The University of the State of New York

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

No. 20-203

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 New York City Department of Education

Appearances:
Law Office of Steven Alizio, PLLC, attorneys for petitioners, by Steven J. Alizio, Esq. and Justin B. Shane, Esq.

Judy Nathan, Esq., Interim Acting General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which dismissed without prejudice their claims against respondent (the district) for reimbursement of their son's tuition costs at the Cooke School (Cooke) for the 2020-21 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts, Procedural History and Due Process Complaint Notice

Given the undeveloped state of the hearing record in the present matter, a full recitation of facts relating to the student is not possible but is, in any event, unnecessary due to the procedural posture of the impartial hearing proceedings and the limited nature of this appeal.[1] No evidence in

[1] When the IHO dismissed the matter without prejudice no evidence had been admitted into the hearing record (IHO Decision at p. 1; see Tr. pp. 1-24). As such, in addition to a transcription of the administrative hearing, the district

this proceeding was marked for identification. According to a due process complaint notice filed on July 1, 2020, the parents' son has been found eligible for special education and related services as a student with autism, received a recommendation from the CSE receive 12-month services while placed in a 6:1+1 special class in a specialized school for the 2014-15 school year, but the parents rejected that offer and unilaterally placed the student in Cooke for the 2014-15, 2015-16, 2016-17, 2017-18 and 2019-20 school years. The student attended Cooke pursuant to settlement agreements with the district for all of the years prior to the 2019-20 school year, which remained the subject of an unresolved administrative due process proceeding at the time the instant due process complaint notice for the 2020-21 school year was filed.

With regard to the 2020-21 school year, the parents indicated that on January 8, 2020, a CSE convened to create an IEP for the student. The parents alleged that it had been approximately five and one half years since the CSE had last convened a meeting or developed an IEP for the student. The parents asserted that the January 8, 2020 IEP recommended that the student be placed in a 12:1+1 special class in a specialized school, including 12-month services for the extended school year (ESY), with related services of counseling once a week for 40 minutes in a group, occupational therapy twice a week for 40 minutes individually, speech-language therapy twice a week for 40 minutes individually and once a week for 40 minutes in a group and parent counseling and training.

In the due process complaint notice, the parents also alleged procedural and substantive violations of the IDEA related to the 2020-21 school year. The parents contended that the student was not evaluated in all areas of suspected disability and the district failed to consider relevant evaluative information concerning the student. The parents also asserted that the IEP did not adequately reflect the student's present levels of performance or full range of needs. The parents alleged that the 12:1+1 special class was not appropriately supportive and did not provide a sufficiently small class size and individual attention necessary to provide the student with a FAPE. They also contended that the district did not recommend appropriate levels of related services or appropriate and measurable goals and short-term objectives.

According to the parents, they submitted a 10-day notice of unilateral placement to the district June 16, 2020 in which they disagreed with the district's recommended program and placement for the student for the 2020-21 school year, and indicating that they would seek public funding from the district for their unilateral placement of the student at Cooke.

In their due process complaint, the parents requested pendency funding for Cooke under a theory that it was the student's "operative placement" at the time of the filing of the due process complaint notice. As relief, the parents sought funding from the district for the student's tuition at Cooke for the 2020-21 school year and special transportation.

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provided the following documents to the Office of State Review as the administrative record on appeal: the parent's due process complaint notice, the IHO's final written decision, an interim decision regarding consolidation, a notice of appearance by the district's attorney. In addition, as further described below, the parent attached documents to the request for review and requests that it be considered as additional evidence. Unless otherwise specified, all factual references in this decision are drawn from the parents' allegations in their July 1, 2020 due process complaint notice.

A. Impartial Hearing and Impartial Hearing Officer Decision

An impartial hearing officer (IHO Gewirtz) was appointed to hear the matter. The parties appeared before the IHO at an impartial hearing on November 18, 2020 which proceeded to address the issue of the student's pendency placement (Tr. at p 2). After both parties had made initial arguments with respect to pendency and the parents attorney inquired as to whether IHO Gewirtz would like the parties to brief the pendency issue (Tr. pp. 5-17), the IHO informed the parties that she was "up against compliance" (Tr. at p. 16) Specifically, IHO Gewirtz stated "If you'd like to brief the case, that's fine. I'm up against compliance. So if you have any applications regarding that, I can give you an opportunity to file a brief on that" (Tr. at pp. 16). In response, the parents' counsel stated that the parents could not request an extension of the compliance date given "the fact that the SRO has recently issued a decision that essentially holds that sort of request . . . against the [p]arent, especially when it comes to pendency" (Tr. at p. 16). Thereafter, the IHO determined that the compliance date had passed and raised the possibility of dismissing the case without prejudice:

> "Your compliance date has already passed. It's September 14th. If you'd like me to dismiss this without prejudice, and you can do it that way, that's fine too. But the compliance date has passed. This case was given to me on the 13th of November. I gave you as soon -- as soon as I had a date, I gave you my first available date. And you are here on November 18th, five days after I was assigned the case. But if there is no application, that's fine. I'll consider my options and act accordingly. So I don't know what else to say." (Tr. at p. 17)

The IHO noted that "You can ask for an adjournment, which I cannot grant, because there is no . . . extension of the compliance date as of now" and "[i]f I cannot render a decision with just hearing your testimony, I'm not going to be able to do that" (Tr. at p. 19). The IHO further stated that absent an extension of the compliance date "I will have no choice but to dismiss without prejudice. And you'll have to refile it." (Tr. at p. 19). The parents' attorney represented that the hearing could not conclude that day because the testimony of the student's mother was required and she could not testify because the district had provided a Greek translator and not a Cantonese translator as needed (Tr. at pp. 2, 21). Accordingly, IHO Gewirtz set an adjourn date of December 4, 2020 and informed the parties that the short adjournment would afford her some time to confer with the "[district] office" to determine if there were any options other than a dismissal of the proceeding without prejudice and also would provide the district additional time to secure a Cantonese interpreter (Tr. at pp. 22-23).

During the hearing, the district agreed that the basis for pendency lay in the unappealed September 14, 2020 decision by IHO De Leon related to the 2019-20 school year, but contended that, contrary to the parents' argument that pendency should begin on July 1, 2020, the date of the due process complaint concerning the 2020-21 school year, pendency instead should not did begin until September 14, 2020, the date of the IHO De Leon's unappealed decision (Tr. at pp. 4 -7).

On November 18, 2020, IHO Gewirtz issued an order dismissing the matter. She noted that she had been assigned as the IHO for the matter on November 13, 2020 and that a pendency hearing

commenced on November 18, 2020 (IHO Decision at p. 1). IHO Gewirtz also stated that she had notified the parties that the compliance date was September 14, 2020 and had asked if either party had any application (id. at p.1). She also stated that both parties represented that they were not asking to extend the compliance date and that she notified both parties that she had no authority to continue and would consider dismissing the case without prejudice. Finding that there "[was] no extension of the compliance date and that future hearing dates are required," the IHO proceeded to dismiss the complaint without prejudice and that "[a]ny future adjourned dates are vacated" (id. at pp. 1-2).

IV. Appeal for State-Level Review

The parents appeal from IHO Gewirtz's dismissal of their July 1, 2020 due process complaint notice. The parents argue that the IHO erred by basing her dismissal of the case on the failure of the parties to request an extension of the compliance date. The parents contend that the IHO should have issued an interim order addressing the student's pendency placement and scheduled an immediate substantive hearing date. The parents assert that the IHO improperly solicited a compliance date extension from the parties, and that the resulting dismissal due to the fact that neither party acceded to her request for an extension of the compliance date constituted reversible error. The parents further assert that the IHO's solicitation of a compliance date extension request from the parties demonstrated a lack of understanding of the relevant law and regulations and therefore deprived the parents of a hearing by a qualified IHO.

The parents also argue that the IHO erred by failing to find the district responsible for the expiration of the compliance date. The parents note that the "compliance date" expired prior to IHO Gewirtz's appointment to the matter because of the "well-publicized delay in the appointment of hearing officers in the DOE's impartial hearing system" (Req. for Rev. at p. 3). The parents contend that the district "should not be able to escape its financial obligations related to pendency due to delays in an impartial hearing system that is under the [its] control" (id.). In addition, the parents assert that the IHO improperly based on her dismissal of the due process complaint notice on the expiration of a compliance date, which is not an appropriate ground for dismissal.

The parents also argue that they were deprived of their due process rights because they were not provided with a Cantonese translator at the impartial hearing despite their multiple requests but were instead provided with a Greek translator. They further assert that the IHO deprived them of their right to present evidence because the student's mother could not testify at the impartial hearing due to the lack of a Cantonese interpreter. In addition, the parents contend that although they disclosed evidence prior to the impartial hearing, the IHO failed to address such evidence at the hearing and refused to enter the parents' evidence into evidence which resulted in an incomplete and undeveloped record.

The parents argue that IHO Gewirtz failed to deem the unopposed or unaddressed factual allegations included in the due process complaint notice to be admitted and did not hold the district to its burden of proof. According to the parents, the IHO erred as a matter of law by failing to deem the factual allegations included in the DPC that were unopposed or not addressed by the DOE and the unrebutted evidence to be admitted. The parents also argue that the IHO issued a decision that failed to include clear legal findings with citations to the record and legal authority

and instead only "surmised" that the she did not have authority to continue because the compliance date had expired.

The parents assert that the IHO displayed bias because she dismissed the due process complaint notice due to the expiration of the compliance date without determining any of the parents' claims, including pendency, thereby placing "her own interests ahead of those of [the student], which constitutes a disqualifying bias" (Req. for Rev. at p. 6).

The parents argue that the IHO erred by failing to issue a pendency determination finding that the student was entitled to pendency at Cooke with special education transportation which was the sole purpose of the November 18, 2020 hearing. The parents note that the district agreed that Cooke was the student's pendency placement as of September 14, 2020, the date of IHO De Leon's unappealed decision upon which pendency was based, and only disagreed with respect to whether pendency at Cooke should date further back to July 1, 2020, the date of the due process complaint notice, and whether transportation was included.

The parents state that they refiled their claims for the 2020-2021 school year on December 8, 2020, and a different IHO (IHO Cohen) was assigned to the refiled matter who has since held that pendency at Cooke commenced on December 8, 2020—the date on which Parents' 2020-2021 claims were refiled. Accordingly, the parents argue that if IHO Gewirtz's order of dismissal is not reversed on appeal, the student will be left without a funded pendency placement prior for the period between July 1, 2020 and December 7, 2020. Accordingly, as relief, the parents request reversal of IHO Gewirtz's order of dismissal, a finding that the student's pendency placement is Cooke with special transportation from July 1, 2020 and an order that the district fund the student's pendency placement at Cooke and special transportation from that date. The parents also seek the remand of the substantive claims contained in the dismissed due process complaint notice to another IHO for determination. Alternatively, if the SRO deems the record to be inadequately developed for purposes of a pendency determination, the parents request that the matter be remanded to a different IHO to develop the record and determine both pendency and the substantive issue contained in the dismissed due process complaint notice.

In an answer, the district responds to the parent's allegations with admissions and denials. The district contends that the student's entitlement to pendency at Cooke for the 2020–21 school arose on September 14, 2020, the date of the unappealed final decision for the student's 2019–20 school year and acknowledges "that is the position taken by the DOE at the November 18 pendency hearing" before IHO Gewirtz (Answer at p. 8). However, the district argues that IHO Gewirtz had no legal authority to extend the hearing to further develop the hearing record because State regulations specifically prohibit an IHO from "grant[ing] extensions on his or her own behalf or unilaterally issu[ing] extensions for any reason" (see 8 NYCRR 200.5[j][5][i]).[2] The district further asserts that the IHO appropriately afforded the parents' attorney every opportunity to request an extension of the compliance date in order to ensure that the record could be developed with the testimony of the student's mother and the admission of any documentary evidence that

[2] The district's argument on this ground is specious. It is true that an IHO may not grant an extension of time absent a request of a party, but it does not follow that the failure to receive an request for an extension of time from a party then requires the automatic dismissal of a due process complaint.

the parents sought to admit into evidence.[3] Accordingly, the district requests that the SRO affirm the dismissal by IHO Gewirtz of the due process complaint notice without prejudice.

V. Applicable Standards

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education 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 Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. for 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 (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented

[3] The parents' argument that the IHO was improper soliciting an extension of time was unavailing as she did not issue an extension. The available record, as a whole, indicates that she was informing the parties of how the timelines had been affected and was unwilling to proceed if no one was willing to bring the case into an extended timeline, but while she might have felt that would address matters going forward, at no time did she indicate that it would completely absolve the district of responsibility for prior delays. It was readily apparent that she was trying to make a broken system workable in this case.

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, 86 F. Supp. 2d at 366; 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).

VI. Discussion

A. Second Due Process Proceeding

As described in their request for review, the parents refiled a due process complaint notice concerning the 2020-21 school year which was assigned to a different IHO (IHO Cohen) on December 9, 2020. The parties proceeded to a pendency hearing on December 16, 2020 and IHO Cohen issued a pendency order dated December 28, 2020 (SRO Ex. D at p. 1). The parents have attached the December 8, 2020 pendency order to the request for review as SRO Exhibit D.

As an initial matter, IHO Cohen noted that both parties agreed that pendency funding at district expense for the student's placement a Cooke was proper based upon a decision dated September 14, 2020 wherein IHO De Leon found that the parents' unilateral placement of the student at Cooke for the preceding school year (2019-20) and ordered tuition funding (SRO Ex. D at p. 1). However, IHO Cohen stated that there was a pendency disagreement between the parties concerning the "start date" of the district's obligation to fund Cooke during the 2020-21 school year (SRO Ex. D at p. 2). She also noted the district's position that Cooke should not constitute the student's pendency placement unless the parents demonstrated that the program offered by Cooke during the 2020-21 school year was "substantially similar" to that for which tuition was awarded in the September 14, 2020 IHO Decision (id.).

With respect to the start date for the student's pendency services, IHO Cohen noted that the parents contended that pendency should "go back" to the initial due process complaint notice for the 2020-21 year which was filed on July 1, 2020 (SRO Ex. D at p. 2). IHO Cohen noted that

the July 1, 2020 due process complaint notice had been dismissed by IHO Gewirtz on November 18, 2020 and that the parties had filed a Notice of Intention to Seek Review (id.).[4]

In declining to find that the pendency start date was July 1, 2020, IHO Cohen found that "[i]t is not within my purview to review a decision of a hearing officer, to pre-empt a decision by the State Review Officer on appeal, or to make a pendency determination regarding a prior hearing request which has been dismissed" (SRO Ex. D at p. 2). Accordingly, IHO Cohen stated that "I will therefore not consider any pendency issues that arose prior to the filing of the current hearing request" and found that "[p]endency in this matter . . . relates back to the date the current hearing request was filed" (id.). IHO Cohen forecasted that the "[SRO] will address any issues related to the prior case."

With respect to the substantial similarity issue, IHO Cohen stated that she disagreed with the district's contention that the parents were required to prove that the program at Cooke for the current school year was substantially similar to the program ordered in the September 14, 2020 IHO Decision (IHO Pendency Decision at p. 2). Rather, she determined that the September 14, 2020 IHO Decision had "ordered funding of the program at Cooke," "[t]he Student continues to attend Cooke" and "[t]herefore, pendency is at Cooke" (id.). Accordingly, IHO Cohen ordered that "the student's pendency program as of December 8, 2020, and throughout the pendency of the proceedings, shall be at Cooke" (id.).

B. Dismissal Without Prejudice

The problems faced by the parties and IHO Gewirtz are almost certainly the result of systemic disfunction of the impartial hearing system in New York City.[5]

An IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may be granted consistent within regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). Pursuant to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]).

In this case, IHO Gewirtz said it best when she explained that she was appointed to hear the case months after the 45-day deadline for issuing a final decision had already elapsed (see Tr. at p. 17). No one suggested otherwise. What was left for the IHO Gewirtz to do was to try to

[4] A Notice of Intention to seek review is a precursor to initiating an appeal, and while it signals to the opposing party it must marshal the resources necessary to address the tight timelines in a State-level administrative review in a forthcoming appeal, it is also not uncommon that an appeal never materializes after such a notice is served.

[5] It is a well-documented problem in the district of "an unprecedented volume of special education due process complaints [that] is overwhelming the New York City due process system" (N.Y. Reg., July 29, 2020, at p. 15).

conduct a hearing in a manner not contemplated by federal regulation by a reasonable structure for proceeding with the impartial hearing such as establishing new timelines for her to issue a final determination.[6] But to be clear, there are no explicit rules in either State or federal regulation that specifically guide an IHO in how to address a case that is already untimely. Trying to follow the remainder of the rules is not per se unreasonable, but it is also clear timeline violations cannot be undone.

While I agree with the parents insofar as IHO Gewirtz's outright dismissal of their complaint achieved little in the way of correcting the procedural safeguards violations in this particular case (and may have just compounded the difficulties in reaching a practical solution), I cannot resolve what is essentially a systemic issue. As one court has explained, "systemic violations are often the result of implemented policies and procedures, [ ] administrative hearing officers do not have the ability to alter already existing policies" (J.L. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 465 [S.D.N.Y. 2018]] citing S.W. v. Warren, 528 F.Supp.2d 282, 294 [S.D.N.Y. 2007]).

The parents are entitled to be heard in a due process proceeding, but I do not agree with the them that "the IHO failed to deem the unopposed or unaddressed factual allegations included admitted." Their argument is just is another way of asserting that IHO Gewirtz should have issued a default judgment against the district, which can only be plausibly grounded in the State's statute governing the burden of proof in IDEA due process hearings (Educ. Law § 4404[1][c]). However, such default judgments are disfavored by the federal courts (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]; see also G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 F. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]). The IDEA itself is clear that an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). In a Burlington/Carter case in which the parent must carry their own burdens, or a compensatory education dispute, administrative hearing officers should not be rendering default judgments based on a complete absence of evidence about the disabled student. As the parents have explained, a new proceeding before IHO Cohen was commenced before this appeal was filed. The question that can be resolved, in this particular case, is how the parties' dispute should proceed from here.

C. Pendency

Although couched as a request to reverse the order dismissing the parents' due process complaint notice without prejudice, the gravamen of the parents' appeal is whether the time period for which the district is responsible for funding the student's pendency at Cooke for the 2020-21 school year commenced on July 1, 2020 (the date of the parent's first due process complaint notice concerning the 2020-21 school year), or September 14, 2020 (the date of the unappealed IHO decision which the district agrees established the student's pendency placement at Cooke) or December 8, 2020 (the date of the parent's refiled due process complaint notice for the 2020-21 school year as determined SRO D, the Pendency Order dated December 8, 2020). Whatever the wisdom, or lack thereof, of IHO Gewirtz's initial decision to dismiss the due process complaint

[6] The lack of an appropriate interpreter was clearly not the fault of the IHO either.

notice without prejudice due to the expiration of the 45-day timeline and the parents' reluctance to undertake the additional burden of requesting a further extension, reversal of that decision at this juncture would be the proverbial ship that has sailed, especially since another proceeding is now pending, and maintaining that proceeding is the most expeditious vehicle for obtaining some relief for the student in the form of pendency funding. This is a particularly germane consideration given that the parents have argued that systemic dysfunction in the administration of the impartial hearing system has led to delays in the assignment of IHOs and scheduling of hearing dates as occurred in the underlying matter.

The parents have refiled the due process complaint notice, and the matter was assigned to IHO Cohen who has issued an interim decision for the student. Accordingly, if I were to vacate the IHO Gewirtz's order of dismissal or remand to yet another IHO for the purposes of a pendency determination and determination of the underlying substantive IDEA issues, as requested by the parents, such relief would only confuse matters further as COHEN's interim decision is the only pendency order currently in effect for the student and the parents have clearly challenged IHO Gewirtz's final determination in this appeal. Remanding the proceeding that was before IHO Gewirtz would result in two competing proceedings on the same issue, which would not be permissible. This is the case even though IHO Cohen declined to consider the student's pendency prior to December 8, 2020 and de facto delegated the issue of pendency elsewhere. While it is understandable that IHO Cohen was reluctant to encroach upon a pending appeal, the piecemeal determination of the disputed aspects of a pendency placement for one school year by two different administrative hearing officers at different stages of the administrative process is not tenable. The undisputed facts that have been established to my satisfaction is that 1) the district has stipulated in this appeal that it is responsible for the stay-put funding of the student's placement at Cooke from September 14, 2020 to the present in accordance with the unappealed final decision of IHO De Leon in favor of the parent, which found Cooke was an appropriate unilateral placement for the student; and 2) the student has been entitled to a stay put placement under IDEA since due process was imitated on July 1, 2020 until the present.

One of the reasons that the parents argue that the student has been deprived of a stay put funding at Cooke from July 1, 2020 to September 14, 2020 is that IHO De Leon's decision was delayed for months after the 2019-20 hearing concluded. However, even if that argument was valid a valid reason, there is no evidence to that effect. I cannot tell when IHO De Leon's decision should have been rendered. If the parent's feel that is a valid argument, they should be allowed to return to the proceeding in which IHO Cohen has been presiding, and request to develop the record on that point, and provide the IHO with legal authority that is on point. With this appeal resolved and the proceeding before IHO Gewirtz laid to rest, the IHO can proceed with record development unencumbered by other, duplicative proceedings. This decision effectively leaves any modification of the IHO Cohen's pendency order within the sound discretion of the current IHO Cohen (or any successor IHO in that proceeding). IHO Cohen noted that she declined to address any issues regarding pendency that pre-dated the December 8, 2020 in part because she did not want to encroach upon a forthcoming appeal before the undersigned. But the hearing record is not adequately developed regarding the parent's allegations that IHO De Leon's proceeding was delayed. Given that I have declined to vacate IHO Gewirtz's order of dismissal IHO Cohen is left free has jurisdiction address the remaining pendency disputes in this case without concern of encroaching on pending matters or issuing a contradictory determination. Accordingly, to the

extent the parents continue to pursue pendency funding for Cooke and special transportation from the district beginning on July 1, 2020, they should do so in IHO Cohen's case.

Finally, I note that the allegations in this case—essentially that the student had not been reevaluated by the CSE for many years but nevertheless developed a new IEP for the student without reevaluating him are particularly troublesome, and, unless there is compelling evidence to the contrary, the parties' efforts toward completing the merits portion of the hearing – or even settling the 2020-21 matter amicably—could be far more productive use of their time than engaging in a protracted, complicated battle over stay-put.

VII. Conclusion

It was likely ill-advised to dismiss without prejudice the parents' July 1, 2020 due process proceeding, but vacating the IHO Gewirtz's dismissal accomplishes nothing in light of the fact that a second proceeding is pending, and the IHO in that proceeding may revisit the remaining pendency dispute if necessary, based upon the development of an evidentiary record. Accordingly, I will dismiss this appeal.

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

THE APPEAL IS DISMISSED.

Dated: Albany, New York
January 28, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER