The University of the State of New York

The State Education Department
State Review Officer
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No. 22-102

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 Westhampton Beach Union Free School District

Appearances:
Anne Leahey Law, LLC, attorney for respondent, by Anne Leahey, 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), which determined that respondent (the district) did not unilaterally change the student's pendency placement or violate the student's pendency rights as set forth in the parties' September 2019 pendency agreement. 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[a]). 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 in this case has been the subject of 13 prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 22-010; Application of a Student with a Disability, Appeal No. 21-249; Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019; Application of a Student with a Disability, Appeal No. 20-135; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with a Disability, Appeal No. 18-064; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Accordingly, the parties' familiarity with the facts and procedural history preceding this case, as well as the student's

educational history, will be presumed and will not be repeated herein unless relevant to the disposition of the limited issues raised on appeal.

Briefly, due to the nearly continuous nature of the administrative due process proceedings and State-level administrative appeals—and related federal district court proceedings—involving this student, he has been receiving his special education program under various pendency placements since approximately the 2015-16 school year (see generally Application of a Student with a Disability, Appeal No. 22-010; Application of a Student with a Disability, Appeal No. 21-249; Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019; Application of a Student with a Disability, Appeal No. 20-135; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with a Disability, Appeal No. 18-064; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

Within the last four to five years, the student's pendency placements arose from agreements between the parties. For example, as noted in Application of a Student with a Disability, Appeal No. 20-135, at the time of a CSE meeting held in May 2018, the student received the following special education and related services through his pendency placement:

> all related services ([occupational therapy (OT)], [physical therapy (PT)], and speech-language therapy) delivered to the student within the district public school during the morning; and 35 hours per week of "instructional hours (his academics) at home provided by two special education teachers who work[ed] with [the student] 1:1, one from 10:00 a.m. to 3:00 p.m., and the other from 3:00 p.m. to 5:00 p.m." The evidence in the hearing record reveal[ed] that the pendency services arose per agreement of the parties.[1]

(Application of a Student with a Disability, Appeal No. 20-135 [internal citations omitted; emphasis added]; see Application of a Student with a Disability, Appeal No. 19-021). Subsequently, and as documented in a letter dated September 20, 2019 (September 2019 pendency agreement), the parties formulated and agreed to the following, in relevant part, as the student's most recently implemented pendency placement that was in effect at the time of the instant administrative proceeding:

> 2. Upon arrival at the defendant District, [the student] shall receive his scheduled related services, which consist of [PT], adapt[ed] physical education, speech pathology and [OT]. . . .

[1] Likewise, in Application of a Student with a Disability, Appeal No. 18-064, it was noted that the student's pendency placement consisted of related services provided daily at an in-district school and home-based services: the student took the bus in the morning to school to receive PT, OT, adapted physical education, and speech-language therapy in school and then returned home to receive five hours of home-based 1:1 instruction from a special education teacher and two hours of home-based after-school 1:1 services from a second special education teacher.

> 3. Upon completion of his related services, [the student] will be bused to the local library for the provision of his special education instruction. . . . [The student] shall receive three hours of special education at the library as follows: instruction shall occur for a minimum of two hours pursuant to district policy . . . ; [the student] shall receive an additional hour of instruction to makeup previously missed instruction. . . .
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> 4. Following [the student's] school day, and at the scheduled time, [the student's] parents shall be responsible for transporting [the student] to the local library for the provision of his special instruction. During such time, the defendant District will be responsible for providing [the student's] special instruction and [the student's] parents will be responsible for providing a suitable person to provide adult supervision for [the student]. . . .
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> 8. Should the library become unavailable for home instruction or special instruction due to an emergency, a library closure, or other circumstances not caused by and beyond the control of the parties, the terms above shall remain operative except that the instruction set forth in paragraphs 3 and 4 above shall take place in [the student's] home, if available. . . .

(IHO Ex. II-B at pp. 1-3). The September 2019 pendency agreement indicated that the student would receive the services of an individual aide on the bus, while receiving his related services at the district's school, and during the "provision of his special education instruction" at the local library (id. at pp. 1-2).

The District Court for the Eastern District of New York took up the question of the student's stay-put placement, as set forth in the September 2019 pendency agreement, during the pendency of another proceeding (and the district's implementation of the same during the COVID-19 pandemic) and noted that, as of the start of the 2019-20 school year, the student's pendency placement was based on an agreement between the parties, pursuant to which, the student "would receive a hybrid of services in the District and then be bussed to the local library (not the library within the school) for special education instruction" (K. on behalf of A.K. v. Westhampton Beach Sch. Dist., 2020 WL 5424722 [E.D.N.Y. Sept. 10, 2020]). In that case, the parents sought a preliminary injunction compelling the district to alter the location of the delivery of some of the student's pendency services from the student's home (which had been shifted to that location due to the library's closure during the COVID-19 pandemic) to a space within the district's school during the 2020-21 school year (Westhampton Beach Sch. Dist., 2020 WL 5424722, at *1-*2).[2] The court denied the parents' motion for a preliminary injunction, finding in part that "in light of

[2] The evidence in the hearing record indicated that the local library closed on or around "March 16, 2020, when the [d]istrict closed all of its schools due to the pandemic" (IHO Ex. III at ¶ 27). From the date of the local library's closure through the conclusion of the 2019-20 school year in June 2020, the student "received remote related services and remote instruction at home," which consisted of "three hours of [s]pecial [e]ducation in the morning" and two hours of "[s]pecial [i]nstruction on Monday through Thursday" in the afternoon (id. at ¶ 28).

the tremendous difficulties placed on all students, parents, and school employees by COVID-19, [the district was] substantially complying with the [September 2019 pendency a]greement" (Westhampton Beach Sch. Dist., 2020 WL 5424722, at *1, *3). The court also found that the September 2019 pendency agreement specifically addressed this contingency, namely, if the library was no longer an option as a location within which to deliver the student's pendency placement (Westhampton Beach Sch. Dist., 2020 WL 5424722, at *3).

Based on the evidence in the hearing record, the library remained closed until May 2021 (see IHO Ex. III at ¶ 57). When the library reopened, the district, in a letter dated May 17, 2021 (May 2021 letter), informed the parent of the student's schedule for resuming the receipt of services through his pendency placement (see Dist. Ex. 1; see also IHO Ex. III at ¶ 57). According to the district's letter, the student would be "transported daily to the [local l]ibrary for his academic instruction and the special instruction hours indicated on his IEP" (Dist. Ex. 1). More specifically, the letter indicated that the student would be picked up at the library and transported home at noon on Mondays and Wednesdays and at 1:10 p.m. on Tuesdays, Thursdays, and Fridays (id.). The letter further indicated that "[t]wo hours daily w[ould] be devoted to academic instruction" and "[s]ix hours weekly (special instruction) w[ould] be dedicated to providing transition opportunities in the [local] community" (id.). The district's letter also noted that the local library had "not yet responded to the request to waive the library usage restrictions," and therefore, the special education teacher "may need to utilize community resources to address [the student's] IEP goals if a table [at the library wa]s not available" (id.).

At the impartial hearing, the district's director of pupil personnel services (director) explained that the "academic instruction" referenced in the May 2021 letter "refer[red] to the home instruction provided through the pendency agreement and the special instruction hours as indicated on the IEP [we]re the six hours that also [we]re part of the pendency agreement" (Tr. pp. 377-78; see IHO Ex. III at ¶ 1). During cross-examination, the director testified that, notwithstanding the parent's assertion that they had immediately raised objections to the "six hours being utilized for transition[] activities," she did not "recall anything specific"; however, she did acknowledge that it was possible because she received "almost daily e-mails from [the student's mother] about objections" (Tr. pp. 380-81; see IHO Ex. III at ¶ 58 [reflecting that the parent did not object to the information that special instruction hours would be used to provide the student with transition opportunities in the community or to the actual implementation of special instruction for transition activities]).

The director testified that the district implemented the student's pendency placement consistent with the schedule set forth in the district's letter, dated May 17, 2021, for the remainder of the 2020-21 school year, as well as during the 2021-22 school year (see IHO Ex. III at ¶¶ 57-62).[3] The director also testified that, upon resuming the student's pendency placement in spring 2021 when the local library reopened, the "academic instruction took place inside the library," but due to the "library's tutoring policy limit[ing] the use of the library for a student to three hours per

[3] The evidence in the hearing record reflects that, on June 9 and June 27, 2021, a CSE convened and developed the student's IEP for the 2021-22 school year (see IHO Exs. II-C at pp. 1-2; III at ¶ 61). According to the director, the parent rejected the special education recommendations and IEP for the 2021-22 school year and invoked the student's pendency placement "for extended year services and for the 2021-2022 [s]chool [y]ear" (IHO Ex. III at ¶ 61).

day, . . ., [s]pecial [i]nstruction took place both inside and outside of the library building pending the [l]ibrary's decision to grant an exemption to the [s]tudent from its rule limiting tutoring to three hours per day" (id. at ¶ 59).

As of September 2021, the student's pendency placement was delivered to the student as follows: he received his related services at the district's school, he received his academic instruction at the library (two hours), and he received his special instruction (two hours per day on Mondays, Tuesdays, and Wednesdays; consisting of academic instruction and transition activities) at the library (IHO Ex. III at ¶ 62). However, the "first hour of [s]pecial [i]nstruction was generally spent in the library and the second hour in the community where the [s]tudent engaged in transition activities" (id.).

According to the director, on or about November 16, 2021, the district wrote to the local library—at the parent's request—seeking an exemption from the "library policy restricting a student's use of the library facilities for tutoring to a maximum of three hours per day" (IHO Ex. III at ¶ 63; see IHO Ex. II-G). According to the director, in the letter, the district requested that the student receive permission to "use the library for an extra hour per day on Monday, Tuesday, and Wednesday during inclement weather" (IHO Ex. III at ¶ 63).

In a letter dated November 22, 2021, the president of the local library's board of trustees advised the parent that the board had considered his request to accommodate the student's instructional needs schedule by modifying the library's policies (see IHO Ex. II-G at pp. 1-2; see generally IHO Ex. II-F). The president indicated that the local library would "provide space for the three hours of daily instruction currently in place," however, the library could not "extend the hours of tutoring to [four] hours," and thus, the board denied the parent's request to "modify [the library's] policy to extend tutoring time beyond three hours daily" (IHO Ex. II-G at p. 2). According to the director, on November 23, 2021, the district requested that the library review and reconsider the parent's request to extend its tutoring hours for the student; however, on December 15, 2021, the library's board of trustees "determined that its position remained the same" (IHO Ex. III at ¶ 65).

According to the director, the parent had complained about the student "being forced to leave the public library for his second hour of [s]pecial [i]nstruction," and in response, the district emailed the parent "on December 30, 2021 explaining that the [September] 2019 [p]endency [a]greement provide[d] that in the event the [l]ibrary [wa]s unavailable for instruction, instruction [wa]s to take place in the home unless the home [wa]s unavailable"—and asked the parent to "advise as soon as possible whether the home was available and, if not, why not" (IHO Ex. III at ¶ 66). The director testified that, on the same day, the parent responded "without explanation that the home was not available" (id. at ¶ 67). The next day, the district followed up with the parent and asked for a "basis for his claim that his home was not available for [s]pecial [i]nstruction" (id. at ¶ 67). In addition, the district indicated that if the parent's home was "truly unavailable," the district "would, on a temporary basis commencing January 3, 2022, while the home remained unavailable, provide the [s]tudent with [s]pecial [i]nstruction . . . in the [d]istrict [m]iddle [s]chool [l]ibrary, or, if the library was unavailable, in a nearby classroom" (id. at ¶ 68). According to the director, the parent then indicated that his home was not available due to "Covid, 'amongst other things'" (id.).

The director testified that, subsequently, on January 3, 2022, the district informed the parent that the time scheduled for the student's special instruction had to be changed due to a conflict, but that the special instruction would still take place at the district middle school library (IHO Ex. III at ¶ 69). According to the director, the student's mother replied that the "hours for [s]pecial [i]nstruction had been established by the pendency placement and could not be changed and . . . she offered to bring the [s]tudent to the [d]istrict [h]igh [s]chool" for his special instruction (id. at ¶ 70). However, the district high school library was not available for the district to deliver the student's special instruction hours at those specific times because it was not staffed during those hours (id. at ¶ 70, n.3). Unable to reach an agreement to deliver the student's special instruction, the parent "refus[ed] to send the [s]tudent to [s]pecial [i]nstruction" and the district received the parent's due process complaint notice on January 13, 2022 (id. at ¶¶ 73-74; see IHO Ex. I).

A. Due Process Complaint Notice

By due process complaint notice dated January 13, 2022, the parent alleged that the district violated the IDEA "by violating the terms of 'pendency'" and "by unilaterally changing the content and focus of the [student's] 'after-school academic instruction'" (IHO Ex. I at p. 2).[4] The parent also alleged that the district violated the IDEA by "precluding the [student's] ability to receive appropriate 'after-school academic instruction,' which in turn ha[d] precluded his ability to receive an appropriately ambitious free and appropriate [public] education (FAPE)" (id.).[5] The parent's due process complaint notice focused on the parent's claim that the district's director "'unilaterally' changed the instructional content being taught during [the student's] after-school academic support period'" (id.). More specifically, the parent asserted that the director "directed the instruction to discontinue 'academic support instruction,' and instead begin focusing on the [student's] 'transition[] instruction'" (id.). The parent indicated that he "objected to this substantive 'switch', as the [student] was entitled to have his 'after school academic support' to be utilized for just that, as opposed to 'transition[] instruction'" (id.).

As relief, the parent requested an order directing the district to "abide by the terms of 'pendency', which demand[ed] the provision of the [student's] 'after-school academic instruction' between the hours of 2:00 p.m. [and] 4:00 p.m., focusing upon 'academic support', as opposed to transition [services]" (IHO Ex. I at p. 3). The parent also requested "an award of 'back-end' compensatory education" (id.).

B. Facts Post-Dating the Due Process Complaint Notice

In a letter dated January 14, 2022, the district informed the parent that the student's "[s]pecial [i]nstruction after school hours w[ould] resume as previously scheduled from 2:00 pm [through] 4:00 pm Monday through Wednesday at the [local] library" beginning on January 18, 2022 (IHO Ex. II-H; see IHO Ex. III at ¶ 75). The director testified that the student received the

[4] In the due process complaint notice, the parent indicated that the "'after school academic support instruction'" component of the student's pendency placement consisted of six hours per week of instruction, which had been delivered, at times, over the course of either three or four days per week (IHO Ex. I at pp. 1-2).

[5] During the impartial hearing, the parent withdrew claims in the due process complaint notice set forth in paragraphs identified as "6d" and "6e," related to the time-period during which the student received after school instruction, as the parties resolved that dispute (IHO Exs. I at pp. 2-3; X at pp. 1-2).

first hour of special instruction at the local library, and he received the second hour of special instruction "engaged in planned transition activities in the community" (IHO Ex. III at ¶ 76).

On or about January 31, 2022, the district responded to the parent's due process complaint notice and simultaneously moved to dismiss the parent's due process complaint notice (see generally IHO Exs. II; II-A-II-H [consisting of exhibits attached to the district's motion to dismiss]; III [consisting of the director's affidavit submitted in support of the district's motion to dismiss]).

In a decision dated March 22, 2022, the District Court for the Eastern District of New York took up the question of the student's stay-put placement—as set forth in the September 2019 pendency agreement—for a second time, wherein, the district moved to dismiss the parent's complaint, which alleged that the district violated the student's pendency rights during the 2020-21 school year and sought an order "'compelling the [District] to allocate the space necessary to educate [the student],' and compensatory education damages for a purported violation of the stay-put provisions of the IDEA" (K. on behalf of A.K v. Westhampton Beach Sch. Dist., 2022 WL 866816, at *1, *3 [E.D.N.Y. Mar. 22, 2022]).[6] The parent cross-moved for summary judgment on his remaining IDEA claims (id. at *1). The court found that the district had not breached the September 2019 pendency agreement, and contrary to the parent's contentions, the closure of the local library did not constitute a "pendency changing event" (id. at *4-*5). The court rejected the parent's argument seeking to change the location of the student's pendency placement due, in part, to the fact that the September 2019 pendency agreement already provided for this very contingency—the local library's closure—and therefore, there was no need to "'reform'" the pendency agreement already in place (id. at *5-*6). The court further found that, "even if there was no pendency placement agreement between the parties, 'it [wa]s the [District], not the Parents, that [wa]s authorized to decide how (and where) the Student's pendency services [we]re to be provided'" (id. at *6, citing Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 533-34 [2d Cir. 2020] [finding the stay-put provision "does not eliminate [] the school district's preexisting and independent authority to determine how to provide the most-recently-agreed-upon educational program . . . [i]t is up to the school district, not the parent, to decide how to provide that educational program [until the IEP dispute is resolved], so long as the decision is made in good faith"] [internal citations omitted]). As a result, the court noted that the parent's "desire to have [the student's] special education occur in the [d]istrict d[id] not obviate the [d]istrict's authority" (Westhampton Beach Sch. Dist., 2022 WL 866816, at *6). In light of the foregoing, the court granted the district's motion to dismiss the parent's IDEA claim with prejudice (Westhampton Beach Sch. Dist., 2022 WL 866816, at *6).

C. Impartial Hearing Officer Decision

On April 11, 2022, the parties proceeded to an impartial hearing, and the IHO conducted a prehearing conference (see Tr. pp. 1-34). At the prehearing conference, the IHO inquired about the most recent federal district court decision issued on March 22, 2022, and whether the court's decision had any preclusive or res judicata effect on the instant pendency proceeding (see Tr. pp.

[6] The parent initiated the action with the district court on September 2, 2020, by Order to Show Cause, which resulted in the court's above-described September 10, 2020 order issued in Westhampton Beach School District, 2020 WL 5424722 (see K. on behalf of A.K. v. Westhampton Beach Sch. Dist., 2022 WL 866816, at *2 [E.D.N.Y. Mar. 22, 2022]).

6-14). The parties agreed that the subject of the impartial hearing was separate and distinct from the court's decision, and thus, the IHO continued to have jurisdiction over the issues raised in the parent's due process complaint notice (id.).

Next, the IHO and the parties discussed the director's "21-page affidavit"—which the IHO described as "fairly extensive and fact specific"—that was submitted in support of the district's motion to dismiss, and the IHO's concern that resolving the district's motion on papers alone "might not give [the parent] a full and fair opportunity to have his allegations be heard at least in the context of [his] deciding this motion" (Tr. pp. 14-15; see generally IHO Ex. III). After hearing the parties' input, the IHO requested that the district produce the director for cross-examination on the affidavit by the parent (Tr. pp. 16-24).[7] In addition, the IHO noted that after completing the cross-examination, the parties could "explore" the submission of additional briefs (Tr. p. 24).[8]

The impartial hearing resumed on May 9, 2022 and was completed on May 19, 2022 (see Tr. pp. 35-398). In a decision dated July 27, 2022, the IHO granted the district's motion to dismiss the parent's due process complaint notice, which, according to the IHO, alleged that the "district violated the terms of a pendency agreement between the parties by unilaterally changing the content of the student's instruction during an after-school support period" (see IHO Decision at pp. 3, 20). The IHO noted that, as relief, the parent sought an order directing the district to comply with the pendency agreement by "providing the student with after-school instruction which focuse[d] on academic support, rather than transition activities" (id. at p. 3).

In reaching the decision to dismiss the parent's due process complaint notice, the IHO initially reviewed the procedural history of the case, as well as the factual background (IHO Decision at pp. 5-8). The IHO noted that the "instant dispute center[ed] on a related service the parties call[ed] 'special instruction,' which originated as an IEP component when the student was educated at [elementary school]" (id. at p. 7). The IHO found that, beginning in 2016, the district "agreed to provide the student with special instruction in the form of six (6) hours per week of academic support after school at the student's home" (id.). The IHO also found that, at a CSE meeting held in October 2018, the "CSE changed the location of special instruction from 'home' to 'home and community'" (id.). Based on the evidence in the hearing record, the IHO noted that, "[s]ince October 2018, the special instruction provided to the student ha[d] included academic instruction, as well as transition activities at home and in the community" (id.).

With respect to the September 2019 pendency agreement in effect during this administrative proceeding, the IHO indicated that it described the "location and logistics of the student's education" (IHO Decision at p. 7). In addition, the IHO found that, pursuant to the September 2019 pendency agreement, the student received related services at one of the district's schools; he was then transported to the local library for his "special education instruction"; and later in the day, the student returned to the local library for his "special instruction" (id. at pp. 7-

[7] The IHO viewed the director's affidavit pursuant to State regulations permitting the submission of an affidavit in lieu of direct testimony (see Tr. pp. 15-16, 26; 8 NYCRR 200.5[j][3][xii][f]).

[8] Both parties submitted additional briefs to the IHO at the conclusion of the impartial hearing (see IHO Decision at p. 6; see generally IHO Exs. VIII-IX [consisting, respectively, of the parent's opposition to the district's motion to dismiss and the district's reply in further support of its motion to dismiss]).

8). As clarified by the IHO, it was the parent's contention that the director "unilaterally changed the instructional content being taught during the student's after-school academic support period (i.e., special instruction)" (id. at p. 8, emphasis in original). More specifically, the IHO noted that the parent asserted that the director "'directed the instruction to discontinue 'academic support instruction,' and instead begin focusing on the [student's] 'transition instruction'" (id.).

After explaining the parties' respective positions on the issue presented, the IHO recited the applicable legal standards and turned to the district's motion to dismiss, initially determining that the hearing record contained "sufficient evidence to make necessary findings of fact and law relative" to the district's motion (see IHO Decision at pp. 8-14).[9] Next, the IHO addressed mootness, finding that although the parent's FAPE claims related to the 2021-22 school year were now moot, an exception to the mootness doctrine applied with respect to the "reasonable expectation that the parties will have a pendency dispute in one or more of th[e four currently pending] matters similar to the one raised in this case" (id. at pp. 14-16). Consequently, the IHO moved on to analyze the merits of the "parent's claims and the [d]istrict's motion" (id. at p. 16).

Next, the IHO addressed what constituted the student's pendency placement (see IHO Decision at pp. 16-17). Based on the evidence in the hearing record, the IHO determined that the student's "last agreed upon educational placement" was set forth in the September 2019 pendency agreement, contrary to the parent's assertion (id. at p. 17, citing IHO Exs. II-B; IX at p. 1; Westhampton Beach Sch. Dist., 2022 WL 866816 [finding that the September 2019 pendency agreement set forth the student's last agreed upon educational placement]).[10] As part of this

[9] As noted by the IHO, the district moved to dismiss the parent's due process complaint notice because it failed to "meet the sufficiency requirements" in State regulations, and the parent failed to "state a claim upon which relief c[ould] be granted" (IHO Decision at p. 8). The district also argued that the parent's complaint should be dismissed as moot, that the district had not violated the September 2019 pendency agreement, that the director "did not order the discontinuation of academic instruction during special instruction," and that the "content of the student's special instruction [ha]d not change[d] during the 2021/22 school year" (id. at p. 9). The district further argued that the student's special instruction had "included transition activities" since October 2018, and that consistent with the Second Circuit's holding in Ventura de Paulino, 959 F.3d at 534-36, the district retained the "authority to determine where and how to provide special instruction during pendency" (id.). Next, the IHO noted that, in opposition, the parent contended that "[a]ll pendency agreements must facilitate a FAPE," that the student's "last-agreed upon placement was an IEP brokered between the parents and [the student's elementary school district]" during the 2016-17 school year, that the same IEP also "represent[ed] the student's operative placement," and that "[a]t no time was transition instruction intended to be blended or integrated into the student's special instruction" (id.).

[10] It appears that the IHO may have mistakenly cited to the district's reply memorandum of law (IHO Ex. IX at p. 1) for the parent's assertion to the contrary, which was actually set forth in the parent's brief in opposition to the district's motion to dismiss (IHO Ex. VIII at p. 1)—namely, as asserted by the parent, that the student's last-agreed upon IEP was "brokered between [the parent] and the [student's elementary school district]" and moreover, that the parent "has never agreed upon a single IEP with the defendant district" (IHO Ex. VIII at p. 1). In the parent's brief, he argued that, during the 2016-17 school year (i.e., the academic school year during which the "alleged original 'pendency agreement' arose"), the student's "'operative placement' consisted of the provision of 'related services,' 'core academic instruction, and 'special instruction'—geared exclusively towards providing the [student] with 'after-school supplementary academic support instruction'" (id.). The parent further asserted that, at that time, the student's IEP did not include transition activities because the student had not yet turned 15 years old (id.). According to the parent's brief, the district did not add transition activities or postsecondary goals to the student's IEP until the 2017-18 school year at the parent's request (id. at pp. 1-2). Thereafter, as a result of a corrective action plan issued by the New York State Education Department's Office of Special Education Quality

conclusion, the IHO noted that the "content of the student's special instruction was changed at" the October 2018 CSE meeting (IHO Decision at p. 16). The IHO further noted that, at the October 2018 CSE meeting, the CSE modified the student's IEP by changing the location of his special instruction from the "'home' to 'home and community,' [and] incorporate[ing] then-newly developed postsecondary goals and a coordinated set of transition activities" (id.).[11] In addition, the IHO indicated that based on the director's testimony, the "change 'was not intended to replace any academic support,' . . . [and t]he parent agreed to this change and raised no objection at the CSE meetings held subsequent to 2018" (id. at pp. 16-17, citing Tr. pp. 174, 181, 347). Next, the IHO determined that the location of the student's "home instruction and special instruction" was changed from the student's home to the local library by virtue of the parties' September 2019 pendency agreement (IHO Decision at p. 17).

Finally, the IHO analyzed whether the district violated the student's September 2019 pendency agreement (see IHO Decision at pp. 17-19). The IHO noted that the parent's assertion that the district "unilaterally changed the content and focus of the student's special instruction" . . . "rested heavily" on the May 2021 letter, which informed the parent how and where the student's pendency placement would resume in May 2021 (id. at pp. 17-18). Based on the director's testimony, the IHO found that the director had "not directed the [letter to the] student's instructors and [the letter was] not intended to change the content of the student's special instruction" (id. at p. 18, citing Tr. p. 250). The IHO also pointed to the director's testimony explaining that her intention with the May 2021 letter was to "communicate to the parent the urgency in getting instruction in place for the student to work on transition goals following COVID-19-related shutdowns of the library in 2020" (IHO Decision at p. 18, citing Tr. p. 334).

Turning to the September 2019 pendency agreement itself, the IHO observed that it was "silent on the content of the student's special instruction" (IHO Decision at p. 18). Ultimately, the IHO concluded that "[g]iven that the parties' September 2019 [pendency a]greement d[id] not specify the content of the student's instruction, . . . the [d]istrict retain[ed] the discretion to determine the content of the student's special instruction" (id., citing Ventura de Paulino, 959 F.3d at 533-34). The IHO further noted that, generally, a CSE was not required to "specify a methodology on an IEP, and the precise teaching methodology to be used by a student's teacher [wa]s usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology [wa]s necessary" (IHO Decision at pp. 18-19 [citations omitted]). As a final point, the IHO "decline[d] the parent's invitation to use extrinsic evidence of oral or written agreements between the parties prior to the September 2019 [pendency a]greement to fashion an instructional content component to the parties' September 2019 [pendency a]greement" (id. at p. 19, citing IHO Ex. VIII [citations omitted]).

Assurance (SEQA), the district "agreed to modify the [student's] IEP by way of agreeing to include 'post-secondary goals' that would eventually be pursued via the implementation of a 'coordinated set of transitional activities' integrated within the [student's] community" (id. at p. 2).

[11] In a footnote, the IHO noted that the parent "dispute[d] this point, and [had] assert[ed] that the [October] 2018 CSE was not designated to integrate transitional instruction within the time-parameters of the student's special instruction" (IHO Decision at p. 16, n.8). However, the IHO specifically indicated that he did "not find this factual dispute w[ould] impede [his] ability to identify the student's pendency placement or determine if the student's pendency rights ha[d] been violated" (id.).

In light of the foregoing conclusions, the IHO granted the district's motion to dismiss the parent's due process complaint notice (see IHO Decision at p. 20).

IV. Appeal for State-Level Review

The parent appeals, arguing that he was deprived of due process because he was unable to present an "affirmative case" and was precluded from "introduc[ing] any affirmative evidence towards substantiating his claims, nor towards discrediting the alleged factual allegations of [the director]." Similarly, the parent argues that he was denied due process because he was "denied the ability to affirmatively dis-prove several of the allegations set forth" by the district, which the IHO "subsequently adopted." In addition, the parent asserts that he "continues to remain capable of introducing affirmative evidence conclusively establishing that [the student] was not receiving the 'transitional instruction' as falsely contended by the defendant school district's affiant." Next, the parent challenges whether the IHO erred by finding that the student's "'special instruction' included 'transitional instruction.'" Here, the parent contends that the IHO relied solely on the director's testimony to reach this "false conclusion," and the parent "continues to remain capable of introducing affirmative evidence conclusively establishing that 'transitional instruction' was not implemented into [the student] educational program following the referenced '2018 CSE meeting,' if afforded the opportunity to present a direct case."

Next, the parent challenges whether the IHO erred by finding that the director's May 2021 letter "did not effectively change the pendency instruction being afforded to the [student] during his two (2) hours of special instruction." The parent asserts that the IHO relied solely on the director's testimony to reach this conclusion, and if he had been afforded the opportunity to present or introduce "any affirmative evidence whatsoever, . . . he could have conclusively established not only how [the director's May 2021] letter was designed to effectuate a change in pendency, but also how it actually did just that."

Next, the parent challenges whether the IHO erred by determining that the September 2019 pendency agreement "did not incorporate two (2) hours of special instruction geared exclusively towards after-school academic support instruction." The parent argues that "had he been given the opportunity to introduce any direct evidence at all, . . . he could have conclusively established that the nature of the 'special instruction' leading into the [September] '2019 Pendency Agreement' was exclusively dedicated towards the provision of 'after-school supplementary academic support instruction,' as opposed to 'transitional instruction.'"

As a final issue, the parent challenges whether the IHO erred by finding that the district "was only responsible for implementing 'transitional instruction,' if it could do so at the expense of sacrificing and/or commandeering the provision of the [student's] 'after-school supplementary academic support instruction.'" The parent contends that, since the student's "'operative placement'" for the purpose of pendency consisted of "'after-school academic support instruction,'" the district's decision to implement transition instruction changed the student's "'operative pendency placement'" in violation of his pendency (stay-put) rights under the IDEA.

As relief, the parent seeks to overturn the IHO's decision and to remand the matter to afford him with the opportunity to "proffer an affirmative 'case in chief,' including but not limited to, the introduction of documentary evidence, affidavits, and direct testimony, in order to support his complaints." Alternatively, the parent seeks to overturn the IHO's decision and for an SRO to

issue a decision finding that the district violated the student's pendency rights "worthy of the issuance of a judgment for compensatory education."

In an answer, the district responds to the parent's allegations, and generally argues to uphold the IHO's decision in its entirety. Alternatively, the district argues that the parent's request for review should be dismissed for the failure to comply with practice regulations.

V. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

The district contends that the request for review must be dismissed for failing to comply with State regulations governing the initiation of the review and the form requirements for pleadings (see 8 NYCRR 279.4[a]; 279.8[c][1]-[3]).

State regulations provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]).

Section 279.8 of the State regulations requires that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.
>
> (4) any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer.

(8 NYCRR 279.8[c][1]-[4]).

Generally, 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]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist.,

2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; 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]).

In this instance, the district argues that although the request for review identifies "six findings for review, it fails to identify the specific findings, specify the reasons for challenging said findings, and explain the grounds for the review or modification of such findings"; therefore, the request for review fails to comply with sections 279.4(a) and 279.8(c)(2) of State regulations (Answer ¶ 9). More specifically, the district contends that in issues identified by numbers one through five in the request for review, the parent asserts that "various findings" in the IHO's decision were erroneous because he was "deprived of the opportunity to submit an affirmative case," but the parent otherwise fails to offer any "other basis in support of the contention of erroneous factual findings" (id. ¶ 10). The district further argues that the parent fails to point to any "rulings and findings which deprived" him of the "opportunity to submit an affirmative case and no citations to findings and exceptions in the record are provided" (id.). With regard to the issue identified by number six in the request for review, the district asserts that the parent "fails to identify any finding in the [d]ecision which supports that [the] IHO [] reached this alleged finding" (id. ¶ 11). In addition, the district contends that the parent's request for review fails to set forth the relief sought, and also fails to include citations to the hearing record (id. ¶¶ 10, 14, 16). As a result, the district contends that the request for review fails to comply with practice regulations and must be dismissed.

Generally speaking, similar compliance issues have plagued the parent's pleadings in State-level administrative appeals to the extent that at least two of the parent's appeals were dismissed for the failure to comply with practice regulations (see Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019).[12] Consistent with the district's arguments, a majority of the issues and arguments interposed by the parent in the request for review assert the same due process violation based on the parent's alleged inability to present an affirmative or direct case, but do not otherwise grapple with the IHO's findings aside from contending that the parent remains capable of presenting evidence to the contrary. Additionally, other than pointing to one page in the IHO's decision, page 18, the request for review fails to include any other citations to the hearing record. With respect to the district's contention that the request for review does not set forth the relief sought, this assertion is generally true, except that the parent does seek to overturn the IHO's decision and also includes a request for an unspecified amount of compensatory educational services.

In light of the foregoing, the district's contentions relative to the form and content of the parent's request for review, when viewed in light of the parent's history of noncompliance, weigh

[12] The parent's appeals in two additional matters were also dismissed for failing to timely initiate the appeal and/or for improperly serving the appeal on the district (see Application of a Student with a Disability, Appeal No. 22-010; Application of a Student with a Disability, Appeal No. 21-249).

heavily in favor of dismissing the parent's appeal especially where, as here, the parent has been cautioned—based on similar contentions asserted by the district in this appeal—about the effect of his continued failure to comply with the practice regulations in at least five separate appeals initiated by the parent (see Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).[13] Consequently, the parent's non-compliance in the instant appeal and his repeated lack of compliance in numerous other State-level administrative appeals previously initiated by the parent—when coupled with the fact that SROs have already dismissed two of the parent's appeals due to his continued non-compliance with the practice regulations—will also result in a dismissal of the parent's current appeal, with prejudice.

Nevertheless, assuming for the sake of argument that the parent's request for review was not dismissed for the failure to comply with practice regulations, a review the of the evidence in the hearing record supports the IHO's findings that the September 2019 pendency agreement formed the basis for the student's pendency placement and that the provision of transition services during the time allotted for special instruction did not violate the student's pendency rights.

2. Conduct of the Impartial Hearing

Before turning to the pendency issues, as noted above, the parent's request for review identifies five issues, as well as arguments thereto, focusing on the parent's alleged inability to present an "affirmative case" or a "direct case" at the impartial hearing as a basis for challenging the IHO's decision and as a violation of the parent's due process rights. Upon review, the evidence in the hearing record does not support the parent's contentions.[14]

The IDEA provides parents involved in a complaint with the "opportunity for an impartial due process hearing" (20 U.S.C. § 1415[f]). Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard

[13] In each of those five appeals, an SRO declined to dismiss the request for review based on noncompliance, but specifically cautioned the parent that, "while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements" (Application of a Student with a Disability, Appeal No. 19-021).

[14] Notwithstanding the allegations that he was deprived of due process because he was not able to present evidence, the parent did not include any additional documentary evidence for consideration on appeal (see generally Req. for Rev.). Generally, documentary evidence not presented at an impartial hearing is 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, 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]).

legal practice]). State regulation sets forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). However, any party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" or issue a subpoena if necessary (8 NYCRR 200.5[j][3][xii], [xiii][a], [xii][c]-[e]; see 8 NYCRR 200.5[j][3][iv]). Furthermore, State regulations permit an IHO to "take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination" (8 NYCRR 200.5[j][3][xii][f]).

Initially, it must be noted that although the parent argues that he was denied the opportunity to present evidence in support of his affirmative or direct case, the parent does not point to any evidence in the hearing record indicating that he attempted to do so and was precluded from proffering or entering any testimonial or documentary evidence into the hearing record (see generally Req. for Rev.). Rather, a review of the evidence in the hearing record establishes that the IHO formulated a process, through discussions with the parties on the record, to address the lengthy and fact-specific affidavit submitted by the district in support of its motion to dismiss—viewing the affidavit as direct testimony—and that the IHO allowed the parent the opportunity to conduct an extensive cross-examination of the director about her affidavit over the course of two days of proceedings (see Tr. pp. 14-26, 80-264, 301-87; see generally IHO Ex. III).

In reaching the decision to allow the parent the opportunity to conduct a cross-examination of the director, the IHO voiced his concern that the parent be afforded a "full and fair opportunity to have his allegations be heard at least in the context of [his] deciding th[e] motion [to dismiss]"—instead of deciding the motion to dismiss on papers, alone (Tr. pp. 14-16). The parent agreed to the IHO's offer to conduct a cross-examination (see Tr. p. 17; see generally IHO Ex. III). Throughout the discussions about how best to handle and decide the district's motion to dismiss, the parent never objected to the IHO's suggested procedure (see Tr. pp. 14-26).

On the second date of the impartial hearing, and before turning to the parent's cross-examination of the director, the IHO asked the parties if they had any issues to raise (see Tr. p. 71). During those discussions, the parent stated that he had no "problem with not proceeding with a case in chief if, in fact, this hearing [wa]s limited to the [m]otion to [d]ismiss" (Tr. pp. 72-73). He also stated that he "certainly w[ould] be seeking to put on a case in chief to prove [his] case" (Tr. p. 73).

On the final date of the impartial hearing, the IHO asked the parties about "what remaining submissions the parties may wish to offer" after completing the director's testimony (Tr. p. 279). At a minimum, the IHO stated that he would seek briefs from both parties, and noted that to the "extent that [the parent] may wish to offer some type of affidavit or affirmation in response to [the district affidavit], . . . , [they] c[ould] discuss that in terms of, again, a responsive motion" (Tr. pp. 279-81). The IHO further stated that he would also consider allowing the parent to "submit some type of affidavit in response in supplement to a legal brief" (Tr. p. 281).

In response, the parent first confirmed that the instant proceeding was a "motion hearing," as opposed to a "substantive due process hearing" (Tr. pp. 282-83). At that point, the parent spoke "hypothetically," indicating that if the IHO denied the district's motion to dismiss and then the parties proceeded to a "substantive due process hearing, . . . , it would just seem to [him] that as a matter of substance at that point there would be nothing left to really introduce" and "all of the evidence would have been submitted, so there probably wouldn't be a need for a hearing so to speak" (Tr. pp. 283-84). The parent added that his concern was that he was "not going to be able to put on a case in chief via testimony of witnesses at this stage," and if that was the case, "then [h]e would want to do that at a later stage"—even if it would be "more economical to be afforded that opportunity to do so now" and just submit briefs thereafter (Tr. pp. 284-85). The IHO assured the parent that if the district's motion to dismiss was denied, he would discuss what evidence the parties wished to offer "on the merits of the dispute" and repeated that at this stage the parties could discuss having the parent provide "something in addition to the legal brief" (Tr. pp. 285-88). The parent thanked the IHO and did not object to the process the IHO set forth (see Tr. pp. 285, 288).

Prior to the conclusion of the last impartial hearing date, the IHO confirmed with the parent that, in addition to the submission of a brief, the parent wished to submit an "affidavit or affirmation in response" to the district's motion to dismiss (Tr. p. 388). The parent stated, "I would prefer testimony, but absent testimony, yes, [an] affidavit" (Tr. p. 388).

Following the last impartial hearing date, the parent submitted a brief in opposition to the district's motion to dismiss, but without any affidavit or affirmation, as was discussed by the IHO and the parent during the hearing (see generally IHO Ex. VIII).

Now on appeal, the parent asserts he was deprived of due process because he was denied the opportunity to present an affirmative or direct case at the impartial hearing. Generally, it is necessary to determine whether the improper exclusion of evidence caused any harm to the parent. As a general rule, "the party that 'seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted'" (Shinseki v. Sanders, 556 U.S. 396, 409-10 [2009], quoting Palmer v. Hoffman, 318 U.S. 109, 116 [1943]; see Snyder v. New York State Educ. Dep't, 486 Fed. App'x 176, 180 [2d Cir. 2012] [noting that "[t]he moving party has the burden of showing that 'it is likely that in some material respect the factfinder's judgment was swayed by the error'"], quoting Tesser v. Bd. of Educ., 370 F.3d 314, 319 [2d Cir. 2004]; see also Fed. Rules Civ. Pro. 61; Fed. Rules Evid. 103).[15] Initially, the parent has failed to submit evidence or identify the nature of the evidence he intends to submit other than in vague statements; without this information, it is impossible to determine whether the exclusion of the proposed evidence caused any harm to the parent. Additionally, because the district bore the burden of establishing that it had maintained the student's pendency placement, it is not immediately clear why the parent's alleged inability to present direct testimony or documentary evidence with regard to an issue on which he bore no burden of proof was harmful.

[15] The Court in Shinseki explained that this rule does not constitute burden shifting; rather, it requires the appealing party to "explain why the erroneous ruling caused harm" (556 U.S. at 410).

Moreover, although the parent did not present evidence in the form of direct testimony, an affidavit in lieu of direct testimony, or documentary evidence, he did have the opportunity to present an affidavit as part of his response to the district's motion and he decided against doing so, and he was also able to confront and cross-examine the director concerning the content of her affidavit that the district submitted in support of its motion to dismiss, as guaranteed under the IDEA and State and federal regulations (see 20 U.S.C. § 1415[h][2]; 34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). The United States Department of Education's Office of Special Education Programs (OSEP) has opined that "decisions regarding the conduct of [IDEA] due process hearings are left to the discretion of the hearing officer. These decisions, however, are subject to review under [the federal regulations] if a party to the hearing believes that the hearing officer has compromised the party's [due process] rights" (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]). In this case, the parent was afforded the opportunity to participate in the impartial hearing.

B. Pendency

Before reaching the merits of the parent's appeal, it is worth noting that the only substantive issue raised in this proceeding concerns the student's right to pendency (see IHO Ex. I) and much of the evidence, such as the May 2021 letter and IEPs developed for prior school years but rejected by the parent, reflects that the pendency claim asserted is not specifically connected to any underlying substantive claims related to a particular CSE or IEP. Notably, the parties are not disputing the parent's right to pendency during this proceeding; rather, the parties appear to be arguing about the student's pendency status generally as it stood during a prior proceeding and in four separate pending proceedings—as identified by the IHO (IHO Decision at p. 16). Accordingly, it is worth noting that because pendency operates as an automatic injunction that arises as a result of the filing of a due process complaint notice, it is not necessary for a party to assert or "invoke" the right to pendency in the due process complaint notice under the pendency provision (20 U.S.C. § 1415[j]). In other words, a pendency dispute cannot occur until after a due process complaint has been filed and, consequently, the student's right to the stay-put placement is not waived because a party fails to address it in the due process complaint notice. Instead, it is the district's responsibility upon the parent's filing of a due process complaint notice to implement the "then current educational placement" in accordance with 20 U.S.C. § 1415(j), and the parties should thereafter notify the IHO if there is a dispute over which services constitute that educational placement so that the IHO can ensure that arrangements are made for the submission of any necessary evidence on the issue and the matter is decided while the underlying substantive claims then proceed to hearing and are resolved. Considering the above, the way this matter was litigated appears contrary to the intended purpose of the pendency provision and leads to a question as to what benefit a decision in this proceeding would actually have for the parties, as it is questionable whether the IHO's decision in this matter would be the controlling one with respect to other IHOs making decisions as to pendency in separate concurrent proceedings each arising out of a separate due process complaint notice.[16] While some of the danger inherent in having concurrent

[16] As has been mentioned in some prior State-level review appeals, as some courts permit suits involving pendency to move forward without exhaustion, there have been situations where disputes involving pendency have proceeded simultaneously in two forums at the same time leaving the matters in an awkward posture (see Application of a Student with a Disability, Appeal No. 20-164; Application of the Dep't of Educ., Appeal No. 20-033). However, those situations involved a court proceeding and an administrative proceeding moving forward

proceedings that may address the same issue is mitigated here by the fact that the IHO in this proceeding is also appointed to preside over the other four proceedings involving the parties, in order to avoid the risk of having differing outcomes altogether, a better practice would have been to have consolidated this proceeding with one of the pending proceedings to at least append the pendency issue here to a specific due process complaint notice asserting substantive IDEA claims. Otherwise, not only are different outcomes concerning pendency in concurrent cases a possibility, but the existence of an essentially "free floating" pendency claim also runs the risk of acting as a de facto collateral attack on decisions in other proceedings which already have determined issues related to the validity of the September 2019 pendency agreement and the district's implementation of pendency thereunder. Consequently, although I do not believe that holding a proceeding solely to address the student's right to pendency in separate proceedings was an appropriate course of action, I will address the parties' dispute as to the IHO's findings.

With respect to pendency, the crux of the parent's appeal focuses on whether the IHO erred by finding that the district did not violate the student's pendency rights by providing transition instruction during a portion of the time allotted for the student's special instruction, as opposed to using the daily two hours of special instruction to provide the student solely with after-school academic support instruction.[17] A review of the evidence in the hearing record does not support the parent's contentions.

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, 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 (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino, 959 F.3d at 531; 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]).[18] 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 to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v.

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at the same time. In this instance, the parties appear to be seeking an administrative determination in this proceeding to control concurrent administrative proceedings, which has a greater potential to lead to confusion and conflicting outcomes.

[17] To be clear, "special instruction" is not a term defined by any law or within State or federal regulations.

[18] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then-current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. 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).

Once a student's "then-current educational" placement or pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino, 959 F.3d at 532; Schutz, 290 F.3d at 483-84; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington, 421 F. Supp. 2d at 697; Murphy, 86 F. Supp. 2d at 366; Letter to Hampden, 49 IDELR 197). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during

those due process proceedings" (S.S., 2010 WL 983719, at *1 [emphasis in the original]). And upon a pendency changing event, such changes apply "only on a going-forward basis" (id.). With that said, it has been held that in certain circumstances a court may, on equitable grounds, retroactively adjust a student's pendency placement if a State-level administrative decision in a parent's favor was not issued in a timely manner (see Mackey, 386 F.3d at 164-66; Arlington, 421 F. Supp. 2d at 701; O'Shea, 353 F. Supp. 2d at 457-58; Murphy, 86 F. Supp. 2d at 366-67).

The parties' dispute in this proceeding centers around the student's pendency placement arising as per an agreement of the parties as was set forth in the September 2019 pendency agreement.[19] Overall, the parties do not dispute this fact or the general parameters of that September 2019 pendency agreement. Generally, a student's educational placement for purposes of pendency includes "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756). Whether a student's educational placement has been maintained under the meaning of the pendency provision may, under certain circumstances, depend on whether the educational program is "substantially and materially the same" as the student's educational program for the prior school year (Letter to Fisher, 21 IDELR 992 [OSEP 1994]; see Application of a Student with a Disability, Appeal No. 16-020). The United States Department of Education's Office of Special Education Programs identified a number of factors that must be considered in determining whether a move from one location to another constitutes a change in educational placement, including: whether the educational program in the student's IEP has been revised; whether the student will be educated with nondisabled peers to the same extent; whether the student will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement is the same option on the continuum of alternative placements (Letter to Fisher, 21 IDELR 992). State regulations define a change in program as "a change in any one of the components" of an IEP, which includes transition services in an IEP for students who are turning 15 years of age (8 NYCRR 200.1[g]; 200.4[d][2][ix][a]).[20]

[19] In addition, two recently issued federal district court decisions addressing issues related to the student's pendency placement both determined that the parties' September 2019 pendency agreement constituted the student's pendency placement (see Westhampton Beach Sch. Dist., 2020 WL 5424722; Westhampton Beach Sch. Dist., 2022 WL 866816).

[20] To be clear, a review of SRO decisions involving the same parties, including the evidence submitted therein, reveals that the student's IEPs predating and postdating the September 2019 pendency agreement have included some form of transition services—i.e., measurable postsecondary goals and a coordinated set of transition activities—beginning with the development of the student's May 2018 IEP and continuing through the development of the student's most recent IEP for the 2021-22 school year (see generally IHO Exs. C-E). As a result, it cannot be argued that the student's pendency placement had been changed based on a revision to the educational program in the student's IEP or based on State regulation, as transition services have remained as a component of the student's IEP for several years. Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). An IEP must also include the transition services needed to assist the student in reaching those goals (id.). Transition services must be "based on the individual child's needs, taking into account the child's strengths,

Here, the parent insists that the "special instruction" component of the student's pendency placement—prior to the district's May 2021 letter—consisted solely of the delivery of after-school academic support and the district's unilateral modification of the pendency agreement by providing the student with transition services during a portion of the time allotted for the delivery of "special instruction" constituted a pendency changing event. The IHO found that, based on the terms and conditions set forth in the September 2019 pendency agreement, the agreement was silent as to the content of "special instruction" (see IHO Decision at p. 18).

Under the standard above—although typically applied to circumstances involving a move from one location to another to provide a student's pendency placement—offers some guidance here; the student's educational placement for the purpose of pendency has been maintained because the hearing record fails to include and the parent's allegations do not indicate the existence of any evidence that the student's educational program in his IEP has been revised; that the student was not educated with nondisabled peers to the same extent; that the student did not have the same opportunities to participate in nonacademic and extracurricular services; or that the new placement was not the same option on the continuum of alternative placements (Letter to Fisher, 21 IDELR 992). Moreover, contrary to the parent's contention, even if the district began providing the student with transition instruction during a portion of the time allotted for "special instruction" as a result of the district's May 2021 letter, the standard set forth above does not include changes in instruction as a factor to consider when determining whether a student's pendency placement has been maintained (see Letter to Fisher, 21 IDELR 992). Notably, the parent's own arguments in his brief in opposition to the district's motion to dismiss supports the proposition that a student's pendency placement must "incorporate a student's needs as they may evolve and develop over time," while maintaining the status-quo, by adjusting to advancing curriculum (i.e., as reflected in the parent's hypothetical #1) (IHO Ex. VIII at pp. 12-13).

In addition, while the facts of this matter do not fall squarely within the Second Circuit's decision in Ventura de Paulino, it nevertheless lends support to the above determination and provides clear direction on the issue of implementing a pendency placement, noting that:

> The stay-put provision . . . was enacted as a procedural safeguard in light of the school district's broad authority to determine the educational program of its students. The provision limits that authority by, among other things, preventing the school district from

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preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]). In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]). It has been found that "a deficient transition plan is a procedural flaw" that will only rise to a denial of a FAPE if it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]; see F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *8-*9 [S.D.N.Y. June 8, 2016]; C.W. v City Sch. Dist. of the City of New York, 171 F. Supp. 3d 126, 134 [S.D.N.Y. 2016]; J.M. v New York City Dep't of Educ., 171 F. Supp. 3d 236, 247-48 [S.D.N.Y. 2016]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013]).

> unilaterally modifying a student's educational program during the pendency of an IEP dispute. It does not eliminate, however, the school district's preexisting and independent authority to determine how to provide the most-recently-agreed-upon educational program. As we have recognized, "[i]t is up to the school district," not the parent, "to decide how to provide that educational program [until the IEP dispute is resolved], so long as the decision is made in good faith"

(Ventura de Paulino, 959 F.3d at 534, quoting T.M., 752 F.3d at 171). Thus, contrary to the parent's contention that the district unilaterally changed the student's pendency placement by including transition instruction during a portion of the time allotted for "special instruction," it is the district that is authorized to decide how (and where) a student's pendency services are to be provided as per the text and structure of the IDEA and given that the district is the party responsible for funding the pendency services (Ventura de Paulino, 959 F.3d at 533-35).

At this juncture, the district has been implementing the student's pendency placement in accordance with the educational program and terms set forth in the September 2019 pendency agreement. Moreover, to the extent that the district provides the student with transition instruction during the "special instruction" component, this does not result in a "fundamental change in, or elimination of[,] a basic element of the [student's] education program" (see Cruz v. New York City Dep't of Educ., 2020 WL 1322511, at *9 [S.D.N.Y. Mar. 20, 2020], quoting Lunceford v. D.C. Bd. of Educ., 745 F.2d 1577, 1582 [D.C. Cir. 1984]; Concerned Parents, 629 F.2d 751; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009] [noting that "'[e]ducational placement' refers to . . . classes, individualized attention and additional services a child will receive"]). While the parent would prefer that the student receive transition services or instruction as an additional component of his pendency placement rather than as part of the "special instruction" component, the district nonetheless has the authority to decide the instructional specifics with respect to how it implements the student's pendency placement (see Ventura de Paulino, 959 F.3d at 533-35).

VI. Conclusion

As discussed, the parent's appeal is subject to dismissal on the ground that he has failed to comply with State regulations governing the initiation of the review and the form requirements for pleadings. In addition, based on the above, neither the parent's arguments nor the evidence in the hearing record present a reason for departing from the IHO's determination that the district's provision of transition services to the student was not contrary to the parties' September 2019 pendency agreement such that it would result in a violation of the student's pendency rights.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 14, 2022

CAROL H. HAUGE
STATE REVIEW OFFICER