The University of the State of New York

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

No. 22-162

Application of a STUDENT WITH A DISABILITY, by her parent, 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:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 an order of termination issued by an impartial hearing officer (IHO) which determined the parent's withdrawal of her due process complaint notice was "without prejudice." The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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 related to IESPs, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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

Given the disposition of this proceeding on procedural grounds and the undeveloped state of the hearing record, a full recitation of the student's educational history is not possible; nevertheless it is unnecessary due to the limited nature of this appeal.[1]

[1] The transcripts from the impartial hearing in this matter were not consecutively paginated; therefore, transcript citations in this decision will refer to the date of the impartial hearing and the page number (e.g., "Oct. 31, 2022 Tr.

A. Due Process Complaint Notice

In an amended due process complaint notice dated September 26, 2022, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (IHO Ex. I).

As an initial matter, the parent requested that pendency in this matter be based on the last agreed upon IESP dated June 1, 2015, which recommended a 12-month extended school year program consisting of fifteen hours of per week of individual special education itinerant teacher (SEIT) services in Yiddish, three 30-minute sessions per week of individual speech-language therapy in Yiddish, two 30-minute sessions per week of individual occupational therapy (OT) in English, and two 30-minute sessions per week of individual physical therapy (PT) in English (IHO Ex. I at p. 2).

Turning to the substance of the complaint, the parent alleged that the student was identified as eligible for special education services and that she was parentally placed in a parochial school for the 2022-23 school year (IHO Ex. I at p. 1). The parent asserted that the district failed to recommend an appropriate placement for the student and failed to convene a CSE meeting in a timely manner to review the parent's individual educational evaluation (IEE) and develop an IESP for the 2022-23 school year (IHO Ex. I at p. 3).[2, 3] Further, the parent asserted that the IESP developed by the CSE on June 10, 2021 failed to recommend an appropriate placement for the student by removing the student's 12-month services and reducing the special education support available for the student from fifteen hours per week of SEIT services to seven hours per week of special education teacher support services (SETSS) to (id. at pp. 2-3).[4]

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pp. 1-27"). At the time the IHO dismissed this matter without prejudice, no exhibits had yet been admitted into the hearing record except those offered by the IHO (see IHO Decision; Oct. 31, 2022 Tr. pp. 1-27; Nov. 23, 2022 Tr. pp. 1-16; IHO Ex. I). In addition to the one IHO exhibit, the district provided the following documents to the Office of State Review as part of the administrative record on appeal: a transcript of proceedings that took place on October 31, 2022; a transcript of proceedings that took place on November 23, 2022; the IHO's Order of Termination dated November 30, 2022; email correspondence between the IHO and parent's attorney regarding pendency dated between November 1, 2022 and November 22, 2022; and a notice of appearance by the district's representative. State regulation specifically requires that, in addition to exhibits and the transcript of the proceedings, "any response to the [due process] complaint," "all briefs, arguments or written requests for an order filed by the parties for consideration by the [IHO]," as well as "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" are part of the hearing record (8 NYCRR 200.5[j][5][vi][a], [b], [c], [e]-[f]; 279.9[a]). As the email correspondence generally addresses the parties' requests to the IHO and the IHO's responses thereto, and as the IHO referenced the email in her final decision (see IHO Decision at p. 2), it is properly considered as part of the administrative hearing record and will be marked and cited herein as SRO Exhibit "2."

[2] At the November 23, 2022 hearing, the IHO indicated that the due process complaint notice in this matter is an amended complaint and marked the amended complaint as IHO Exhibit I (Nov. 23, 2022 Tr. p. 4). There is nothing in the due process complaint notice indicating that it was amended and the hearing record does not include any other due process complaint notice.

[3] The student underwent a comprehensive neuropsychological evaluation which was completed and submitted to the district on August 8, 2022 (Req. for Rev. at p. 2).

[4] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district

For relief, the parent requested the following: a finding that the June 2021 IESP be declared outdated, expired, and constituted a denial of FAPE; a finding that the failure by the district to recommend an appropriate placement for the student was a denial of a FAPE; a finding that the failure of the CSE to convene and review the parent's IEE was a denial of a FAPE; an interim order directing that the recommendations in the June 2015 IESP continue for the 2022-23 school year; an order that the district fund the recommendations outlined in the IEE submitted to the CSE on August 8, 2022; and an order that the district fund a bank of compensatory education to be used over the next two years for any missed services due to delays in convening a CSE meeting or implementation delays by the district; as well as other relief deemed appropriate by an IHO (IHO Ex. I at pp. 3-4).

