The University of the State of New York

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

No. 18-143

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the East Islip Union Free School District

Appearances:
Ingerman Smith, LLP, attorneys for respondent, by Susan M. Gibson, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from an order of termination issued by an impartial hearing officer (IHO), which determined the parents' withdrawal of their due process complaint notice was "with prejudice." The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student

suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has a history of seizures, has "exhibited marked behavioral dysregulation," and "has significant difficulty engaging in appropriate behavior" (Parent Ex. G at p. 1).

A CSE convened on May 23, 2017, found the student eligible for special education as a student with an other health-impairment, and developed an IEP for the student for the 2017-18 school year (see Dist. Ex. 16). Specifically, the CSE recommended that the student attend a 12:1+1 special class with the support of a 1:1 aide and receive related services of three 30-minute sessions per week of group speech-language therapy, one 30-minute session per week of psychological counseling services, and one 30-minute session per week of occupational therapy (OT) (id. at pp. 10, 12). Further, the CSE recommended assistive technology and supplementary aids including breaks, clarification of assignments, modified classwork, and non-verbal cues (id. at pp. 11-12). The CSE also recommended a behavioral consultant (id. at p. 12). The CSE recommended the student receive extended school year services of a 12:1+1 special class (id. at p. 13).

The CSE reconvened on September 27, 2017 to review the student's placement (Dist. Ex. 18 at p. 1). The CSE indicated that the student had a successful summer in the extended school year program but began to have behavioral incidents at the beginning of the school year (id.).[1] The CSE indicated that the parent agreed to explore a smaller setting for the student with more social, emotional, and behavioral support (id.). The CSE agreed to place the student on home instruction for two hours per day with related services until an appropriate placement was secured (id.).[2] The student was placed on home instruction in September 2017 (Tr. pp. 158-59, 218).

On December 5, 2017, the CSE reconvened for a requested review (Dist. Ex. 20 at p. 1). The CSE recommended that the student be placed in an 8:1+1 special class in a board of cooperative educational services (BOCES) program with a full time 1:1 aide and related services (id. at p. 2). The meeting information summary attached to the December 2017 IEP noted that the parent did not agree with this recommendation as the parent indicated the student's physician recommended four schools and he wished to visit all of these schools before making a decision (id.).[3] The parent requested that the student remain on home instruction (id.).

The parent filed a due process complaint notice dated December 5, 2017 regarding the December 2017 CSE meeting (see Dist. Ex. 43). The parties resolved the issues raised by the parent by agreeing the student would remain on home instruction pending a CSE meeting in January 2018 to find an appropriate placement (Dist. Ex. 44 at p. 2).

On March 9, 2018, the CSE reconvened to conduct a review of the student's program (Dist. Ex. 22 at p. 1). The CSE noted that it reviewed the four schools to which the parent requested the district apply but that the student was not accepted for admission to any of these schools (id.). The CSE noted that it had previously obtained admission to BOCES for the student, the placement remained open, and the CSE continued to recommend that placement (id.). The parent was not in agreement with having the student begin a new placement at that time and provided medical information to support the request for continued home instruction (id. at pp. 1-2). The CSE agreed to keep the student on home instruction for the remainder of the 2017-18 school year (id. at p. 2).[4]

[1] The summer classroom teacher reported that the student, while in the half day program, "was able to maintain his behaviors with frequent reinforcement and limited academic demands" (Dist. Ex. 18 at p. 1).

[2] The September 2017 CSE noted that a screening packet was to be sent to a Board of Cooperative Educational Services program (Dist. Ex. 18 at p. 1). Although the CSE recommended that the student be placed on home instruction on September 27, 2018, the IEP was not modified under the "Recommended Special Education Programs and Services" section (id. at pp. 10-12). However, the district sent the parents a prior written notice indicating the student would receive home instruction until an appropriate placement is secured (Dist. Ex. 19 at p. 1).

[3] The December 2017 IEP indicated that the CSE's recommendation was for placement in the home public school district (Dist. Ex. 20 at pp. 10-12); however, the district sent the parents a prior written notice indicating that the CSE's recommendation was for placement in the BOCES program (Dist. Ex. 21 at p. 1).

[4] Again, the March 2018 IEP was not modified under the "Recommended Special Education Programs and Services" section (Dist. Ex. 22 at pp. 10-12). The district sent the parents a prior written notice, which indicated that the student would remain on home instruction for the remainder of the school year (Dist. Ex. 23 at p. 1).

The CSE convened on June 5, 2018 for an annual review (Dist. Ex. 24 at p. 1). The CSE recommended an 8:1+1 special class with the support of a 1:1 aide (id. at pp. 8, 10). The CSE recommended related services of one 30-minute session per week of group speech-language therapy, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of individual psychological counseling services, one 30-minute session per week of group psychological counseling services, and one 30-minute session per week of group OT (id. at pp. 8-9). Further, the CSE recommended supplementary aids and program modifications, which included breaks, clarification of assignments, modified classwork, and non-verbal cues (id. at pp. 9-10). The CSE also recommended a behavioral consultant (id. at p. 10). In addition, the CSE recommended for extended school year services a 12:1+1 special class, two 30-minute sessions per week of group speech-language therapy, and an individual aide (id. at p. 11).

A. Due Process Complaint Notice

The parents filed a due process complaint notice dated June 25, 2018 (Dist. Ex. 1 at p. 12). Due to the nature of the appeal, a full recitation of the parents' claims is not necessary. Briefly, the parents contested the June 2018 IEP asserting that it did not address the student's needs and denied the student a free appropriate public education (FAPE) (id. at pp. 9-10). The parents' allegations centered around the CSE's decision to end home instruction without an appropriate plan and recommendation that the student attend an 8:1+1 special class placement (id.). For relief, the parents requested a finding that the student's current educational placement was home instruction for both the extended school year and the 2018-19 school year and that the student remain in home instruction with related services until the parents' claims were resolved (id. at p. 11). The parents further requested findings related to the CSE's determinations and an order that the CSE reconvene to develop an appropriate program, including that the CSE formulate a plan to transition the student back to school (id. at pp. 11-12). Finally, the parents requested reimbursement "for the costs attendant to any and all educational and remedial services, including home tutoring" (id. at p. 12).

B. Impartial Hearing and Decision

On August 1, 2018, the parties participated in a prehearing conference (IHO Ex. II at p. 1).[5, 6] During this prehearing conference the parties discussed settlement and the district acknowledged that the student's pendency placement, as of September 28, 2018, was home instruction; however, the district asserted that pendency for June and July 2018 was an 8:1+1 special class with related services pursuant to the June 2018 IEP recommendation for extended school year services (id.). The parent indicated that he provided home instruction at his own

[5] Although a transcript for the August 1, 2018 prehearing conference was not entered into the hearing record, the IHO entered a written summary of the prehearing conference into the hearing record, which is permissible pursuant to State regulation (see IHO Ex. II at pp. 1-2; 8 NYCRR 00.5[j][3][xi]). However, the August 1, 2018 prehearing conference summary indicates that another prehearing conference took place on July 24, 2018 and there is neither a transcript nor summary of that conference in the hearing record (IHO Ex. II at p. 1).

[6] There were two other prehearing conferences on September 18, 2018 and October 3, 2018 (see Tr. pp. 1-22, 30-64).

expense and was seeking reimbursement (id.). Further, it was noted that both parties requested an extension of the decision deadline in order to continue settlement negotiations, which the IHO granted (id.).[7]

On October 15, 2018, parents' counsel informed the IHO and district that he was no longer representing the parents and directed them to address all future communications to the parents (IHO Ex. III at p. 1). On October 22, 2018, the parents notified the IHO and district that due to "a lack of communication with and support from" counsel, the parents ended the relationship (id. at p. 2). The student's father indicated that he would personally represent his son at the impartial hearing on October 30, 2018 (id.).

On October 30, 2018, the parties proceeded to an impartial hearing, and the district presented testimony from one witness (see Tr. pp. 76-316).

The parents submitted a written request for a withdrawal of the due process complaint notice without prejudice on November 15, 2018 (IHO Ex. V at p. 1). According to the document, the IHO requested that the parents "outline the reasoning" for their request for withdrawal (id.).[8] The parents indicated that they were seeking to withdraw the due process complaint notice due to financial hardships caused both by the proceeding and outside factors (id.). The parents alleged that, because the district failed to provide the student with home instruction for six weeks over the summer and the first seven weeks of the 2018-19 school year, the parents had to provide the student with home instruction at their own expense (id.). In addition to the cost of home instruction, the parents contended that they had to pay their attorney for his work relating to this proceeding (id. at p. 2). The parents alleged that, although the district began providing the student with home instruction in the eighth week of the 2018-19 school year, the quality of this instruction was so poor that the parent was forced to hire a private tutor to ensure the student maintained his "third grade competence" (id.). The parents also indicated that the student's father was unable work due to a serious illness and disability, which added to the financial hardships the family was enduring (id.). The parents noted that representing themselves was time consuming and that, upon balancing the urgent medical needs of their son, they opted to continue to focus their time and energy on their son's "health and academic progress in lieu of pursuing the time-consuming and complex hearing process" (id.). The parents reiterated claims raised in the due process complaint notice to support their arguments and contended that their allegations in the due process complaint notice had merit (id. at pp. 2-5). The parents also raised claims regarding the proceeding and other actions by the district since the due process complaint notice was filed, asserting that the district witness made false statements under oath and that the district retaliated against the parents for filing the due process complaint notice (id. at pp. 3-5). The parents indicated that, although they did not intend to further pursue the claims raised in the due process complaint notice, "it would clearly be

[7] The IHO granted additional extension requests on October 3, 2018 and October 30, 2018 following requests by both parties due to the availability of witnesses (IHO Ex. II at pp. 3-4).

[8] While not otherwise documented in the hearing record, the IHO decision indicates that the parents requested a withdrawal of their due process complaint notice on November 2, 2018, that the district requested the withdrawal be with prejudice, and that the IHO gave the parties an "'notice and an opportunity to be heard'" (IHO Decision at p. 3).

imprudent to dismiss the allegations" and requested the due process complaint notice be withdrawn without prejudice (id. at p. 5).

The district submitted a written objection to the parent's request to withdraw their due process complaint notice without prejudice on November 15, 2018 (IHO Ex. IV at p. 1). The district asserted that there were three prehearing conferences and one full day of hearing which required extensive preparation and "great monetary cost to the [d]istrict" (id. at p. 2). The district asserted that the parent would have an unfair advantage if they were to re-file another hearing request with the same claims from the June 25, 2018 due process compliant notice because the district essentially laid out its case during the first day of hearing (id.). The district further argued that allowing a withdrawal without prejudice could require the district to duplicate work already done and create unnecessary duplication of time and expense, thereby placing an unwarranted burden on the district (id.). The district requested that the matter be withdrawn with prejudice (id.).

Each party submitted a reply to the other party's submissions (see IHO Exs. VI; VII). The district again requested that the matter be withdrawn with prejudice and asserted that the parent's letter did not comply with the IHO instructions (IHO Ex. VI). The district contended that the parents provided no basis as to why they were requesting a withdrawal without prejudice, "other than the fact that [they] [were] looking for another bite at the apple" (id.). The district reiterated that it should not have "to duplicate time, work and expense because the parents do not wish to proceed with a hearing they insisted go forward" (id.). The parents responded noting that, while district counsel represented that due process was intended as "an inexpensive and expeditious method for resolving disputes," it is obvious that the proceeding would take many months at a high cost for both parties (IHO Ex. VII at p. 1). The parents indicated a desire to settle the matter but "were not offered the opportunity to engage in concrete negotiation measure prior to the commencement of the due process hearing" (id. at p. 2). The parents also asserted that the student's recent health complications overlapped with the start of the impartial hearing and caused them to shift their priorities from the hearing to monitoring the student's health and coordinating medical visits (id.). Further, the parents contended that the district did not reveal its entire legal strategy, but merely that it would continue to deny the allegations, which was "not entirely unanticipated and would not provide [them] with any advantage" should they pursue the claims in the future (id. at p. 3). The parents indicated that they did not intend to pursue the claims at this point but argued that "it would clearly be imprudent to dismiss the allegations" due to their seriousness (id.).

Following the parents' request to withdraw the June 25, 2018 due process complaint notice without prejudice, the IHO issued an order of termination on November 30, 2018 dismissing the parents' due process complaint notice with prejudice (IHO Decision at p. 5).[9] The IHO held that "it would be overly burdensome and prejudicial to the District to dismiss the hearing without prejudice" as preparing for the hearing involved "significant District effort, expense, [and] diversion of staff, and a full day of hearing, with both parties' participation, was held" (id. at p. 4).

[9] 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).

The IHO found that to "allow a withdrawal without prejudice would thwart the intent of the IDEA" (id.). Further, the IHO found that the parents' arguments were contradictory as the parents restated with great length the merits of the allegations, which favored continuing the hearing, not withdrawal (id.). The IHO determined that the parents' dismissal of their counsel was not a justification for withdrawal without prejudice (id.). Moreover, the IHO noted that the medical conditions of the student and his father were unfortunate, but that these conditions and financial hardships pre-existed the due process complaint notice and would be likely to continue if the parents re-filed the due process complaint notice at a later time (id. at p. 5). The IHO also determined that the parents' argument that they were willing to engage in settlement discussions did not support withdrawal without prejudice as it was "unrealistic for the parent[s] to appear for the first day of hearing expecting settlement discussions rather than testimony" (id.). The IHO found that parents had "given no compelling reason that this hearing should not have continued and concluded after both parties invested so much time and effort" (id.). The IHO noted that the parents did not indicate "when or how [they] will seek redress" and held that it would be unfair to "leave the District 'hanging' as to when and how the parent[s] intend[] to re-file the D[ue] P[rocess] C[omplaint notice]" (id.). Therefore, the IHO dismissed the due process complaint notice with prejudice (id.).

IV. Appeal for State-Level Review

The parents appeal. The parents request that the IHO decision dismissing the due process complaint notice with prejudice be reversed and that instead the due process complaint notice be dismissed without prejudice.

The parents assert that the IHO demonstrated bias during the impartial hearing in favor of the district. Specifically, the parents contend that the district intentionally selected the IHO because he has a history of favoring the district. The parents object to the IHO because he did not address the student's pendency placement, or order reimbursement for the costs thereof, which the parents assert is evidence of bias. Moreover, the parents allege that, on the first day of the impartial hearing, the IHO commenced the proceedings without allowing for the parents and district to negotiate a settlement, permitted the district witness to make misleading statements without allowing the parents to clarify, and did not allow the parents time to prepare for cross-examination of the district's witness despite their request for a break. Further, the parents assert that the IHO only took into consideration the needs of the district when scheduling the hearing dates, which caused the hearing to be drawn out over several months and prevented it from being completed expeditiously.

The parents contend that the IHO failed to address the issue of pendency. The parents assert that the student's pendency placement was home instruction and the district failed to provide the student with home instruction. Due to this failure, the parents allege that they had to pay for home instruction out of their own pocket. Therefore, the parents request reimbursement for the cost of home instruction they had to obtain for the student for the summer and the first seven weeks of the 2018-19 school year.

Finally, the parents request that the due process complaint notice be deemed withdrawn without prejudice and that the IHO's decision be reversed on this issue. The parents allege that they were forced to withdraw the due process complaint notice due to financial hardships as they

had to privately pay for home instruction and had no money left to pay for an attorney to represent them during the proceeding. The parents contend that these hardships have prevented them from continuing the proceeding despite having legitimate claims against the district.

In its answer, the district generally admits or denies the parents' specific allegations and asserts that the IHO properly dismissed the parents' due process complaint notice with prejudice. The district contends that there is no evidence of actual or apparent bias on the part of the IHO and that the parents did not raise such an assertion during the impartial hearing. Further, the district contends that, because there was no final determination with respect to any issues raised in the due process complaint notice, an SRO is without jurisdiction to address those claims on appeal. The district also asserts that the parent is not entitled to reimbursement for the cost of home instruction "as the SRO has no jurisdiction to award the same absent a final IHO ruling on such issue."

V. Discussion

A. Impartial Hearing Officer Bias

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

Here, the hearing record does not support a finding that the IHO demonstrated bias in favor of the district. Initially, to the extent that the parent disagrees with the conclusions reached by the IHO, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083). Further, overall, the hearing record demonstrates that the IHO was patient with the parents and attempted to help guide them through the process of entering evidence and questioning witnesses.

Turning to the parents' specific allegations, the parents' blanket assertion that the IHO was not properly appointed, without evidence to support such an allegation, does not justify a finding that the IHO or district acted improperly. Impartial hearing officers are appointed by a board of

education in accordance with a specific rotational selection process (Educ. Law § 4404[1]; 8 NYCRR 200.2[b][9], [e][1], 200.5[j][3][i]). There is no indication in the hearing record that the district deviated from this process.

Next, contrary to the parents' assertion, the IHO did take into consideration the parents' schedule when setting the hearing dates, as the hearing was initially scheduled to start on October 3, 2018, but that date was cancelled due to the availability of the parents and was rescheduled as a prehearing conference (Tr. pp. 4-5, 20; see IHO Ex. II). Further, the parents' allegation that the IHO should not have proceeded with a hearing on October 30, 2018 and instead should have allowed for further settlement negotiations is not supported by the hearing record. The hearing record demonstrates that the parties agreed to begin witnesses testimony on October 30, 2018 (Tr. pp. 5-6; IHO Ex. II at p. 3).[10] Also, there is no indication from the October 30, 2018 hearing transcript that the parents requested the impartial hearing be adjourned for further settlement negotiations (see Tr. pp. 76-316).[11]

In regard to the parents' allegation that the IHO permitted the district's witness to lie during testimony and that the parents were not permitted to prepare for cross-examination, the hearing record demonstrates that the IHO explained to the student's father that he would have an opportunity to cross-examine the witness and to testify himself (Tr. p. 166). The parents did not request a recess prior to the start of his cross-examination of the district witness (Tr. pp. 271-72). Although the parents complained that the student's father did not feel prepared during cross-examination of the district witness, the student's father was able to cross-examine the district witness (Tr. pp. 272-308). Additionally, although the student's father expressed frustration at not having time to organize his questions (Tr. pp. 286-87, 307), the IHO explained that he could give 5 to 10 minutes in between direct and cross-examination, and at times assisted the student's father in framing questions (Tr. pp. 286, 307-08; see Tr. pp. 276-79, 280-81, 287-92, 303-04). Further, the hearing record demonstrates that the IHO was patient, gave the parent guidance, attempted to help clarify the parents' questions, and allowed the parents to question the district witness (see generally Tr. pp. 272-308). Based on a review of the hearing record, the parents' allegation that the IHO demonstrated bias is without merit.

B. Withdrawal of Due Process Complaint Notice

With regard to the parents' assertion the IHO erred by dismissing the due process complaint notice with prejudice, pursuant to State regulation, a due process complaint notice may be withdrawn by the party requesting a hearing (see 8 NYCRR 200.5[j][6]). Except in cases where a party withdraws the due process complaint notice prior to the first date of an impartial hearing, a party seeking to withdraw a due process complaint notice must immediately notify the IHO and

[10] In response to the district's inquiry as to whether the October 30, 2018 hearing was going to proceed, the parents sent an October 22, 2018 e-mail, in which the parents indicated that they would be personally representing the student and would be delivering their exhibits related to the hearing to the district that same day (IHO Ex. III at p. 2).

[11] The IHO encouraged the parties to continue to negotiate the issues, specifically relating to updated evaluations of the student (Tr. pp. 136-45).

the other party, and the IHO "shall issue an order of termination" (8 NYCRR 200.5[j][6][ii]). In addition, a withdrawal "shall be presumed to be without prejudice except that the [IHO] may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice" (8 NYCRR 200.5[j][6][ii]). The IHO's written decision that such withdrawal shall be "with or without prejudice" is binding upon the parties unless appealed to an SRO (8 NYCRR 200.5[j][6][ii]).[12]

The IHO's decision reflects that the district requested that the parents' request for a withdrawal be with prejudice (IHO Decision at p. 3). As discussed above, at the IHO's direction, the parties submitted written briefs outlining their positions as to whether the parents' withdrawal of their due process complaint notice should be with or without prejudice (IHO Exs. IV-V). The parties also submitted replies to the opposing party's briefs (IHO Exs. VI-VII). The IHO's decision reflects that the IHO evaluated and considered both parties arguments in ordering termination of the due process complaint notice with prejudice (see IHO Decision at pp. 3-5). The IHO provided a rational basis for why he dismissed the due process complaint notice with prejudice, addressing the parents' reasoning for requesting withdrawal without prejudice (id.). The parents have not presented a compelling reason on appeal to disturb the IHO's determination. As the IHO noted, the parents continue to make several substantive allegations against the district; however, the parents have indicated that they do not know if they will re-file a due process complaint notice regarding the claims contained in the due process complaint notice in the future. Although, the parents' allegations against the district and allegations of financial hardship in continuing the proceeding are sympathetic, the IHO correctly pointed out that both parties have invested significant time into the proceedings already.[13] Accordingly, the IHO's determination that it would be unfair and not in the interest of justice to allow a withdrawal without prejudice will not be disturbed and the due process complaint notice is dismissed with prejudice.

C. Pendency

Notwithstanding the dismissal of the parent's due process complaint notice with prejudice, the issue of the student's pendency placement remains outstanding. 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 parents' substantive claims were withdrawn and the IHO issued an order of termination making the withdrawal with prejudice, the student's right to pendency automatically attached as of the filing of the due process complaint notice on June 25, 2018 (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.

[12] If a party "subsequently files a due process complaint notice within one year of the withdrawal of the complaint that is based on or includes the same or substantially similar claims as made in a prior due process complaint notice that was previously withdrawn by the party," the district shall appoint the same IHO who was appointed to the "prior complaint unless that [IHO] is no longer available to head the re-filed due process complaint" (8 NYCRR 200.5[j][6][iv]).

[13] As previously noted, there were three pre-hearing conferences and a full day of proceedings with witness testimony (see Tr. pp. 1-316; IHO Ex. II).

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 with 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.[14]

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. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906; 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]; O'Shea, 353 F. Supp. 2d at 455-56). 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

[14] While the district contends that an SRO does not have jurisdiction over pendency because the order of termination is not a final decision, the district does not explain why the order of termination should not be considered a final decision, from which either party may appeal to an SRO, or why the IHO's failure to address pendency cannot be the subject of an interim or final appeal. State regulation provides that "[t]he decision of an [IHO] that a withdrawal shall be with or without prejudice is binding on the parties unless appealed to the S[RO]" (8 NYCRR 200.5[j][6][ii]). Further, State regulation provides parties with the right to appeal from an IHO's ruling, decision, or failure or refusal to issue a determination on pendency on an interim basis, prior to issuance of a final decision (8 NYCRR 279.10[d] [emphasis added]).

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. 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 [OSEP 2007]).

During the impartial hearing, the district agreed that the student's pendency placement was home instruction (IHO Ex. II at p. 1). However, the district asserted that home instruction was only the student's pendency placement as of September 2018 and argued that pendency for the summer was the extended school year program recommended in the June 2018 IEP (id.).[15, 16] The

[15] Although the August 1, 2018 prehearing conference summary indicates that the June 2018 CSE recommended an 8:1+1 special class with related services for the summer (IHO Ex. II at p. 1), the June 2018 IEP reflects a recommendation for a 12:1+1 special class with a 1:1 aide and related services of speech-language therapy for the summer (Dist. Ex. 24 at p. 11).

[16] The district again acknowledges in its memorandum of law filed with its answer that the student's pendency

district's position that pendency should be based on the summer program set forth in the June 2018 IEP is without merit because the parent objected to the June 2018 CSE's recommendations by filing a due process complaint notice initiating this proceeding on June 25, 2018; further, the recommendations in the June 2018 IEP were never implemented (Dist. Ex. 1 at p. 1; see Dist. Ex. 24 at p. 2).[17] In contrast, the student was placed on home instruction by the CSE in September 2017 and he remained on home instruction for the remainder of that school year. Each subsequent IEP created by the CSE, until the challenged June 2018 IEP, allowed the student to remain on home instruction pending the identification of an appropriate placement (see Dist. Exs. 20 at pp. 1-2; 22 at pp. 1-2). As the parent rejected the June 2018 IEP, an appropriate placement had not been identified as of the filing of the due process complaint notice and home instruction was the student's then-current educational placement. The district has conceded that the student's pendency placement was home instruction for the 10-month portion of the 2018-19 school year; however, the district has not provided any reasonable justification as to why home instruction should not also be considered the student's pendency placement for the months of July and August 2018. If the CSE had intended to recommend that home instruction was not to be provided during the summer services, the CSE had multiple opportunities to clarify on an IEP that the recommendation for home instruction was for the 10-month portion of the school year only; however, the CSE did not formalize home instruction on an IEP, but rather recommended it until an appropriate placement could be located (see Dist. Exs. 18 at p. 1; 20 at p. 2; 22 at p. 2). Therefore, the parent is entitled to reimbursement under pendency for the student's home instruction for July and August 2018.

With respect to the beginning of the 10-month portion of the 2018-19 school year, the district alleges that it attempted to provide the student with home instruction in September 2018 but the parent refused those services and that, had the hearing continued, it would have provided evidence to support its allegation (Dist. Mem. of Law at p. 8). Although, the parent is entitled to reimbursement under pendency for the months of July and August 2018, the hearing record is insufficient to direct reimbursement for the first seven weeks of the 10-month 2018-19 school year as requested by the parent. Since the parents withdrew their due process complaint notice, the hearing record was not fully developed regarding these allegations. A finding regarding reimbursement for home instruction under pendency as of September 2018 cannot be made without additional facts.

It is noted that pendency determinations do not require exhaustion at the administrative level before bringing such an action to state or federal court (Cruz v. New York City Dep't of Educ., 2019 WL 147500, at *8 [S.D.N.Y. Jan. 9, 2019] [claims for injunctive relief compelling a school district to comply with its stay-put obligations under IDEA does not require exhaustion of administrative remedies]; Murphy, 297 F.3d at 199-200; see E. Lyme Bd. of Educ., 790 F.3d at 455 [noting that "[a]pplying the exhaustion requirement to stay-put claims would create a loop of marathon proceedings, since each new round of administrative proceedings would itself be subject to a fresh round of judicial review"]). Accordingly, the parents may bring their claims regarding

placement from September 2018 through June 2019 was home instruction, but asserted that it did not concede the student's pendency placement for the summer of 2018 because "home instruction was not [the student's] placement for the summer of 2017" (Dist. Mem. of Law at p. 2).

[17] In the alternative, the parent requested an immediate hearing on the issue of pendency (Dist. Ex. 1 at p. 11).

reimbursement for pendency services in State or federal court should they decide they wish to pursue them. Alternatively, as this proceeding was withdrawn with prejudice only as to the substantive claims raised in the due process complaint notice and, as discussed above, the parents' claims regarding pendency are separate from the claims raised in the due process complaint notice regarding the provision of a FAPE, the parents may resort to the due process procedures to seek reimbursement for pendency services for the 2018-19 school year or if the district fails to offer the student a FAPE in the future.

VI. Conclusion

The due process complaint notice is dismissed with prejudice. The parent is entitled to reimbursement for the costs of the provision of home instruction under pendency for July and August 2018 upon presentation of acceptable proof of payment to the district.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the parent is entitled to reimbursement for home instruction provided in July and August 2018 upon presentation of proof of payment to the district in an acceptable form.

Dated: **Albany, New York**
January 18, 2018

SARAH L. HARRINGTON
STATE REVIEW OFFICER