The University of the State of New York

The State Education Department
State Review Officer
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No. 18-138

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 Board of Education of the Clarkstown Central School District

Appearances:
Jaspan Schlesinger LLP, attorneys for the respondent, Carol A. Melnick, 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 from the decision of an impartial hearing officer (IHO) following remand, which denied her request for reimbursement for her son's tuition costs at the Hawk Meadow Montessori School (Hawk Meadow) for the 2012-13 through 2017-18 school years pursuant to pendency. 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

The student has been the subject of a prior administrative appeal (Application of the Bd. of Educ., Appeal No. 15-048). Accordingly, the parties' familiarity with the facts and procedural history through the prior administrative appeal is presumed and will not be repeated in detail.

Pertinent to the issue presented on remand, in a letter dated June 4, 2012, the parent informed the district that they reserved the right to place the student in a private school at district

expense, and rejected "the program … as inappropriate" (Dist. Ex. 9).[1] The parent further advised that she planned to request "busing" for the student for summer 2012 and the 2012-13 school year (id.). On June 19, 2012, the CSE convened to conduct an initial eligibility determination and found the student eligible for special education and related services as a student with a learning disability (Dist. Ex. 3). The June 2012 CSE developed an IEP with annual goals and recommended that the student be placed in a 15:1 special class for instruction in language arts, one 30-minute session per day of resource room services in a small group, one 30-minute session per week of indirect consultant teacher services, and one 30-minute session per week of counseling in a small group (id. at pp. 1, 6-8). The parent placed the student at Hawk Meadow for summer 2012 (see Parent Ex. HH) and the student has continued to attended Hawk Meadow for the 2012-13 through 2017-18 school years.

By letter dated September 4, 2012, the parent notified the district that the student would be attending Hawk Meadow starting September 5, 2012 and requested transportation to Hawk Meadow pursuant to Education Law §4402[4][d] (Dist. Ex. 16). On October 11, 2012, counsel for the parent sent a letter to counsel for the district confirming the district's position that if the parent accepted the IEP recommended for the student, the district would immediately provide the student with transportation to and from his home and Hawk Meadow (Dist. Ex. 23).[2]

By due process complaint notice dated September 27, 2013, the parent challenged the programs developed for the 2011-12, 2012-13, and 2013-14 school years (see Dist. Ex. 1 at pp. 4-5). With respect to the parent's substantive claims, following decisions by the IHO and the undersigned SRO, the District Court for the Southern District of New York determined that the student was denied a free appropriate public education (FAPE) for the 2011-12 and 2012-13 school years, the student was provided a FAPE for the 2013-14 school year, and Hawk Meadow was an appropriate placement for the student (A. v. Clarkstown Cent. Sch. Dist., 2018 WL 4964230 [S.D.N.Y. Oct. 15, 2018]).

With respect to pendency, the IHO issued an interim decision dated March 1, 2014 (IHO Ex. III at p. 5). The IHO noted that the parent was seeking a pendency finding regarding the student's transportation to Hawk Meadow based on the district's agreement to provide transportation during the 2012-13 school year (id. at p. 2). The IHO also noted that the district objected to continuing transportation because the agreement to provide transportation was not formalized in an IEP and the special education services the student received at Hawk Meadow were not similar to those recommended by the district (id.). The IHO found that there was no dispute that the district agreed to provide the student with transportation for the 2012-13 school

[1] The parties in this proceeding offered exhibits into evidence both prior to remand (Parent Exs. B-F; H-I; K-P; R-Z; AA-JJ; LL-QQ; SS-XX; Dist. Exs. 1-46; IHO Exs. I-VI) and after remand (IHO. Exs. I-III) using duplicative exhibit designations. As the bulk of the exhibits were entered prior to remand, the citations in this decision reference the exhibits entered prior to remand unless otherwise specified as post-remand.

[2] As of the October 2012 letter, the last recommended IEP was the September 2012 IEP. On September 28, 2012, the CSE convened to conduct a "Revision of IEP" meeting (Dist. Ex. 4 at p. 1). The district essentially continued the program and services as developed for the student in the June 2012 IEP; however, it updated the student's IEP to reflect a status of "parentally placed outside of district" (id. at p. 2).

year, and that "the agreement to provide transportation to and from Hawk Meadow[] was the last agreed upon placement between the parties for the student" (id. at p. 4). Further, the IHO found that the parent did not "need to establish that the student's current placement at Hawk Meadow[] was sufficiently similar to the program offered in the student's IEP for the 2013-14 [school year] as a prerequisite to continue transportation services under the … pendency provisions" (id.). The IHO ordered that "the student's pendency placement from September 27, 2013, the date of the parents' [due process complaint notice], until such time as the issues raised … are resolved by final order" was transportation to Hawk Meadow (id. at p. 5). Neither party raised pendency or appealed from the IHO's pendency determination to the Office of State Review; however, the undersigned noted that the September 2012 CSE meeting was convened solely to discuss the provision of transportation of the student to the unilateral placement, Hawk Meadow (see Application of Bd. of Educ., Appeal No. 15-048).

On August 28, 2018, the District Court for the Southern District of New York issued an interim decision on the issue of pendency (A. v Clarkstown, 2018 WL 4103494 [S.D.N.Y. Aug. 28, 2018]).[3] The District Court found that the student's last agreed upon placement was Hawk Meadow based on the IHO's March 1, 2014 interim decision on pendency (id. at *5). The Court determined that because "the District agreed to, and was already providing transportation to and from Hawk Meadow beginning in October 2012," the district agreed to placement at Hawk Meadow and Hawk Meadow became the "last agreed-upon location" (id.).[4]

For the sake of thoroughness, the District Court reviewed "the Second Circuit's then-current placement factors, which yield the same result" (Clarkstown, 2018 WL 4103494 at *6). The Court identified the factors as "'(1) the placement described in the child's most recently implemented IEP; (2) the operative placement actually functioning at the time when the stay put provision of the IDEA was invoked; or (3) the placement at the time of the previously implemented IEP.'" (id., quoting Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015], quoting Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir.2004]). The District Court held that the first and third factors were not applicable as the first factor required a court to look at the placement described in the student's most recently implemented IEP and the third to look at the placement at the time of the previously implemented IEP (id.). The Court found that no IEP was implemented prior to the parental placement of the student at Hawk Meadow in 2012 and there was "no evidence that since that time the District developed any IEPs for [the student] and whether or not such IEPs were ever put into effect" (id.). Based on this, the Court determined that the only applicable factor was the second one, which required a court to look at the operative placement actually functioning at the time when the stay put provision of the IDEA was invoked (id.). The Court held that at the time of the parent filed the due process complaint notice, she explicitly invoked the stay put provision of the IDEA and that the operative placement

[3] As noted above, the District Court rendered a decision on FAPE for the three school years in question in October 2018 (Clarkstown, 2018 WL 4964230).

[4] In regard to the parent's argument that pendency should be based on the finding in Application of the Bd. of Educ., Appeal No. 15-048, that Hawk Meadow was appropriate for one of the three school years in question, the District Court rejected this argument and found the parent could not "cherry pick" the favorable portion of the SRO decision to determine pendency (Clarkstown, 2018 WL 4103494 at *5).

actually functioning at that time was Hawk Meadow (id.). The Court then found the district was "responsible for ensuring that [the student] remain 'stay put' at Hawk Meadow, until a change in [the student's] then-current placement is properly made under the IDEA" (id.).

The District Court then addressed the parent's requested relief (Clarkstown, 2018 WL 4103494 at *6-*7). The Court held that there was no question that pursuant to pendency, the parent was entitled to prospective relief in the form of payment for the student's tuition at Hawk Meadow and continued transportation (id. at *6). The Court determined that "[w]hen a parent invokes pendency, if the then-current placement is private school, the district is responsible for providing tuition therefor" (id. at *7). The Court further stated that "[t]he law seems to indicate that [the parent] is entitled to reimbursement for tuition at Hawk Meadow from the date she filed her due process complaint " (id.). However, the Court noted that the IHO only directed the district to provide transportation and "d[id] not illuminate why tuition was not also directed, or whether it was requested in the first place" (id.). The Court remanded the issue of retroactive tuition reimbursement from September 2012 through the 2017-18 school year back to the IHO to "ascertain to what extent, if at all, [the parent] is entitled to tuition reimbursement" (id.).[5]

A. Impartial Hearing Officer Decision

After the matter was remanded to the IHO, a conference was held on October 17, 2018 (see Tr. pp. 1-14).[6] Subsequently, both parties submitted briefs to the IHO regarding the issue of pendency and tuition reimbursement (see Post-Remand IHO Exs. I; II).

The parent asserted that pendency is an automatic injunction that was triggered upon the filing of the parent's due process complaint notice on September 27, 2013 and that at the time of the filing the student's then-current placement was Hawk Meadow (Post-Remand IHO Ex. I at p. 2). The parent contended that her attorney only requested transportation as part of pendency; the parent assumed that her attorney "was unaware of the District's obligation under pendency law to have been funding and steadily maintaining both transportation and tuition since 2012" (id. at p. 3). The parent further alleged that the IHO's interim decision on pendency and the district's agreement to provide transportation constituted an agreement to place the student at Hawk Meadow (id. at p. 4). The parent requested reimbursement for the cost of transportation (in the amount of $5,962.00) and after-care at Hawk Meadow (in the amount of $4,278.00) from September 2013 through the IHO's March 1, 2014 interim decision on pendency, which awarded transportation going forward (id. at p. 7). The parent also requested tuition reimbursement for the 2012-13 through 2017-18 school years (in the amount of $95,500.00) (id. at pp. 7-8).[7]

[5] The District Court noted that the district had provided transportation services since the Interim Order (IHO Ex. III at pp. 14-15).

[6] The hearing record indicated that the parties had an off-the-record conversation on October 16, 2018 and that the hearing was being held for the parties to reiterate the discussion that took place off the record (Tr. pp. 4-6).

[7] The parent raised other issues unrelated to pendency, such as child-find; however, those allegations are not repeated (see Post-Remand IHO Ex. I at pp. 2-5).

The district asserted that although it did agree to provide the student with transportation to Hawk Meadow, it did not agree with the parent's unilateral decision to place the student at Hawk Meadow (Post-Remand IHO Ex. II at p. 1). The district argued that Hawk Meadow was not the student's then-current educational placement (id. at pp. 3-7). The district contended that when a parent unilaterally moves a student to a private school and then seeks tuition reimbursement, there is no agreement to placement in that private school and it is not pendency (id.at pp. 4). According to the district's brief, the student's pendency placement should have been general education with the support of response to intervention services or the placement recommended in the September 2012 IEP (id. at pp. 5-6). Finally, the district alleged that the parent could not raise a claim for tuition reimbursement pursuant to pendency now, because the claim was not raised in the parent's due process complaint notice or during the initial hearing (id. at p. 7).

By decision dated October 19, 2018, the IHO denied the parent's request for tuition reimbursement pursuant to pendency for the 2012-13 through 2017-18 school years (Oct. 19, 2018 IHO Decision).

The IHO held that the parent was not entitled to pendency tuition reimbursement for the 2012-13 school year because the parent did not file her due process complaint notice until September 27, 2013 (Oct. 19, 2018 IHO Decision at p. 4). The IHO determined that "any requested stay-put claims commenced with the filing of the due process complaint notice" and therefore, the request for reimbursement for the 2012-13 school year was outside the scope of the provisions in this proceeding and was denied (id.).

Further, although the IHO noted that the student's then-current placement was Hawk Meadow, the IHO found that the parent did not request tuition through stay-put in the due process complaint notice or at any time prior to the IHO's final decision (Oct. 19, 2018 IHO Decision at pp. 4-5). Therefore, the IHO held that the parent was not entitled to tuition reimbursement for the school years in question as the parent was now prohibited from raising a pendency claim relating to tuition reimbursement (id.). The IHO noted that the parent invoked pendency regarding transportation, not tuition reimbursement, and the parent had to provide the district with notice that she was requesting pendency so that the district "could either agree to implement that stay put provision or argue pendency was not appropriate" (id. at p. 5). The IHO noted that Hawk Meadow was the student's then-current placement and that the student remained in that placement as the parent was now requesting reimbursement for tuition (id.).

IV. Appeal for State-Level Review

The parent appeals. The parent asserts that the IHO erred by not granting tuition reimbursement from 2012-13 through the 2017-18 school years.

As an initial matter, the parent asserts several reasons in support of her argument that the IHO should not be given deference. The parent claims that the March 25, 2015 IHO decision was not timely as it took more than six months from the record close date for the IHO to render the decision. The parent contends that the IHO was not an expert in special education. The parent also refers back to the initial hearing and argues that the IHO gave the district's attorney "generous opportunities to testify, interrupt, and inappropriately argue when it was not her turn to cross-

examine" and marked up the hearing transcript from one of the district's witnesses and proceeded to credit that testimony. The parent asserts that "[g]iving deference to the case record or the IHO decisions does not afford parent a fair hearing."

The parent contends that the District Court correctly found that the last agreed upon placement was Hawk Meadow and therefore, the IHO should have granted tuition reimbursement. The parent argues that the IHO erred in finding that she was required to request pendency in her due process complaint notice. She asserts that a parent can request pendency at any time. The parent further alleges that the IHO erred in finding that her request for pendency was limited to transportation. The parent asserts that transportation "was the imminent issue at that time"; however, "it was never intended to be the sole request for pendency." Further, the parent notes that in her request for review filed in Application of the Bd. of Educ., Appeal No. 15-048, she requested "all payments made in the future" and "any additional relief the SRO determines just and appropriate."[8] She also contends that the IHO contradicted herself in finding the student remained in her then-current educational placement because in order to maintain the placement, the district was required to fund it. The parent requests reimbursement for the cost of the student's tuition at Hawk Meadow for the 2012-13 through 2017-18 school years pursuant to pendency.

Additionally, the parent argues that the IHO erred in failing to enforce her own pendency decision by not addressing the issue of reimbursement for transportation. The parent contends that she should be fully reimbursed for transportation costs pursuant to pendency from September 27, 2013 through April 2014.

In its answer, the district generally denies the parent's allegations raised in the request for review. The district contends that the parent failed to state a claim upon which relief may be granted. Further, the district asserts that the parent's request for review was not in compliance with 8 NYCRR 279 as the parent failed to verify the request for review, file proof of service, or file a notice of request for review. Moreover, the district argues that the IHO correctly denied the parent's request for tuition reimbursement and that Hawk Meadow is not the student's pendency placement. The district asserts that the IHO erred by stating the student's then-current placement was Hawk Meadow and that the IHO misinterpreted the term actually functioning. Finally, the district contends that since the IEP was never implemented and the parent unilaterally placed the student without the district's consent, Hawk Meadow cannot be the student's pendency placement.

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

[8] The parent filed an answer with cross-appeal and memorandum of law in Application of the Bd. of Educ., Appeal No. 15-048. Neither of those documents referenced pendency; however, in the conclusion of the memorandum of law the parent requested "Reimbursement/direct payment for tuition for [Hawk Meadow] from September 1, 2012 through June 30, 2014, inclusive of ESY, including reimbursement of monies paid to date and any payments to be made in the future." The parent also requested "Any additional relief as the SRO determines just and appropriate." The parent also asserts her "due process requests all future tuition payments"; however, the due process complaint notice does not contain this language.

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., 752 F.3d at 170-71; 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 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. Compliance with Part 279 Regulations

The district asserts that the parent's request for review failed to comply with 8 NYCRR 279. Specifically, the district contends that the parent failed to verify the request for review, file proof of service, or file a notice of request for review.

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Along with the request for review, a petitioner must file the notice of intention to seek review, notice of request for review, and proof of service with the Office of State Review within two days after service of the request for review is complete (8 NYCRR 279.4[e]). In addition, all pleadings shall be verified (8 NYCRR 279.7[b]).

Initially, it is noted that the parent did file a notice of request for review along with her request for review.[9] Further, the notice of request for review was stamped as received by the district. The parent also filed an affidavit of verification and an affidavit of personal service with the Office of State Review. Since all of these documents are now a part of the hearing record, and there is no indication that the district was not served with the notice of request for review, request for review, verification, or memorandum of law, the district's assertion does not raise any concerns that the parent did not comply with the requirements of Part 279 of the State regulations.

B. IHO Bias

The parent asserts that the IHO demonstrated bias in favor of the district and that the IHO's decision should not be granted deference.

[9] Although parent's pleading was captioned as a "Verified Petition," the practice regulations were modified by the Board of Regents nearly two years ago to align with federal terminology and the revised State regulations provide for a "Request for review" (8 NYCRR 279.4[1]; see 34 CFR 300.515[b]).

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Initially, it is noted that the parent's claim that the initial IHO decision was not rendered within applicable timelines is outside the scope of this review. The issue was not raised by either party previously in Application of the Bd. of Educ., Appeal No. 15-048, and the parent cannot now raise the issue for review. Further, the majority of the parent's allegations regarding IHO bias date back to the initial hearing and were not raised by either party in Application of the Bd. of Educ., Appeal No. 15-048.

With respect to the parent's allegations regarding the hearing after remand, a review of the hearing transcript from the October 17, 2018 hearing does not support a finding that the IHO displayed bias in favor of the district. The IHO allowed both parties to express any concerns and provide an initial argument (see Tr. pp. 1-13). The parties were also presented with an opportunity to present briefs on the issue before the IHO, which both parties provided (see IHO Exs. I; II). The hearing record does not support the parent's allegation that the IHO demonstrated bias.

C. Remand-Pendency

The parent requests tuition reimbursement under pendency for the 2012-13 through 2017-18 school years. She asserts that pendency was automatic as of the filing of the due process complaint notice in this matter and because the student's then-current placement was Hawk Meadow, the district should be required to fund the cost of the student's tuition at Hawk Meadow for all school years at issue.

Initially, the IHO correctly found that the parent is not entitled to tuition reimbursement under pendency for the 2012-13 school year as the due process complaint notice was not filed until September 27, 2013 (see Dist. Ex. 1). A student's right to pendency automatically attaches as of the filing of the due process complaint notice (see 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see also Child's Status During Proceedings, 71 Fed. Reg. 46,710 [2006]["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]).

Turning to the student's right to pendency beginning September 27, 2013 through the 2017-18 school year, neither party appealed from the IHO's March 1, 2014 interim decision on pendency.

In that decision, the IHO determined that "the agreement to provide transportation to and from Hawk Meadow was the last agreed upon placement between the parties for the student" and ordered that the "student's pendency placement from September 27, 2013" was "[t]ransportation to and from Hawk Meadow" (id.).

As discussed above, the District Court for the Southern District of New York found that the student's last agreed upon placement was Hawk Meadow based on the IHO's March 1, 2014 interim decision on pendency (Clarkstown, 2018 WL 4103494 at *5). The Court determined that the district was "responsible for ensuring that [the student] remain 'stay put' at Hawk Meadow, until a change in [the student's] then-current placement is properly made under the IDEA" and directed the district "to provide tuition for Hawk Meadow for the 2018-19 year onward" (id.). However, the Court remanded the issue of reimbursement for the cost of tuition for the 2012-13 through 2013-17 school years noting that the IHO only directed the district to provide transportation and "d[id] not illuminate why tuition was not also directed, or whether it was requested in the first place" (id.).

On remand, the IHO answered this question, and found that the parent did not request tuition through stay-put in the due process complaint notice or at any time prior to the IHO's final decision and only invoked pendency regarding transportation, not tuition reimbursement (see IHO Decision at pp. 4-5). This finding is supported by the hearing record as, in requesting pendency, the parent's attorney specifically requested transportation; she explained that, at the time of the September 2012 CSE meeting, the student was privately placed but the CSE agreed to provide transportation (Tr. pp. 619-21). This request was consistent with the parent's prior requests for transportation pursuant to Education Law Section 4402[4][d] (Dist. Exs. 16; 23; see Dist. Ex. 1 at p. 5).[10]

While the parent is correct in contending that a student's right to pendency automatically attaches as of the date of filing the due process complaint notice and a request for pendency is not required to be contained in a due process complaint notice or made "at any particular point in the proceedings" (Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 701 [S.D.N.Y. 2006]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 455 [2d Cir. 2015]; M.R. v. Ridley Sch. Dist., 744 F.3d 112, 123-25 [3d Cir. 2014]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199-200 [2d Cir. 2002]), the District Court explicitly requested clarification from the IHO regarding whether tuition was requested. Based upon the hearing record, the IHO determined that tuition was never requested by the parent pursuant to pendency and, therefore, was not granted, thereby providing the "illumination" that the District Court sought via its remand to the IHO.

Considering the District Court's directive on remand, and the IHO's findings, the IHO completed the task presented to her, explaining why she did not initially grant tuition reimbursement under pendency. The parent has not presented any reasoning as to how the IHO

[10] State law requires districts to provide "suitable transportation up to a distance of fifty miles to and from a nonpublic school which a child with a handicapping condition attends if such child has been so identified by the local committee on special education and such child attends such school for the purpose of receiving services or programs similar to special educational programs recommended for such child by the local committee on special education (Educ. Law §4402[4][d]).

Decision was not in compliance with the direction from the District Court on remand. Accordingly, there is no basis for overturning the IHO's findings.

VII. Conclusion

Based on the above, the IHO answered the question presented by the District Court on remand and there is no reason to depart from the IHO's determination that the parent did not request pendency during the hearing other than for transportation.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 23, 2019

CAROL H. HAUGE
STATE REVIEW OFFICER