B. Prehearing Conference

The IHO conducted a prehearing conference with the parties on October 31, 2022 (Oct. 31, 2022 Tr. pp. 1-27). During the prehearing conference, the IHO asked the district "[w]ithout going into the substance can you talk about where [] things are?" (id. at p. 5). The district's attorney stated that she was under the impression that a resolution offer would be sent to the parent's attorney today or "sometime this week" (id.).[5]

During the prehearing conference, counsel for the district indicated that a pendency determination was not necessary in this matter because the district was "not contesting the student's entitlement to services and so long as the [district] receive[d] all the service provider information that we need[ed]. . . . [the district] [wa]s prepared to implement those services" (Oct. 31, 2022 Tr. p. 5). The parent argued that pendency was an automatic entitlement and requested an order on pendency by the IHO or that the district sign the proposed pendency agreement that was submitted with the due process complaint notice (Oct. 31, 2022 Tr. pp. 8, 20-22). The IHO directly asked the district's representative if the district "intend[ed] to sign [the pendency agreement]" to which the district representative responded, "I don't have the answer to that question" (Oct. 31, 2022 Tr. pp. 21-22). The district agreed with the parent's identification of pendency services, but did not see the need for a formal order on an uncontested pendency issue (Oct. 31, 2022 Tr. pp. 21). The IHO declined to issue an order regarding pendency at the prehearing conference and instead decided, if necessary, to "tack on" and hold a pendency hearing immediately before the due process hearing (Oct. 31, 2022 Tr. pp. 21-24).

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and a static and reliable definition of "SETSS" does not exist within the district, and unless the parties and the hearing officer take the time to develop a record on the topic in each proceeding it becomes problematic (see Application of the Dep't of Educ., Appeal No. 20-125). For example, SETSS has been described in a prior proceeding as "a flexible hybrid service combining Consultant Teacher and Resource Room Service" that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" (Application of a Student with a Disability, Appeal No. 16-056), and in another proceeding it was suggested that SETSS was more of an a la carte service that is completely disconnected from supporting the student in a general education classroom setting (Application of a Student with a Disability, Appeal No. 19-047).

[5] The IHO noted that the resolution period for this matter had ended, and that no resolution meeting took place within the first 15 days from the filing of the due process complaint notice (Oct. 31, 2022 Tr. p. 6). When asked by the IHO why no resolution meeting took place, the district representative stated, "I'm unable to answer that" (id.).

The IHO further noted that the due process complaint notice in this proceeding was similar but not identical to a due process complaint notice filed for the same student in a prior matter (Oct. 31, 2022 Tr. p. 7). Counsel for the parent appeared to indicate that the prior matter was withdrawn (id.). The IHO noted that the key difference between the two due process complaint notices was that in this matter the parent obtained an evaluation of the student (id. at pp. 6-8).

The IHO scheduled the due process hearing for November 23, 2022 and gave parties a firm disclosure deadline of November 16, 2022 for evidence related to both the pendency and due process hearings (see Oct. 31, 2022 Tr. pp. 10-18, 24).

C. Events Post-Dating the Due Process Complaint Notice

On November 1, 2022, one day after the prehearing conference, the parent's attorney emailed the IHO requesting that the November 23, 2022 combined pendency and due process hearing be converted to only a pendency hearing (SRO Ex. 2 at p. 4). The parent claimed that it came to her attention that upon the submission of the IEE to the district on August 8, 2022, the district requested additional evaluations to "fully paint the picture of the student's needs" and the parent was in the process of arranging and completing the requested evaluations (id.).[6] The parent further stated that "we feel it would be premature to conduct a full [due process hearing], which would include a request for relief based on the information contained in the completed IEE report, without the full battery of testing done for the student" (id.). On November 9, 2022, the IHO responded to the parent's email stating "I find no need for a pendency hearing because there is no dispute about pendency and the [s]tudent is receiving services" (id. at p. 3).

The parent's attorney responded to the IHO's email on November 10, 2022, restating the parent's position on why a pendency hearing was warranted and again requested either that a pendency hearing be held or that the district sign the proposed pendency agreement (SRO Ex. 2 at p. 2). The IHO responded on November 14, 2022, noting the parent's objection but again declined to hold a pendency hearing stating that there was "nothing to adjudicate in a pendency hearing" (id. at p. 1).

In an email dated November 22, 2022, one day prior to the date of the scheduled impartial hearing, the parent's attorney informed the IHO that the parent was not prepared to move forward with a hearing on the merits (SRO Ex. 2 at p. 6). The parent's attorney requested additional time to review a "resolution agreement" that had been sent to him by the district the day before (id.).[7] The IHO responded on the same day reiterating her instructions that were presented to the parties at the prehearing conference on October 31, 2022 (id. a p. 5; see Oct. 31, 2022 Tr. pp. 10-18). The IHO noted that the deadline for disclosures was November 16, 2022; that the parent did not submit any evidence to support her positions; and that counsel for the district indicate it would not waive

[6] According to the parent's request for review, on October 13, 2022, the district requested that the student undergo "additional invasive neuropsychological testing" (see Req. for Rev. at pp. 2-3).

[7] The use of the term "resolution agreement" by the parent's attorney in this case should not be confused with the statutory and regulatory terms "resolution session," "resolution meeting," "resolution agreement" or the 30-day "resolution period," which are associated with a specific statutory time frame and have been clearly described in the case law of this circuit (see Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 161 [2d Cir. 2021]). In this case, a less confusing term would have been "proposed settlement agreement," which could come into play at any point during the litigation between the parties.

the five-day disclosure rule (SRO Ex. 2 at p. 6; see Oct. 31, 2022 Tr. pp. 10-18, 24). Considering the lack of documentary evidence, the IHO indicated that it was "unclear as to how the [p]arent could proceed with a separate pendency hearing tomorrow even if granted" (SRO Ex. 2 at p. 6). The IHO denied the parent's extension request and stated the due process hearing would proceed as scheduled (id.).

D. Impartial Hearing Officer Decision and Related Events

On November 23, 2022, the parties appeared for an impartial hearing before the Office of Administrative Trials and Hearings (OATH) (Nov. 23, 2022 Tr. pp. 1-16). The IHO opened the impartial hearing by restating the claims raised in the parent's amended due process complaint notice (id. at pp. 4-5). When asked by the IHO if the parent's attorney would like to make an opening statement, the parent's attorney responded "Well, yes. First off, I would like to make a statement, but I believe I am going to -- given the options I have, I am going to be compelled to withdraw this case without prejudice" (id. at p. 5). In reference to an hour-long conversation that took place off the record prior to the start of the impartial hearing, the parent indicated that he had explained to the IHO that if he had a choice between proceeding on the merits or withdrawing, he would be forced to withdraw (id. at p. 6). The IHO responded that her understanding from the hour-long off the record conversation was that the parent's attorney wanted to be heard on why he would not be presenting a case on behalf of the parent; that she had asked if he wanted to withdraw prior to the start of the hearing; and that a motion to withdraw after the start of the hearing may be found to be with prejudice (id.). The IHO then allowed the parent's attorney to make a motion to withdraw the due process complaint notice without prejudice (id.). In response, the parent's attorney proceeded to make a statement regarding a neuropsychological evaluation report he received on or about November 20, 2022, stating that it formed the basis for his adjournment request on November 22, 2022, before he was cut off due to technical difficulties (Nov. 23, 2022 Tr. pp. 6-7).[8] When the parent's attorney returned, he made a motion to withdraw the due process complaint notice without prejudice (Nov. 23, 2022 Tr. pp. 10-11, 14-15).[9, 10]

On November 30, 2022, the IHO issued an order of termination for the September 26, 2022 due process complaint notice (IHO Decision pp. 1-4).[11] The IHO ordered that the case be terminated without prejudice and stated that "[h]ere, although the due process hearing had already

[8] The IHO stated on the record that all the information the parent's attorney had stated up to that point of the hearing was memorialized in the emails sent by parent's attorney (compare Nov. 23, 2022 Tr. pp.6-7, with SRO Ex. 2).

[9] The district stated for the record that it had not presented either opening statements or evidence in this matter (Nov. 23, 2022 Tr. p. 9).

[10] While making the motion to withdraw without prejudice, the parent's attorney also requested an additional five minutes to make a statement on the record which the IHO allowed; however, the IHO ultimately cut the parent's attorney off indicating she was not going to hold a hearing after the parent's motion to withdraw (Nov. 23, 2022 Tr. pp. 12-14).

[11] State guidance defines an order of termination as "the written decision of the IHO as to the conditions of the withdrawal of the due process complaint notice" ("Questions Relating to Impartial Hearing Procedures Pursuant to Sections 200.1, 200.5, and 200.16 of the Regulations of the Commissioner of Education, as Amended Effective February 1, 2014," at p. 9, Office of Special Educ. [Revised Sept. 2016], available at http://www.p12.nysed.gov/specialed/dueprocess/documents/qa-procedures-sep-2016.pdf).

commenced, [the district] did not object to the Parent's motion to withdraw without prejudice, noting in particular that [the district] had not yet provided its opening statement, nor proffered its exhibits" (id. at p. 4). The IHO also made a statement in a footnote regarding why the IHO denied the parent's adjournment request on November 22, 2022 stating:

> Before the undersigned IHO began the recording, she denied Parent's attorney's requests because: (1) [the district] still did not contest pendency; (2) per the Parent's attorney's email, the adjournment request pertained to settlement discussions, not an evaluation; (3) all disclosures were already due two days before Parent's attorney received the evaluation; (4) the Parent bears no burden of proof in a due process hearing, including the burdens of persuasion and production; and (5) nowhere in the [due process complaint notice], including the eight proposed means of relief, did it contemplate, let alone require, the aforementioned [October 2022 neuropsychological] evaluation.

(IHO Decision at p. 3 n. 8)

IV. Appeal for State-Level Review

The parent appeals from the order of dismissal without prejudice and argues that the IHO deprived her of her due process rights.

First, the parent argues that the IHO was incorrect to refuse to conduct a pendency hearing, which according to the parent, deprived the student of a basic fundamental right. According to the parent, the IHO's finding that pendency did not need to be addressed because the student was receiving services was flawed because the purpose of pendency was to require the district to fund the services. The parent asserts that the IHO's refusal to conduct a pendency hearing has caused significant damage to the student, arguing there is "no way to obtain coverage for the services that the Parent has obtained privately" and, even if the parent was to refile a due process complaint notice, "any subsequent pendency would only be retro-active to the new filing date." The parent also claims that the district argued that pendency was inappropriate because the district was trying to resolve the matter. According to the parent, holding or refusing to provide services that the student was entitled to until the parent agreed to a resolution was inappropriate, coercive, and illegal.

Second, the parent argues that the IHO was unreasonable and abused her discretion by refusing to grant a first-time adjournment request on consent of the parties. The parent asserts that the "crux" of her case is contained in the October 2022 neuropsychological evaluation, which was not completed until two days before the November 2022 hearing date and would not have been possible to disclose within the five-day disclosure rule. The parent further asserts that she disclosed the evaluation report on the same day that it was received but the IHO refused to accept the evaluation into evidence. Furthermore, the parent asserts that the district submitted a settlement proposal to the parent one day before the November 2022 hearing date and argues that she did not have an opportunity to review the proposed settlement with her attorney. The parent further asserts that she had never previously asked for an adjournment; that the district consented in writing to the adjournment; and that this is a case where an adjournment would have been

appropriate.[12] The parent further alleges that the result of the IHO not granting the adjournment resulted in a "sham withdrawal entered under extreme duress without any Pendency." (Req. for Rev. at p. 7).

Lastly, the parent argues that it was improper for the IHO to engage in an hour-long discussion off the record and refuse to permit the parent's attorney to make a brief statement on the record. The parent alleges that there were lengthy discussions that were made off the record and when the parent attempted to make a brief, less than five-minute statement on the record, the IHO prevented the parent from doing so.[13]

As relief, the parent requests that the termination order based on parent's withdrawal under duress be vacated; that pendency be established as the last agreed upon program set forth in the June 2015 IESP; and that this matter be remanded to a hearing officer who is "amenable to conducting an impartial hearing rather than forcing a case to a premature conclusion."

In an answer, the district denies each allegation contained within the parent's request for review and generally argues to uphold the IHO's decision in its entirety. The district further argues that the parent's request for review must be dismissed for failure to comply with the practice regulations.

In a reply, the parent responds to the district's allegations and generally repeats arguments made in the request for review.[14]

V. Discussion

A. Preliminary Matters - Compliance with Practice Regulations

The district contends that the request for review must be dismissed for failure 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]). In this instance, the district argues that the parent's request for review fails to comply with practice requirements of Part 279 because the request for review is undated and the affidavit of service makes a vague reference to service of "the annexed documents" on December 19, 2022 (Answer ¶ 8). The district further argues that it was not served with a request for review on December 19, 2022 as indicated in the parent's affidavit of electronic service but, instead, it was served with the parent's notice of intention to seek review

[12] The parent also alleges in her request for review that there was "an element of cruelty in the District delaying a case for months only to insist on additional invasive neurological testing which resulted in [the] evaluation being finalized too late to be considered under the draconian schedule of the IHO" (Req. for Rev. at p. 6).

[13] The parent also asserts that despite numerous attempts, the transcript in this matter has not been made available to the parent and further asserts that she reserves the right to amend this request for review if the parent is able to obtain a transcript of the most recent appearance.

[14] The parent prepared, served, and filed a reply to the district's answer in this case. However, State regulation limits the scope of the parent's reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the parent did not reply to the procedural defenses raised in the district's answer. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

on December 20, 2022 and a request for review on December 21, 2022 (Answer ¶ 8; see Answer Ex. 2; Parent Aff. of Service).

An appeal from an IHO's decision to an SRO—whether the appeal is by a district or a parent—must be initiated by timely personal service of a verified request for review and other supporting documents, if any, upon respondent (8 NYCRR 279.4[b], [c]). Personal service on a school district is made "by delivering a copy thereof to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service" (8 NYCRR 279.4[b]). The petitioner must personally serve the opposing party with the notice of intention to seek review no later than 25 days after the date of the IHO's decision and with the request for review no later than 40 days after the date of the IHO's decision (8 NYCRR 279.2[b]). Thereafter, "the notice of intention to seek review, notice of request for review, request for review, and proof of service [must be filed] with the Office of State Review . . . within two days after service of the request for review is complete" (8 NYCRR 279.4[e] [emphasis added]).

Moreover, all pleadings and papers submitted to an SRO must "be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney" (8 NYCRR 279.7[a]). All pleadings must be signed by an attorney, or by a party if the party is not represented by an attorney (8 NYCRR 279.8[a][4]). Additionally, all pleadings shall be verified by a party (8 NYCRR 279.7[b]).

In this instance, the parent filed with the Office of State Review the following documents: a notice of intention to seek review and case information statement dated December 5, 2022, a notice of request for review dated December 5, 2022, an undated request for review, an affidavit of verification signed and notarized on December 12, 2022, and an undated, unnotarized affidavit of electronic service stating under penalty of perjury that on December 19, 2022, counsel for the parent served the "annexed documents" on the district.

Regarding the content of the parent's affidavit of service, the parent failed to identify appropriately the documents served on the district. The parent's affidavit of electronic service merely indicates that the parent served the "annexed documents"; however, because the parent's request for review is undated, the affidavit of electronic service was not notarized, and the parent failed to respond to the district's allegations regarding underlying service issues in a reply, the affidavit of service is too vague to identify what documents were actually served on the district and when (see Parent Aff. of Service; Req. for Rev.). Most concerning, the district argues that it was not served with the notice of intention to seek review and the request for review on December 19, 2022 as indicated in the parent's affidavit of electronic service but instead received the notice of intention to seek review on December 20, 2022 and the request for review on December 21, 2022 respectively (Answer ¶ 8). In support of this contention, the district submits emails dated December 20, 2022 and December 21, 2022 demonstrating that a legal assistant and not the parent's attorney sent the notice of intention to seek review and "attached documents" to the district (Answer Ex. 1).[15] These emails appear to directly contradict the affidavit of electronic service representing that the parent's attorney "under penalty of perjury" served the "annexed documents"

[15] The District marked the document as "SRO Ex. 1" and to avoid confusion with SRO Ex. 2, I have marked this as "Answer Ex. 1."

on December 19, 2022 (compare Parent Aff. of Service, with Answer Ex. 1). Counsel for the parent had the opportunity to address this contradiction in his reply and declined to do so, leaving the district's contention as the only explanation as to what occurred regarding service.

Going forward, I expect the attorney for the parents to refrain from generic statements about serving "documents" and file a separate affidavit of service that show when a "notice of intention to seek review" required by Section 279.2 of the practice regulations was served upon a school district. Similarly, a "notice of request for review" and a verified "request for review" should be accompanied by a separate affidavit of service that specifically identifies said documents, and as specified in Section 279.4 of the practice regulations all of the documents—along with their affidavits of service— must be filed at the same time with the Office of State Review (see 8 NYCRR 279.4). The practice regulations envision an efficient process by which a notice of intention to seek review is served upon the respondent approximately 10 days before a request for review is served (but not later than 25 days after the date of the IHO decision).[16]

Also, adding to the carelessness undertaken in service and filing the request for review in this matter, the parent's attorney's signature on the affidavit of service was not notarized (see Parent Aff. of Service). Review of the affidavit indicated that the parent's attorney swore under the penalty of perjury that he served the district on December 19, 2022; however, as stated above, the affidavit of service is inaccurate as the parent's attorney did not personally serve the district and the underlying documents were not served on the district on December 19, 2022 (compare Parent Aff. of Service, with Answer Ex. 1). I strongly caution the parent's attorney about submitting inaccurate affidavits of service in the future to avoid any potential litigation for perjury. Also, the parent's attorney is cautioned that Office of State Review does not allow affirmations of service (see 8 NYCRR 279.4[a]; 279.8[c][1]-[3]).

In this matter, even though the evidence in the hearing record shows that the affidavit of service is unreliable regarding the dates of service, the district's answer essentially concedes that it received the notice of intention to seek review and the request for review within the regulatory timeframe for filing an appeal. The IHO's decision in this matter is dated November 30, 2022 (IHO Decision at p. 1). The district provided proof of service with its answer that a legal assistant from the parent's attorney's law firm electronically filed the notice of intention to seek review on December 20, 2022 and then the request for review on December 21, 2022, which is 20 and 21 days respectively after the date of the IHO's decision (Answer Ex. 1). The Office of State Review received the notice of intention to seek review, notice of request for review, request for review, affidavit of verification, and proof of service on December 19, 2022. Though December 19, 2022 is before the date that service of the request for review was completed, the district was able to respond to the parent's request for review and there is no indication that it suffered undue prejudice as a result of parent's counsel's actions.

[16] If the respondent in an appeal is a school district, this provides school district personnel ample time to examine, prepare and certify the complete administrative record. On the other hand, if the respondent is a parent, the parent who has been timely provide a notice of intention to seek review has ample notice before the parent's responsive pleading is due to facilitate engagement (or reengagement) of legal representation and/or to begin to consider possible defenses to favorable outcomes obtained in the hearing process or cross-appeal any unfavorable aspects of the IHO's decision.

Although not raised by the district, I note that, regarding the content of the request for review, State regulation provides that a request for review shall set forth "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" (8 NYCRR 279.8[c][3]). In this matter, the pleading lacks the required citations. That is, all allegations of IHO misconduct are stated without citations to the portions of the hearing record or IHO's decision from which the parent appeals (see Req. for Rev.). Going forward, I expect counsel for the parent to comply with that provision of the practice regulations as well.

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]).

Considering all of the above, I find no evidence of purposeful intent to evade compliance and no reason that these deficiencies cannot rectified in future proceedings, and therefore I decline to exercise my discretion to reject the request for review outright based on the counsel for the parent's failure to comply with the practice regulations. In this case, I fully examined the hearing record and as further described below, I have found the IHO's ultimate determination was supported by the evidence. Although I will not dismiss the appeal outright, the parent's attorney is warned that my patience has been exhausted and future filings from him may be rejected as a sanction if noncompliance with Part 279 continues.

B. Conduct of Impartial Hearing

The parent asserts that the IHO was unreasonable and abused her discretion by refusing to grant an adjournment request on consent of the parties and by having a one-hour off the record conversation.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-064).

Also, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Student with a Disability, Appeal No. 09-073; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a

Disability, Appeal No. 04-061). Under sufficiently egregious circumstances, SROs have found that an IHO has properly dismissed a parent's due process complaint notice for his or her failure to comply with an IHO's reasonable directives by not attending an impartial hearing either in person or by an attorney or advocate (see, e.g. Application of a Student with a Disability, Appeal No. 18-111 [finding that it was within the IHO's discretion to schedule the impartial hearing at a district location when the parent did not submit a formal request for a different location and to dismiss the due process complaint notice without prejudice when the parent and her advocates did not appear]; Application of a Student with a Disability, Appeal No. 09-073 [finding that an IHO had a sufficient basis to dismiss a matter with prejudice after the district had rested its case, parent's counsel had been directed by the IHO to produce the parent for questioning by the district at a following hearing date, and neither the parent nor counsel for the parent appeared at the subsequent hearing date]).

The parent argues that the IHO's conduct in declining to grant the parent's request for an adjournment "destroyed" any possibility of the parent having a meaningful opportunity to have the student's case heard and the result was not a "tainted hearing but a sham withdrawal entered under extreme duress without any Pendency" (Req. for Rev. at pp. 6-7).[17] The parent further argues that an impartial hearing should be conducted at a time and place which is "reasonably convenient to the parent and student involved" (Req. for Rev. at p. 5, citing 8 NYCRR 200.5[j][3][x]). However, unless specifically prohibited by regulation, IHOs are also provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "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. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

In this matter, on November 22, 2022, the parent emailed the IHO to request an adjournment to consider a resolution agreement, which the IHO denied because the IHO had expressly stated to the parties at the prehearing conference that if the case was not fully resolved by the date of the due process hearing, the hearing would proceed, and the case would resolve in that fashion (Oct. 31, 2022 Tr. p. 10; SRO Ex. 2).[18] Also, at the prehearing conference, the IHO

[17] During the impartial hearing, counsel for the parent indicated that the district consented to the request for an adjournment (Nov. 23, 2022 Tr. pp 12-13).

[18] It has been acknowledged that the district has been swamped with an unprecedented number of due process hearing requests and is facing corrective action and class litigation over long delays in that process (see New York City Department of Education Compliance Assurance Plan" [May 2019], available at https://www.regents.nysed.gov/common/regents/files/120p12d3.pdf; J.S.M. et al v. New York City Department of Education et al, 1:20-CV-00705 [filed 2/7/2020, EDNY]). As the task of bringing the impartial hearing system within the district into compliance is daunting, it is understood that considerations of judicial economy might weigh into how an IHO exercises his or her discretion in the conduct an impartial hearing. With this understanding, the IHO's decision to set firm expectations and deadlines for the parties to follow and to hold the parties to those expectations is a reasonable method for balancing the hearing system's need for efficiency with

informed the parties that the disclosure deadline for both a pendency hearing and the impartial hearing was November 16, 2022 (Oct. 31, 2022 Tr. pp. 15, 24). The parent did not disclose any evidence even after her multiple requests for a pendency hearing, which the IHO was willing to hold if there was a dispute over what the pendency services entailed (see Oct. 31, 2022 Tr. pp. 1-27; Nov. 23, 2022 Tr. pp. 1-16; IHO Decision at p. 2; SRO Ex. 2).

The parent also asserts that an adjournment was needed to properly disclose a November 20, 2022 neuropsychological evaluation report which the parent argues is the "crux" of her case (Req. for Rev. at p. 3);[19] however, the November 2022 neuropsychological evaluation was not known to the parent at the time of filing the September 2022 due process complaint notice.[20] On or about October 13, 2022, the district requested that the student undergo further evaluations (Nov. 23, 2022 Tr. p. 7), around seventeen days after the filing of the due process complaint notice in this matter (see IHO Ex. I). To say that the result of this evaluation is the crux of the parent's case is concerning as, at the time of filing the due process complaint notice, the parent was not aware that the evaluation was going to be conducted and none of the information contained in the evaluation report would have been known to the parent (see IHO Decision at p. 3 n. 8). The IHO also informed the parent that on November 18, 2022 the district informed the IHO that it would not waive the five-day disclosure rule (SRO Ex. 2 at p. 5). Therefore, the IHO was not unreasonable nor did she abuse her discretion by declining to adjourn this matter and by declining to waive the five-day disclosure requirement for the parent to submit the results of the November 2022 neuropsychological evaluation.

To the extent that the parent argues that it was improper for the IHO to engage in an off the record conversation and to refuse to permit the parent to make a brief statement on the record, the parent, while crying foul, does not assert any fact-specific harm with respect to these allegations nor does the hearing record otherwise support finding that the parent was harmed in any way. Review of the hearing record in this matter shows that the parties engaged in an hour long off the record conversation before the start of the November 2022 impartial hearing (see Nov 23, 2022 Tr. pp. 1-6). The IHO gave the parent opportunities to make a statement on the record during the impartial hearing (see Nov. 23, 2022 Tr. pp. 6-7, 11-14). Although the IHO did cut off counsel for the parent advising him that his statement was argument as to the merits of the hearing and that at that point he could either move to withdraw or the hearing would go forward, counsel for the parent has not provided any additional argument that was not addressed by the IHO as to why the IHO's actions were not proper (id. at pp. 14-15). Based on the hearing record, the IHO was not unreasonable nor did she abuse her discretion by having an off the record conversation

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fairness to the parties.

[19] State regulations set 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, federal and State regulations provide that a 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]). If a party fails to disclose all completed evaluations, the prohibition against introduction of evaluations is discretionary insofar as an IHO "may" bar a party from introducing an evaluation (34 CFR 300.512[b][2]; 8 NYCRR 200.5[j][3][xii][a]).

[20] As stated above, the IHO made note in her decision that the parent's original adjournment request pertained to the proposed settlement agreement from the district, not an evaluation (see IHO Decision at p. 3 n. 8).

prior to the start of the impartial hearing as the IHO gave both parties opportunities to be heard on the record and the parent has not suffered any harm as the IHO ultimately dismissed this matter without prejudice. There is nothing that prevented the parent from refiling a due process complaint notice.

C. Pendency

The parent argues that the IHO deprived the student of a basic fundamental right by refusing to conduct an evidentiary hearing on the issue of pendency.

Initially, the student's right to pendency is evaluated separate from the substantive claims alleged in the due process complaint notice (see Mackey Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 160-61 [2d Cir. 2004], Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 459 [S.D.N.Y. 2005]). While the parent's substantive claims were withdrawn and the IHO issued an order of termination making the withdrawal without prejudice, the student's right to pendency automatically attached as of the filing of the due process complaint notice on September 26, 2022 (see 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see also Child's Status During Proceedings, 71 Fed. Reg. 46, 710 [2006] ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]). Considering the focus on maintaining the status quo during the proceeding and the time-sensitive nature of a pendency determination, an IHO may and generally should promptly resolve a pendency dispute (see Murphy v. Arlington Central Sch. Dist., 297 F. 3d 195, 199-200 [2d Cir. 2002]; see also 8 NYCRR 276.1[c]; "Questions Relating to Impartial Hearing Procedures Pursuant to Sections 200.1, 200.5, and 200.16 of the Regulations of the Commissioner of Education, as Amended Effective February 1, 2014," at p. 7, Office of Special Educ. [Revised Sept. 2016] [noting that, if there is a dispute regarding a student's pendency placement, it is incumbent upon the IHO "to render a written decision regarding pendency as soon as possible and prior to determining any other issue"], available at http://www.p12.nysed.gov/specialed/dueprocess/documents/qa-procedures-sep-2016.pdf). Additionally, as pendency has the effect of an automatic injunction, it is normally not necessary for a parent to bring a separate action for pendency and parents may raise a claim for pendency at any point during the hearing (M.R. v. Ridley Sch. Dist., 744 F. 3d 112, 123 [3d Cir. 2014]; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 701 [S.D.N.Y. 2006]). Accordingly, although pendency was not addressed by the IHO and the parents' claims raised in the due process complaint notice are deemed withdrawn without prejudice, the student's right to pendency and the parents' claim for reimbursement for pendency services are still live and may be addressed within the scope of this appeal.

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

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

In the request for review, the parent's attorney misapplied the legal standards regarding pendency as set forth under both Federal and state law by stating:

> The IHO stated explicitly that because the District agreed in principle that the student is entitled to the services, Pendency was not applicable. This shows a deep misunderstanding about the nature of Pendency. There are only two ways to effectuate a Pendency program in [the district]. Pendency by agreement or a pendency order. Without a formal agreement or order there can be no Pendency regardless of what the District representative might believe the child is entitled to. For the District to agree in principle is meaningless. For the District to suggest that they would agree but refuse to sign and participate in a Pendency hearing is disingenuous. For an IHO to not understand the mechanisms by which Pendency can be put in place is deeply concerning.
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> (Req. for Rev. at p. 4 [emphasis added])

As stated above, and as correctly identified by a representative from the parent's attorney's law firm at the prehearing conference and in the parent's request for review, pendency functions as an automatic injunction by virtue of statute which is triggered the moment a due process complaint notice is filed (see E. Lyme Bd. of Educ., 790 F.3d 452; Oct. 31, 2022 Tr. p. 8; Req. for Rev. at p. 4). However, this principle is contrary to parent's counsel's argument on appeal that pendency may only be enforced by agreement or by a pendency order (Req. for Rev. at p. 4). As pendency is an automatic injunction, there is no requirement to have the district sign a pendency agreement or any mandate that an IHO hold an evidentiary hearing because the district is already liable under the statute, especially in cases such as this one which failed to identify a genuine dispute. To require a hearing on pendency where the parties agree on the record as to what program constitutes pendency only adds an unnecessary layer to due process proceedings. Accordingly, the IHO correctly informed counsel for the parent that "there [wa]s nothing to adjudicate in a pendency hearing" as there were no facts in dispute as to the pendency services (SRO. Ex. 2 at p. 1). At the prehearing conference, the parent's attorney confirmed that the student was receiving services as recommended in a June 2015 IESP and the district agreed to fund those services under pendency (see Oct. 31, 2022 Tr. pp. 5-6, 8-9, 20-21). The district stated to the parent "[the district] is not contesting the student's entitlement to services and so long as the [district] receives all the service provider information that [it] need[s,] [t]he [district] is prepared to implement those services" (Oct. 31, 2022 Tr. p. 5).

To the extent that the parent asserts that the district refused to provide services through pendency until the parent agreed to sign a resolution or an agreement, the parent's contention is speculative and premature. There is no indication in the hearing record that the district refused to provide services until the parent signed a resolution agreement. In fact, as described above, evidence in the administrative hearing record shows the opposite—that the district was willing to fund pendency services upon submission of the required provider information (Oct. 31, 2022 Tr. p. 5). The IHO was correct that there was no requirement to hold a pendency hearing when there was no disagreement as to what program constituted the student's placement for the pendency of this matter. Pendency attached by virtue of the statute for the duration of the administrative due process proceedings, If the district refuses to fund services under pendency from September 26, 2022 through the date of this decision, the parent may file a new due process complaint notice containing allegations relating to that period of time.

VI. Conclusion

Based on the foregoing, there is insufficient basis in the hearing record to disturb the IHO's order of termination without prejudice or the IHO's conclusion that a hearing on pendency was not required in this matter.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 8, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER