injuries" and the student "continues to attend iHOPE to receive these services" for the 2017-18 school year (id. at p. 2).

**B. Impartial Hearing Officer Decision**

The parties appeared at a hearing on December 22, 2017, and the IHO issued an interim decision dated December 22, 2017, which determined that iHOPE was not the student's pendency (Tr. 1-4; Interim IHO Decision).[2] The IHO noted that the parents "requested the student's pendency be the non-approved private school I-Hope," while "[t]he student's IEP recommended an approved non-public school" (Interim IHO Decision at p. 2). The IHO reasoned that

[1] The parents also described their request for funding as "prospective tuition reimbursement" (Parent Ex. A at p. 1).

[2] The transcript indicated that the argument from the parent was heard by the IHO while the district representative was on the telephone, but that the participants and IHO were unaware that arguments had been conducted "off the record" (Tr. p. 1). The IHO's interim decision indicates that the parents' November 2017 due process complaint notice and the student's March 2016 IEP had been entered into evidence, but that four other documents were "not accepted." (IHO Interim Decision at p. 3).

"[p]endency is based on the last agreed upon IEP or a Finding of Fact and Decision that was not reversed on appeal" and that the parents' request for pendency at iHOPE was denied because it was not based upon either (id.).

## IV. Appeal for State-Level Review

The parents appeal the IHO's December 22, 2017 interim decision, contending that iHOPE is the appropriate pendency placement for the 2017-18 school year. The parents assert that the "basis for pendency" is the "last agreed upon IEP" of March 23, 2016, which noted the student's eligibility for special education as a student having a traumatic brain injury and recommended placement in an approved nonpublic school. The parents assert that the district did not find a school to implement the March 2016 IEP during the 2016-17 school year and that currently there are no approved nonpublic school programs that offer a 6:1+1 special class for students classified as having a traumatic brain injury. The parents argue that the iHOPE program provides special education and related services which are "substantially similar" to the services called for by the March 2016 IEP. However, the parents contend that the IHO refused to admit or consider supporting documents to show that "iHOPE serves as an appropriate placement within the mandates of [the student's] last agreed upon IEP," specifically an IEP prepared by iHOPE for the 2017-18 school year, a program description of iHOPE, and related service provider affidavits. The parents further argue that the iHOPE placement: (1) satisfies the placement mandates on the student's "most recently implemented IEP (March 23, 2016)," (2) is the "operative placement actually functioning during this current request for pendency," and (3) was the "placement at the time of the previously implemented IEP (March 23, 2016)." Finally, the parents allege that the district "agreed to fund" the student's iHOPE tuition and related services for the 2016-17 school year under a May 23, 2017 stipulation of settlement entered into by the parties, and since the district failed to identify an appropriate placement in an approved non-public school for the 2017-18 school year, there is "no possible pendency other than the nonpublic school" the student attended during the 2016-17 school year.

In its answer, the district argues that the parents' appeal is untimely because it was served on March 8, 2018, more than 40 days after the date of the IHO's interim decision on December 22, 2017, and the parents do not provide any reason for the failure to timely seek review that would constitute "good cause." The district further contends that the May 2017 stipulation of settlement, attached to the parents' request for review, should not be considered on appeal because it is "irrelevant . . . as it is not even arguably the basis of pendency" because it states that the district's funding of iHOPE to resolve the parents' claims regarding the 2016-17 school year "does not comprise the [s]tudent's educational program for purposes of pendency." In addition, the district contends that the stipulation is confidential and the parents' use of it here violates the confidentiality provision of the agreement. Finally, the district alleges that as the parents are not using the stipulation for a proper purpose such as enforcement or implementation, the district can use it to show that the 2016-17 IEP and school year cannot be the basis for pendency. Alternatively, the district argues that if the appeal is not dismissed, it should be remanded back to the IHO for development of the hearing record, to include events prior to the 2016-17 school year, regarding petitioner's claim that iHOPE should be the student's pendency placement.

In a reply, the parents assert that the appeal was not untimely and that the the May 2017 stipulation was relevant and admissible in this case.[3]

## V. Applicable Standards

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 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 (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

[3] The parents personally served the reply on the district on March 23, 2018 (Aff. of Service). State regulations require that a reply "shall be served upon the opposing party within three days after service of the answer is complete" (8 NYCRR 279.6). Service by mail is complete upon deposit of the paper enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States Postal Service. Service by a private express delivery service (e.g. Federal Express or UPS) is complete upon delivery of the pleading or paper enclosed in a properly addressed wrapper to an employee or agent of such private express delivery service or by deposit of such pleading or paper, properly addressed and wrapped, in a depository of such private express delivery service (see Application of a Student with a Disability, Appeal No 08-155; see generally Fed.R.Civ.P. 5[b][2][C]; NY CPLR 2103[b][2], [f] ["service by mail shall be complete upon mailing"]). However, when the answer has been served by mail upon petitioner, or petitioners' counsel—as in this case—"three days shall be added to the period in which … a reply may be served and filed" (8 NYCRR 279.11). State regulations further provide that if the "last day for service of any paper … falls on a Saturday or Sunday, service may be made on the following Monday" (id.). In this case, the district served its answer by mail on March 15, 2018; thus, using the computations set forth above, the last day for the parents to timely serve a reply to the district's answer fell on Wednesday, March 21, 2018 (see id.). Therefore, the parents' service of the reply on March 23, 2018, was untimely, and the reply will not be considered.

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 (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

### A. Timeliness of the Appeal

As set forth below, the parents' appeal must be dismissed for non-compliance with the regulations governing practice before the Office of State Review. An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). State regulation provides an SRO with the authority to dismiss sua sponte an untimely request for review (8 NYCRR 279.13; see Application of the Board of Educ., Appeal No. 17-100 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service in a timely manner]; Application of the Dep't of Educ., Appeal No. 12-120 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; Application of the Bd. of Educ., Appeal No. 12-059 [dismissing a district's appeal for failure to initiate the appeal in a timely manner with

proper service]; Application of a Student with a Disability, Appeal No. 12-042 [dismissing a parent's appeal for failure to properly effectuate service in a timely manner]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing a parent's appeal for failure to timely effectuate personal service upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing a parents' appeal for failure to timely effectuate personal service upon the district]). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the 40-day timeline for good cause shown (8 NYCRR 279.13). The reasons for the failure must be set forth in the request for review (id.). "Good cause for late filing would be something like postal service error, or, in other words, an event that the filing party had no control over" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 441 [W.D.N.Y. 2012]).

In this proceeding, the parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The IHO's interim decision regarding pendency was dated December 22, 2017 (Interim IHO Decision at p. 2). The parents were therefore required to serve their request for review on the district no later than January 31, 2018, 40 days from the date of the interim IHO decision (8 NYCRR 279.4[a]). The parents' affidavit of service indicates that the parents served the district on March 8, 2018. Accordingly, the request for review was untimely. Furthermore, while an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the time specified for good cause shown, the reasons for the failure must be set forth in the request for review (see 8 NYCRR 279.13). In this case, the parents failed to assert good cause—or any cause whatsoever—in their request for review for the failure to timely initiate the appeal of the IHO's interim decision on pendency.

Accordingly, no good cause has been asserted or found to excuse the untimely service of the request for review on the district (8 NYCRR 279.13; see New York City Dep't of Educ. v. S.H., 2014 WL 572583, at *5-*7 [S.D.N.Y. Jan. 22, 2014] [upholding SRO's decision to reject petition as untimely for being served one day late]; B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 2013]; T.W., 891 F. Supp. 2d at 440-41; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *4-*5 [Sept. 25, 2009] [upholding dismissal of a petition served three days late]; Keramaty v. Arlington Cent. Sch. Dist., 05-cv-0006, at *39-*41 [S.D.N.Y. Jan. 25, 2006] [upholding dismissal of a petition served one day late], adopted [Feb. 28, 2006]). Consequently, the parents failed to comply with State regulations regarding service of a request for review, and the request for review is therefore dismissed (8 NYCRR 279.4[a]; 279.13).

I note that in addition to an appeal from an IHO's interim decision on pendency, pursuant to 8 NYCRR 279.10(d), a party may seek review of "any interim ruling, decision or refusal to decide an issue" in an appeal from the final decision of an IHO. However, State regulation does not provide a party with an indeterminate extension of the 40-day timeline to file an appeal from an interim decision on the issue of pendency through the time to file an appeal from the IHO's final decision. Accordingly, although the parents may appeal from the IHO's final decision and they may include an appeal of the IHO's interim decision on pendency with an appeal from the IHO's final decision, because the parents' appeal from the interim decision is untimely, they may not file an appeal until a final decision has been rendered by an IHO (see Application of a Student with a Disability, Appeal No. 13-041 & 14-008).

This matter must be dismissed on procedural grounds and it is unnecessary to reach the

merits of the parties' claims. However, because the IHO's interim decision did not identify the pendency placement for the student and it is possible that the parties may continue to disagree as to the student's placement for the purposes of pendency, I will briefly provide some guidance regarding the adequacy of the hearing record. Here, the IHO's decision was limited to rejecting the parents' position and a finding that iHOPE was not the student's pendency placement. I infer that the IHO did not find it necessary to determine what the student's pendency placement was if not iHOPE. However, should a party seek to appeal any additional interim ruling, decision, or lack of decision regarding the student's pendency placement after a final decision of an IHO, and/or it becomes necessary for an IHO to issue a ruling identifying the student's pendency placement, the IHO must ensure that there is an adequate record upon which to render findings and permit meaningful review, including an understanding of how the student was initially placed at iHOPE for the 2015-16 school year, and therefore the IHO has a responsibility to exercise his authority to "ask questions of counsel or witnesses for the purpose of clarification or completeness of the record" (8 NYCRR 200.5[j][3[vii]). In addition, with respect to the parties' dispute as to whether or not the stipulation of settlement for the 2016-17 school year should be considered, the stipulation may be relevant and necessary if the IHO is called upon to determine the student's pendency placement (see Evans, 921 F. Supp. 1184 [collecting cases and explaining the different effects upon pendency resulting from the presence or absence of certain provisions within stipulations of settlement]; K.D. v. Dep't of Educ., 665 F.3d 1110 [9th Cir. 2011]). Finally, with regard to four exhibits that were "not accepted" into the hearing record on December 22, 2017 according to the IHO's interim decision (IHO Interim Decision p. 3), the parents complain on appeal that three exhibits were rejected by the IHO; however, the hearing record itself does not indicate the basis for the IHO's exclusion of the documents, yet the IHO stated during the hearing that "I understand your position. You have an [indiscernible] to my ruling" on the issue of pendency (Tr. p. 3). If the IHO stated that the parent had an "exception" to the ruling, the IHO should ensure that the hearing record is clear regarding that evidence was proffered by the party, excluded by the IHO, and the basis for the exclusion. As noted previously, the transcription was an abbreviated version of what occurred at the hearing because of a mistaken belief that the hearing was being recorded when in fact it was not. The IHO and the parties should rectify any record inadequacies before reaching a final decision in this case, unless the parents agree on the record that they are abandoning their position that iHOPE should be the student's pendency placement.

## VII. Conclusion

Having found that the parents failed to timely initiate the appeal, the necessary inquiry is at an end.

**THE APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**April 11, 2018**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**