The University of the State of New York

The State Education Department
State Review Officer
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No. 19-089

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:
Brain Injury Rights Group Ltd., attorneys for petitioners, by Peter G. Albert, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian J. Reimels, 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 from the decision of an impartial hearing officer (IHO 2) which dismissed without prejudice their request to be reimbursed for their daughter's tuition costs at the International Institute for the Brain (iBrain) for the 2018-19 school year.[1] Respondent (the district) cross-appeals from IHO 2's dismissal without prejudice and requests referral back to IHO 2 for further proceedings. The appeal must be sustained in part. The cross-appeal must be sustained.

[1] As described in some detail below, there are two IHO's who have issued decisions in this matter. IHO 1 issued an interim decision concerning the student's pendency dated September 15, 2018 that was the subject of a prior appeal to this office that led to the matter being remanded to IHO 1 (see Sept. 15, 2018 Interim IHO 1 Decision; see also Application of a Student with a Disability, Appeal No. 18-123). IHO 2 was appointed after IHO 1 recused herself from the matter and thereafter IHO 2 issued a decision dated September 5, 2019 that dismissed the matter without prejudice and that decision is the subject of the instant appeal (see Sept. 5, 2019 IHO 2 Decision at p. 1).

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

This appeal arises from an IHO's decision issued after remand (see Application of a Student with a Disability, Appeal No. 18-123). While the parties' familiarity with the facts and procedural history through the prior administrative appeal is presumed, the factual history will be repeated here in some detail in order to provide background for the issues presented in this appeal.

The hearing record reflects that the student attended the International Academy of Hope (iHope) for the 2017-18 school year (see Parent Ex. B at pp. 5-6, 14-15). The parents' unilateral placement of the student at iHope for the 2017-18 school year was the subject of a prior administrative hearing (Parent Ex. B). At the conclusion of the prior impartial hearing, an IHO issued a decision, dated May 3, 2018, finding that the district denied the student a FAPE for the 2017-18 school year, that iHope was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of an award of the costs of the student's tuition at iHope, including related services and paraprofessional costs (id. at pp. 12-17).

A district CSE convened on May 10, 2018 to develop an IEP for the student for the 2018-19 school year, and recommended an 8:1+1 special class in a district specialized school (Dist. Ex. 7 at pp. 9, 11-12). The student began attending iBrain on July 9, 2018 (Tr. pp. 37, 41).

A. Due Process Complaint Notice and Subsequent Events

In a due process complaint notice dated July 9, 2018, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (Parent Ex. A). The parents raised claims with respect to parental participation with the CSE process and CSE composition, evaluative information and IEP goals, and the recommended 8:1+1 special class placement, among other issues (id. at pp. 2-3).

The parents asserted that the unilateral placement of the student at iBrain during the 2018-19 school year was appropriate and further asserted the student's right to a pendency placement at iBrain pursuant to a prior unappealed decision of an IHO (Parent Ex. A at pp. 1-2; see Parent Ex. B). The parents requested that pendency be determined to consist of prospective payment for the full cost of the student's tuition at iBrain (including academics, therapies, and a 1:1 paraprofessional during the school day), as well as special transportation services (including a limited travel time of 60 minutes, a wheelchair-accessible vehicle, air conditioning, a flexible pick-up and drop-off schedule, and a paraprofessional) (Parent Ex. A at p. 2).

For final relief on the merits, the parents requested direct funding of the student's program at iBrain for the 2018-19 extended school year with transportation and other costs, and an order for the CSE to reconvene an annual review meeting for the student (Parent Ex. A at p. 3).

The parties proceeded to an impartial hearing, with IHO 1 presiding, on August 17, 2018 and concluded the pendency portion of the hearing on September 5, 2018, the second day of proceedings (Tr. pp. 1-67). By interim decision dated September 15, 2018, IHO 1 found that the student's pendency was at iHope on the basis of the unappealed May 2018 IHO decision (Sept. 15, 2018 Interim IHO 1 Decision at pp. 2-4). IHO 1 further found that parents who "unilaterally change their [student's] placement during the pendency of review proceedings, without the consent

of state or local school official[s], do so at their own financial risk" and after declining to address the question of whether iBrain provided a program that was substantially similar to iHope, denied the parents' request for tuition at iBrain during pendency (id. at p. 4). The parents' appeal of IHO 1's decision was sustained in a decision dated December 19, 2018, the SRO therein concluded that IHO 1 "erred in resting her denial of the parents' request for pendency at iBrain on her findings that parents were not free to unilaterally transfer the student from one school to another under pendency and that there was no evidence presented that the student could not remain at iHope" (see Application of a Student with a Disability, Appeal No. 18-123). The matter was then remanded to IHO 1 to render a determination as to whether the program at iBrain is substantially similar to that offered by the student's pendency placement established by the unappealed May 2018 IHO decision (id.).

The parties reconvened the impartial hearing before IHO 1, and on January 4, 2019, IHO 1 held a second pendency hearing in response to the SRO's decision to remand the matter (Tr. pp. 174-229).[2] In a decision dated January 8, 2019, IHO 1 determined that the program previously offered at iHope and the program offered at iBrain were substantially similar (Jan. 8, 2019 Interim IHO 1 Decision at p. 5). IHO 1, however, declined to order the district to fund the student's placement at iBrain as pendency, determining that the SRO's remand order had not directed her to do so (id. at pp. 5-6).

Shortly thereafter, on January 14, 2019, the parents' counsel wrote a letter to the Office of State Review, addressing the SRO who decided the appeal of IHO 1's initial pendency determination, and requested that the SRO "immediately issue an order directing [the district] to fund the implementation of the student's pendency placement at iB[rain]" (Answer & Cr. App. Ex. 1). The letter included a copy of the Jan. 8, 2019 Interim IHO 1 Decision and made reference to SRO Appeal No. 18-123 (id.).

On January 15, 2019, the SRO replied to the letter stating, in part, that State regulations make no provision for the initiation of an appeal proceeding by way of a letter request, and that with respect to the reference to SRO Appeal No. 18-123, the matter had been closed, a decision had been issued, and because there was no current proceeding pending before the Office of State Review, she lacked the authority to entertain parents' counsel's request (Answer & Cr. App. Ex. 2).

On January 18, 2019, the parents filed a complaint in the United States District Court, Southern District of New York seeking, among other things, a preliminary injunction ordering the district to fund the student's placement at iBrain as pendency (see Answer & Cr. App. Ex. 3).[3]

[2] Between the first and second pendency hearings, IHO 1 held two pre-hearing conferences on October 25, 2018 and December 12, 2018 (Tr. pp. 68-82, 83-173).

[3] The district attaches 14 documents to the answer and cross-appeal as additional evidence for consideration on appeal (see generally Answer & Cr. App. Exs. 1-14). The parent makes no specific objection to consideration of the offered additional evidence in the answer to the cross appeal, but for a blanket denial to those paragraphs in the district's answer referencing Exhibits 1-14. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see,

According to the district, and as can be gleaned from the hearing record, IHO 1 recused herself from the matter on January 23, 2019, and IHO 2 was appointed on January 29, 2019 (see Answer & Cr. App. ¶ 10; Tr. p. 268, 280, 314; Sept. 5, 2019 IHO 2 Decision at p. 1).

The parents amended their complaint pending in the Southern District of New York on February 28, 2019, adding a request for a temporary restraining order (Answer & Cr. App. Ex. 5). On April 5, 2019 parents' counsel obtained a judicial signature on a proposed order to show cause for a temporary restraining order and preliminary injunction, however the order to show cause was vacated on April 9, 2019 by the United States District Judge assigned to the matter (see Answer & Cr. App. Exs. 6-7).[4]

On April 10, 2019, the parents filed a notice of appeal of the April 9, 2019 order that vacated the order to show cause dated April 5, 2019 (Answer & Cr. App. Ex. 8). On June 21, 2019, the Court of Appeals for the Second Circuit granted the parents' motion to expedite their appeal commenced April 10, 2019 (Answer & Cr. App. Ex. 9). As of this writing, the parents' appeal has not been decided by the Second Circuit.

Also on June 21, 2019, IHO 2 conducted another prehearing conference wherein the parties discussed how to proceed in the matter at length (Tr. pp. 246-306). At the close of this hearing date, IHO 2 directed the parties to consult with the court in the Southern District of New York and obtain some instruction from the court as to what portions of the dispute between the parties, if any, should proceed before IHO 2 (Tr. pp. 281-305, 309). During this hearing date, both the parents and the district asserted that the question of whether the district offered the student a FAPE for the 2018-19 school year, aside from the dispute about the student's pendency, remained before IHO 2 and should proceed to impartial hearing with evidence and testimony (287-93, 299-302).

On June 26, 2019, the parents wrote to the court in the Southern District of New York asking the assigned judge to direct IHO 2 to issue a pendency order and to proceed to a hearing on the merits (Answer & Cr. App. Ex. 10). On June 27, 2019, the district wrote to the court in the Southern District of New York urging the assigned judge to deny the parents' request, on the ground that it would constitute an impermissible "advisory order," and to refrain from issuing an order on pendency because that issue was pending in the Second Circuit (Answer & Cr. App. Ex. 11 at pp. 1-2). The district took the position that it was the responsibility of IHO 2 and the parties

e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Upon review, it is—as the district also asserts—necessary to consider the offered additional evidence to fully explain the lengthy and unusual procedural history of this matter. Additionally, a number of the documents annexed to the district's Answer and Cross-Appeal are documents filed by the parties in the district court action (see Answer & Cr. App. Exs. 3-12). As the documents presented by the district are only a selection of the documents filed with the district court, it was also necessary to conduct a review of the publicly available documents filed in the district court action, which was done solely for the purpose of understanding the procedural history of this matter.

[4] Contemporaneous with these events, IHO 2 held a prehearing conference with the parties on April 8, 2019 (Tr. pp. 230-45).

to ensure that the due process impartial hearing on the merits advance in a timely manner (id. at p. 2).

The Southern District of New York issued an order dated July 23, 2019, in which the assigned judge denied the parents' request to direct IHO 2 to revisit the order on pendency (the decision being challenged before the federal court), and denied the parents' request for an order to direct IHO 2 regarding issues contained in the due process complaint notice, a proceeding that is not a subject of the litigation before the district court (Answer & Cr. App. Ex. 12 at pp. 1-3).

B. Impartial Hearing Officer Decision

On July 31, 2019 the parties convened again for a prehearing conference (Tr. pp. 307-34). The parties and IHO 2 discussed the July 23, 2019 order issued by the assigned judge in the Southern District of New York and IHO 2 determined that, given that the assigned judge had not advised IHO 2 as to how to proceed in light of the federal litigation concerning the student's pendency, IHO 2 would dismiss the matter without prejudice to re-file, rather than continuing to a hearing on the underlying FAPE claims (Tr. pp. 331-32).

In a decision dated September 5, 2019, IHO 2 dismissed the parents' due process complaint notice without prejudice to re-file the matter "[o]nce the case has been determined in the Southern District and if the [parents wish] to reinstate the request, they may do so by requesting a new hearing" (Sept. 5, 2019 IHO 2 Decision).[5]

IV. Appeal for State-Level Review

The parents appeal from the Sept. 5, 2019 IHO 2 Decision. The parents contend that IHO 2 erred in dismissing the case prematurely without issuing a pendency determination, and erred in dismissing the case without a finding on the merits of the parents' FAPE claim. The parents assert that IHO 2 erred in determining that the case could not proceed because portions of the matter were pending before the federal district and circuit courts.

The parents also assert that no additional record is required for an SRO to issue a pendency order after IHO 1 determined that iHope and iBrain offered substantially similar programs, and that the student's current pendency placement lies in the unappealed order of IHO 1 dated January 8, 2019. The parents also contend that the SRO should review and supplement the record and issue a determination on the merits of the parents' FAPE claim and their right to reimbursement for the unilateral placement of the student at iBrain.

For relief, the parents request reversal of the Sept. 5, 2019 IHO 2 Decision that dismissed the matter without prejudice, an order placing pendency at iBrain retroactive to the filing of the

[5] By letter dated September 12, 2019, the district requested that IHO 2 reconsider the dismissal because, although the district's representative at the July 31, 2019 hearing date agreed with IHO 2 that the matter should be dismissed without prejudice, the district now contended that the merits of the parents' FAPE claim should not have been dismissed (Answer & Cr. App. Ex. 13). On the same date, IHO 2 responded via email stating, among other things, that he would not reconsider the dismissal order, having no jurisdiction to do so (Answer & Cr. App. Ex. 14 at pp. 1-2).

due process complaint notice dated July 9, 2018, and for direct payment to iBrain for costs related to the student's tuition, related services and transportation for the 2018-19 school year.

In an answer and cross-appeal, the district responds to the parents' allegations with admissions and denials and asserts that the SRO should not decide the question of the student's proper pendency placement, as that issue is currently being litigated on an expedited basis in the federal court system, and an SRO pendency order would interfere with the process the parents have initiated, and "allow the [p]arents an additional bite at the pendency apple."[6] The district contends that IHO 1's January 8, 2019 Interim Decision after remand has been appealed in the federal court system and that therefore an SRO lacks jurisdiction to render a pendency order.

The district also asserts that IHO 2 should not have dismissed the merits of the parents' FAPE claim for the 2018-19 school year, and the district's cross-appeal seeks a remand of the matter to IHO 2 for a hearing on the merits, as only the student's pendency is before the federal courts. The district contends that the parent has not explained what evidence or testimony should "supplement" the record and allow an SRO to make a finding with respect to FAPE, and that because a student's pendency is evaluated independently from the appropriateness of a CSE's recommended program, the appropriate remedy is to remand the case to IHO 2 to allow the parties to present evidence and for the IHO to thereafter issue a decision.

In an answer to the cross-appeal, the parents re-assert their request for a pendency order and request that the district's cross-appeal be dismissed.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress.

[6] As noted above, the district submitted additional evidence with its answer and cross-appeal, which has been accepted for consideration.

After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[7]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. The Parent's Request for a Pendency Order

The parents request a pendency order for the student, while the district asserts that an SRO lacks jurisdiction to render such an order based on the procedural posture in this matter.

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., 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

[7] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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]).

As identified in Application of a Student with a Disability, Appeal No. 18-123, "pendency disputes should be resolved as quickly as possible" (see Murphy, 297 F.3d at 199-200 [noting "the time-sensitive nature of the IDEA's stay-put provision"]). Contrary to this principle, the dispute surrounding the student's stay-put placement in this matter has been at issue for well over a year. However, at this point in the proceeding, much of the delay is attributable to the path chosen by the parents. The parents had an opportunity to appeal the Jan. 8, 2019 Interim IHO 1 Decision—declining to direct that iBrain was the student's pendency placement—to the Office of State Review. Instead of filing an appeal, counsel for the parents sent a letter to the Office of State Review, dated January 14, 2019, requesting that an SRO "immediately issue an order directing [the district] to fund the implementation of the student's pendency placement at [iBrain]" (Answer & Cr. App. Ex. 1). In response, on January 15, 2019, an SRO advised counsel for the parents that an SRO does not retain jurisdiction after a decision is issued and that a letter request was not the proper way to appeal from an IHO decision (Answer & Cr. App. Ex. 2).[8] Counsel for the parents was well aware of the process for initiating an appeal to this office, having done so in this matter once before as well as in other matters (see, e.g., Application of a Student with a Disability, Appeal No. 18-147; Application of a Student with a Disability, Appeal No. 18-123; see also 8 NYCRR 279.6).

Following the exchange of letters with the Office of State Review, the parents filed a complaint, dated January 18, 2019, in district court seeking enforcement of the SRO decision in Application with a Student Disability, Appeal No. 18-123 and the Jan. 8, 2019 Interim IHO 1 Decision (see Answer & Cr. App. Ex. 3 at p. 7; 5 at p. 7).

The parents have not and do not in this appeal challenge the Jan. 8, 2019 Interim IHO 1 Decision. Rather the parents contend that, read in conjunction, the SRO decision in Application of a Student with a Disability, Appeal No. 18-123 and the Jan. 8, 2019 Interim IHO 1 Decision direct that the student's pendency placement is at iBrain. Based on this interpretation of the two decisions, the parents sought enforcement of the decisions in district court (see Answer with Cross-Appeal Ex. 3 at p. 7; 5 at p. 7).[9] To the extent that the parent is seeking enforcement of the two

[8] I note that at the time of the January 15, 2019 response from the Office of State Review to the Parents' January 14, 2019 letter, ample time remained for a timely request for review of the Jan. 8, 2019 Interim IHO 1 Decision on remand, because a request for review must be personally served on the district within 40 days after the date of the IHO's decision sought to be reviewed (see 8 NYCRR 279.4[a]).

[9] In a July 1, 2019 letter to the district court, counsel for the parents indicated that the parents decided not to appeal the Jan. 8, 2019 Interim IHO 1 Decision on remand because "[t]he process of appealing to the State Review Office could take up to two months AND the State Review Office has no enforcement capabilities." In that letter, and during the course of this proceeding, counsel for the parents further indicated that they were seeking a pendency decision from either the IHO, the district court, or the Second Circuit Court of Appeals, and that once the parents received a favorable ruling, all of the other proceedings seeking pendency would be withdrawn (see Tr. pp. 278-79, 315).

decisions and is not appealing from the Jan. 8, 2019 Interim IHO 1 Decision, neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a], [2]; see e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]).

Concurrently with the proceeding in district court, the parents requested that IHO 2 issue a pendency order directing placement of the student at iBrain for the pendency of this proceeding (see Tr. pp. 265-67, 315).[10]

To the extent that the parents are appealing from IHO 2's decision not to address pendency subsequent to the Jan. 8, 2019 Interim IHO 1 Decision, the parents presented that issue to the district court and the district court decided that it would not direct the IHO to revisit the decision regarding pendency while that decision was being challenged in Court (Answer & Cr. App. Ex. 12 at p. 3). Although the district court decision does not foreclose the ability of an IHO or an SRO to address the student's pendency during this proceeding, it does call into question whether it would be proper to make such a decision at this point in the proceeding. In particular, according to the district court decision, the subject matter of the case before the district court involves an appeal of the student's pendency (see Answer & Cr. App. Ex. 12 at p. 3). As the parent chose to appeal that issue directly to the district court, it would not be prudent to permit the same appeal to go forward in two different forums. The parents have, in effect, selected their preferred method of recourse, and accordingly, I will not address the student's pendency order in this matter.

B. The District's Request for a Remand to the IHO for a Hearing on the Merits

Although the parties disagreed as to whether the IHO should have addressed the parents' request for pendency, on appeal both parties agree that the hearing should have proceeded to address the merits of the parents' due process complaint notice. The parents request that an SRO make a substantive determination as to the parents' claims by reviewing the hearing record and supplementing it where necessary. The district cross-appeals asserting that the matter should be remanded and should proceed separately from the parents' request for pendency as 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"]).

Prior to the hearing date at which IHO 2 voiced a decision to dismiss the matter without prejudice, both the parents and the district were in agreement that the non-pendency portion of the dispute between the parties should proceed to impartial hearing with IHO 2 presiding. For example, counsel for both parties asserted this at the June 21, 2019 hearing date (see Tr. p. 299). At the July 31, 2019 hearing date, the parents' counsel asserted that only pendency was at issue in federal court and that there should be a hearing "reviewing, if not the pendency issue, at least have the administrative proceeding?" and that IHO 2 could "move forward, at least on the substantive issues of the matter, and let the federal district court and the Second Circuit deal with the pendency

[10] A district case follow-up sheet indicates that as of January 16, 2019, IHO 1 had recused herself at the request of the parents.

determination" (Tr. pp. 325-27). However, IHO 2 insisted that that "everything [wa]s before the federal court" (Tr. pp. 325-26). At least some of this confusion appears to have stemmed from a misunderstanding by the district representative at the June 21, 2019 hearing in relaying information from one of her colleagues that the parents raised FAPE as an issue before the Second Circuit (Tr. pp. 267-69), which she later withdrew by accepting a statement from counsel for the parents that only pendency was at issue in federal court (Tr. p. 284). Despite the arguments by counsel for the parents, IHO 2, as of the last hearing date, continued to believe that the federal court would address both the pendency disagreement and the substantive portion of the parents' complaint (Tr. pp. 325-26), and the district representative present agreed with IHO 2 that the whole of the matter should be dismissed without prejudice (Tr. p. 327-28). After IHO 2 dismissed the matter without prejudice, the district wrote to IHO 2 on September 12, 2019 asking for reconsideration of the dismissal because, although the district's representative at the July 31, 2019 hearing date agreed with the IHO that the matter should be dismissed, the district now contended that the merits of the parents' FAPE claim should not have been dismissed (Answer & Cr. App. Ex. 13).

On appeal, both parties agree that the IHO erred in dismissing the non-pendency portions of the dispute between the parties, and also agree that the impartial hearing could proceed with respect to those issues (see Req. for Rev. at pp. 2, 5; Answer & Cr. App. ¶¶ 23-24). In addition, to the extent that IHO 2 wanted a directive from the federal court that the non-pendency portion of the parents' complaint was not at issue in the federal court action, the order from the district court expressly stated that the parents' due process complaint notice was "not a subject of the litigation before this Court" (Answer & Cr. App. Ex. 12 at p. 3). While IHO 2 read this portion of the district court order during the last day of the hearing, it does not appear that he considered the impact of the Court's statement that this issue was not a part of the federal court litigation (Tr. p. 310-11). Accordingly, as there is agreement among the parties that the non-pendency portion of the proceeding should proceed, which is supported by the district court's determination that the parents' due process complaint notice is not a part of the federal litigation, the matter is remanded to IHO 2 to receive evidence and make determinations regarding all of the issues raised in the parents' July 9, 2018 due process complaint notice, other than issues related to the student's pendency placement, consistent with this decision and based upon sufficient evidence and a complete hearing record (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; see e.g., Cruz v. New York City Dep't of Educ., 2019 WL 147500, at *10-*11 [S.D.N.Y. Jan. 9. 2019]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013]).

VII. Conclusion

In summary, the matter must be remanded to IHO 2 for further administrative proceedings consistent with the body of this decision. In particular, the IHO should receive evidence and make determinations regarding all of the issues raised in the parents' July 9, 2018 due process complaint notice, other than issues related to the student's pendency placement which are the subject of the January 18, 2019 complaint initiated by the parents in federal district court.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that this matter is remanded to the same IHO who issued the September 5, 2019 decision for further development of the hearing record in accordance with this decision; and

IT IS FURTHER ORDERED that, in the event the IHO who issued the September 5, 2019 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

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

STEVEN KROLAK
STATE REVIEW OFFICER