The University of the State of New York

The State Education Department
State Review Officer
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No. 21-084

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

Judy Nathan, 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, pursuant to section 8 NYCRR 279.10[d] of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining the student's pendency (stay put) placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2020-21 school year. The district cross-appeals from the IHO's amended interim decision determining that pendency at the Cooke School and Institute (Cooke) began on September 14, 2020. The appeal must be dismissed. The cross-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 and Procedural History

The student in this case was the subject of a prior State-level administrative appeal (see Application of a Student with a Disability, Appeal No. 20-203) and as such the parties' familiarity with the facts and procedural history of the case—as well as the student's educational history—is

presumed and will not be repeated herein unless relevant to the disposition of the issues presented in this appeal.

A. Prior Administrative Proceedings

In a due process complaint notice dated October 17, 2019, the parents alleged that the district failed to provide the student a FAPE for the 2019-20 school year (Parent Ex. E at p. 4). After several adjournments on consent of the parties or for good cause, an impartial hearing was held on May 7, 2020 (id.). In a decision dated September 14, 2020, IHO De Leon found that the parents' unilateral placement of the student at Cooke for the 2019-20 school year was appropriate and ordered tuition for the 12-month program at Cooke (id. at p. 22).[1]

In addition, IHO De Leon discussed the parents' request for transportation during the 2019-20 school year (Parent Ex. E at pp. 20-22). The IHO held that the hearing record did not indicate the "student's need for special transportation during the 2019-20 school year" and more specifically, special transportation was not included in the student's 2019-20 IEP (id. at p. 21). Further, the IHO held that there was no evidence in the hearing record as to how the student was transported to and from Cooke for the 2019-20 school year (id.). However, the IHO held that "this does not constitute a determination regarding the student's entitlement to transportation as available to regular education students or suitable transportation as available to students attending nonpublic schools 'for the purpose of receiving services or programs similar to special education programs recommended' by the CSE" ([s]ee Educ. Law 3635; 4402[4][d])" (id.).

In a second due process complaint notice dated July 1, 2020, the parents alleged that the district failed to offer the student a FAPE for the 2020-21 school year and sought funding from the district for the student's tuition at Cooke for the 2020-21 school year together with special transportation to and from Cooke (see generally Parent Ex. F).

IHO Gewirtz was appointed to hear the matter and a hearing on the issue of pendency was held on November 18, 2020 (Parent Exs. C at pp. 1-2; D at pp. 1-2). During the impartial hearing, the district consented to tuition at Cooke "from the date of the unappealed findings of fact and decision, which would be from September 14, 2020" (Parent Ex. D at p. 4). The parents argued that the student was entitled to pendency at Cooke from the date the due process complaint notice was filed - July 1, 2020 (id. at p. 4).

On November 18, 2020, IHO Gewirtz issued an order of dismissal (see generally Parent Ex. C).[2] IHO Gewirtz noted that although the impartial hearing had proceeded on November 18, 2020, she notified the parties that the "compliance date" was September 14, 2020, and asked if either party had an application to extend the compliance date (Parent Ex. C at p. 1).[3] Since neither

[1] The Commissioner of Education has not approved Cooke as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] The November 18, 2020 decision was corrected on November 20, 2020 to add the Notice of Right to Appeal (Parent Exs. A at p. 3; C at p. 2).

[3] Parties and IHOs in due process proceedings involving this school district refer to the date that an IHO's decision

party requested an extension of the compliance date, IHO Gewirtz notified the parties that she "had no authority to continue and would consider[] dismissing the case without prejudice" (id.). Accordingly, the IHO dismissed the parents' due process complaint notice without prejudice (id.).

On or about November 23, 2020, the parents appealed IHO Gewirtz's decision dated November 18, 2020 for State-level review (Parent Ex. B). On January 28, 2021, the undersigned issued a decision, holding that

> "undisputed facts that have been established to my satisfaction [are] 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 [initiated] on July 1, 2020 until the present"

(Application of a Student with a Disability, Appeal No. 20-203). The undersigned further acknowledged the parents' argument that they felt "deprived of a stay put funding" from July 1, 2020 to September 14, 2020 because the September 14, 2020 decision was delayed (id.). However, that argument was premature because, as noted in that determination, there was no evidence of the delay in the hearing record, i.e., the date a decision should have been rendered. Ultimately, the undersigned declined to vacate the November 18, 2020 order of dismissal because a third due process proceeding, which is further described below, had already been commenced before IHO Cohen (id.). The undersigned left it to the sound discretion of IHO Cohen to allow the parties to be heard and address any outstanding pendency issues, to wit, "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" (id.).

B. Due Process Complaint Notice

As noted above, the parents filed a third due process complaint notice on December 8, 2020, alleging that the district denied the student a FAPE for the 2020-21 school year (see generally Parent Ex. A).[4]

More specifically, with respect to the 2020-21 school year, according to the parents on January 8, 2020, a CSE convened to create an IEP for the student. Further, according to the parents, the January 2020 IEP recommended a 12-month program consisting of a 12:1+1 special class placement in a specialized school, together with related services of one 40-minute session per week of group counseling, two 40-minute sessions per week of individual occupational therapy (OT), two 40-minute sessions per week of individual speech-language therapy, one 40-minute

is due under the IDEA timelines as the "compliance date," but that term is not specifically used in State or federal regulations.

[4] The December 8, 2020 due process complaint notice contained similar allegations of the district's denial of FAPE as was contained in the July 1, 2020 due process complaint notice that was dismissed on November 18, 2020 (compare Parent Ex. F with Parent Ex. A; see Parent Ex. C).

session per week of group speech-language therapy, and parent counseling and training (Parent Ex. A at p. 3).

In addition, the parents alleged several procedural and substantive violations of the IDEA related to the January 2020 IEP (Parent Ex. A at p. 6). The parents alleged that the student required a "small, structured, highly supportive and collaborative" class and the recommended 12:1+1 special class would not permit the student to make "meaningful progress" and would cause regression (id. at pp. 3-4). The parents also contended that the January 2020 IEP was predetermined as the district had failed to evaluate the student "for more than five years" and failed to consider reports from Cooke (id. at p. 4).

According to the parents, another CSE meeting was held on October 26, 2020, and again the district failed to conduct any evaluations of the student (Parent Ex. A at p. 5). The October 2020 CSE recommended a similar program and services as the January 2020 IEP: a 12-month program of a 12:1+1 special class in a specialized school, one 40-minute session per week of group counseling, two 40-minute sessions per week of group OT, one 40-minute session per week of individual speech-language therapy, three 40-minute sessions per week of group speech-language therapy, and parent counseling and training (id.). The parents argued that the October 2020 CSE meeting was untimely and created "nearly five months after" the student's 12-month services for the 2020-21 school year started (id.). As previously alleged in connection with the January 2020 IEP, the parents similarly argued that the district committed several procedural and substantive violations of the IDEA in connection with the October 2020 IEP (id. at pp. 6-7).

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 (Parent Ex. A at p. 8). As relief, the parents sought funding from the district for the student's tuition at Cooke for the 2020-21 school year, as well as appropriate door-to-door transportation to and from Cook, retroactive to July 1, 2020 (id. at pp. 8-9).

C. Impartial Hearing Officer Decisions

A pendency hearing was held on December 16, 2020 (Tr. pp. 1-49). In an interim decision dated December 28, 2020, IHO Cohen initially noted that both parties agreed that pendency funding at district expense for the student's placement at 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) was appropriate and ordered tuition funding (Dec. 28, 2020 IHO Decision). 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 (id.). 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. 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.[5]

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." 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." 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. 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." Accordingly, IHO Cohen ordered that "the [s]tudent's pendency program as of December 8, 2020, and throughout the pendency of the proceedings, shall be at Cooke."

Thereafter, on January 29, 2021 IHO Cohen was reappointed to this matter to address the issue of whether pendency should relate back to the date of the filing of the parent's second due process complaint notice filed on July 1, 2020 (Feb. 16, 2021 IHO Decision at p. 2). Another hearing was held on February 11, 2021 for the purposes of determining the "[s]tudent's pendency program from July 1, 2020 through December 7, 2020" (Tr. pp. 50-86; Feb. 16, 2021 IHO Decision at p. 2). In a decision dated February 16, 2021, the IHO determined that pendency continued to be at Cooke but that the district's obligation began on September 14, 2020, the date of IHO De Leon's unappealed decision (id. at p. 6).

At the February 2021 pendency hearing, the district did not take a "position on what the pendency program should have been from July 1, 2020 to September 14, 2020" and argued that pendency started on December 8, 2020 (Feb. 16, 2021 IHO Decision at p. 4). Further, the district alternatively argued that pendency was based upon an IEP for the 2013-14 school year (id.).

The parents on the other hand argued that pendency was based upon the student's "operative placement" at Cooke (Feb. 16, 2021 IHO Decision at p. 4). The IHO declined to direct that Cooke was the "operative placement" holding that "operative placement" refers to a placement by the district and not a unilateral placement (id.). The IHO held that pendency "was not established at Cooke until September 14, 2020" (id. at p. 6). Furthermore, the IHO held that since the parents unilaterally placed the student at Cooke in July 2020, "there would be no point in my establishing the exact pendency program which would have been in place at that time based upon an IEP from

[5] 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.

the 2013-2014 school year" (id.). Accordingly, the IHO held that pendency at Cooke began on September 14, 2020 (id.).

IV. Appeal for State-Level Review

The parents appeal. The central issue presented by the parents on appeal is whether the IHO erred in failing to find that the student's pendency placement at Cooke began on July 1, 2020. Moreover, the parents contend that the IHO failed to address their request for transportation during pendency.[6]

The parents argue under Application of a Student with a Disability, Appeal No. 20-203, that the student is entitled to pendency since July 1, 2020 (Req. for Rev. at p. 3). The parents contend that when the IHO failed to make a pendency finding as of July 1, 2020, the student was left without a pendency program for over two months which was an "impossible result" (id.).

Next, the parents argue that the IHO failed to address the fact that the district abdicated its responsibility to offer the student a pendency placement as of July 1, 2020. The parents argue that at the pendency hearing the district offered an alternative position that an IEP developed for the 2013-14 school year was pendency. However, as the parents argue, the district failed to establish through witnesses or documentation that the 2013-14 school year IEP was implemented. The parents contend that the IHO acknowledged the district's burden to establish pendency since July 1, 2020, but then determined there was "no point" to determine pendency as of July 1, 2020 (Req. for Rev. at p. 4). Furthermore, the parents argue that the district's failure to implement pendency should result in a finding that Cooke together with transportation was the student's pendency as of July 1, 2020.

Additionally, the parents contend that the IHO erred in determining that "operative placement" does not refer to a unilateral placement (Req. for Rev. at p. 6). It is the parents' contention that "the only factor capable of offering the stability and consistency for which the pendency provision of the IDEA was created" was the student's "operative placement" functioning (for six consecutive years) as of July 1, 2020 which was Cooke (id. at p. 7).

Further, the parents argue that they did not contribute to the delay of the issuance of the September 14, 2020 decision, and the district acknowledged that the delay was caused by the district's "broken impartial hearing system" (Req. for Rev. at p. 7). The parents contend that if IHO De Leon followed the timelines of 8 NYCRR 200.5(j), a decision would have been rendered by July 1, 2020 (id. at p. 8). It is the parents' contention that allowing the district to "escape its financial pendency obligations" through no fault of the parents is "contrary to the equitable considerations set forth in Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 164-65 (2d Cir. 2004)" (id.). Furthermore, the parents argue that the IHO erred in declining to consider equitable considerations in determining pendency (id.).

[6] As the IHO determined that special transportation was not a part of the student's pendency, the issue of special transportation will not be considered as part of pendency in this appeal. The parties are free to litigate the issue of special transportation during the merits phase of the impartial hearing.

Procedurally, the parents argue that the IHO should not have been reassigned to this case and that her reassignment to this case was outside the rotational process as set forth in 8 NYCRR 200.5(j)(3)(i) (Req. for Rev. at p. 9).[7] As a final basis for the appeal, the parents contend that the IHO was not impartial in rendering the decision due to a past relationship with a Cooke employee (id. at p. 10).

In their request for review, the parents submitted three proposed exhibits as additional evidence: 1. SRO Exhibit A, an email exchange (January 29, February 1, February 3, February 4, and February 11, 2021) between the IHO and counsel for the parties attaching a December 2013 IEP, IHO Cohen's reassignment to the case, and pendency arguments; 2. SRO Exhibit B, an email exchange (January 29, and February 1, 2021) between the Director of Case Management for the New York City Department of Education and parents' counsel regarding the reappointment of IHO Cohen; and 3. SRO Exhibit C, an email exchange (February 16, 2021) between IHO Cohen and parents' counsel regarding the IHO's recusal.

In an answer, the district denies the material allegations contained in the parents' request for review. In general, the district seeks to vacate the February 16, 2021 decision. In the alternative, the district argues that even if pendency was effective prior to December 8, 2020, the date the due process complaint was filed, it should not be effective earlier than September 14, 2020. The district contends that since the IHO found that the September 14, 2020 decision "was the definitive source of pendency" there is no need to determine pendency prior thereto (Answer at p. 8). In the alternative, the district argues that if a date prior to September 14, 2020 is considered, that the undersigned should consider a December 12, 2013 IEP as the "source of pendency" (id. at pp. 8-9). In connection with this argument, the district submits two proposed exhibits as additional evidence for consideration. Further, the district asserts that the parents' argument that Cooke is the "operative placement" cannot be sustained on the facts of this case, and specifically that the September 14, 2020 decision became the source of pendency. Finally, in its answer the district argues that IHO Cohen was properly reassigned to this case, that IHO Cohen was impartial, and that the exhibits submitted by the parents in their request for review should not be considered on appeal as they are not necessary to render a decision.[8]

As for the district's request to vacate the February 16, 2021 decision, the district asserts that the IHO erred in determining that pendency at Cooke began on September 14, 2020. The district argues that the filing of the parents' due process complaint notice on December 8, 2020 "triggered" pendency and is the proper date for the commencement of pendency (Answer at pp. 5-6). Additionally, the district argues that Application of a Student with a Disability, Appeal No. 20-203 did not establish pendency as of July 1, 2020, but allowed the parents' the opportunity to revisit the issue of pendency if they desired to do so (id. at p. 6). The district seeks a reinstatement

[7] It should be noted that the regulations allow reassignment of an IHO in subsequent matters involving the same parties (see 8 NYCRR 200.5[j][3][ii]).

[8] To the extent the district objects to the parent's submission on appeal of the email exchanges, the district's argument is without merit as the email exchanges should have been included in the hearing record as a written record of communications between the IHO and counsel regarding reassignment of the IHO, recusal of the IHO, legal arguments, and potential evidence in the impartial hearing (8 NYCRR 200.5[j][5][vi][a]-[c], [e]-[f]; 279.9[a]).

of the IHO's December 28, 2020 decision finding that pendency at Cooke began on December 8, 2020 (id. at p. 7).

In a reply to the district's answer, the parents argue that the additional evidence submitted by the district would "unduly prejudice" the parents and should not be considered on appeal.[9] In their answer to the cross-appeal, the parents argue that pursuant to Application of a Student with a Disability, Appeal No. 20-203, IHO Cohen treated the July 1, 2020 due process complaint notice and the December 8, 2020 due process complaint notice "as a single case" for determining pendency (Reply at p. 6). Again, the parents argue that as a result of delays in rendering the September 14, 2020 decision, together with equitable considerations favor an award of pendency at Cooke beginning on July 1, 2020.

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

[9] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). It is clear from the hearing record that this evidence was available at the time of the impartial hearing, and it appears that the documents relating to the student's December 2013 IEP were submitted to the IHO however as further described below, the dispute is limited to the extent to which the district must fund Cooke, therefore the documents proffered by the district from years ago are not necessary to render a decision in this matter.

distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy, 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. Preliminary Matters—IHO Impartiality

The parents argue that the IHO failed to disclose a conflict of interest affecting her ability to render an impartial decision in the case. Specifically, the parents allege that they learned that the IHO had a personal relationship with the Vice President and General Counsel of Cooke, and in prior cases the IHO had recused herself from cases involving Cooke (SRO Ex. "C"). The IHO in response informed the parents that she had not had any relationship with this individual for years but that she would recuse herself if the parents were "concerned" (id.). The parents did not respond to the IHO's confirmation that she would recuse herself from the case, however, now raise the issue of impartiality on appeal.

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). 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]).

In the instant matter, the hearing record does not support a finding that the IHO failed to act impartially. Initially, to the extent that the parents disagree with the conclusion 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).

Here, there is no allegation that the IHO had any personal or professional interest that would have conflicted with her objectivity and appropriate conduct of the impartial hearing. While it may have been optimal in terms of transparency for the IHO to have initially disclosed her relationship with the Vice President and General Counsel of Cooke, but at the same time it appears that IHO Cohen's prior practice of recusing herself from cases involving Cooke had become obsolete because the IHO explained that she had not had a relationship with that individual "for years" (SRO Ex. "C"). In these circumstances, I find that this does not constitute a conflict of interest or present an interest that would impede the IHO's objectivity or ability to conduct an impartial hearing in accordance with the requisite regulations. Moreover, upon my independent review of the hearing record, there is no indication that the IHO demonstrated any bias in her words or conduct during the proceedings. As a result, there is not a sufficient basis to find any bias on the part of the IHO in this matter.

B. Pendency Discussion

In Application of a Student with a Disability, Appeal No. 20-203, upon declining to vacate IHO Gewirtz's dismissal, it was left to the parties to inform IHO Cohen if they desired a further decision on pendency and therefore, was properly within the jurisdiction of IHO Cohen to address the parties remaining pendency issues, if any. Therefore, if the parents continued to purse pendency at Cooke with special transportation beginning on July 1, 2020, the parties were free to do so before IHO Cohen. This, however, did not automatically entitle the parents to pendency at Cooke from July 1, 2020, but gave the parents the opportunity to be heard on their argument that pendency existed at Cooke prior to September 14, 2020.

In its cross-appeal, the district argues that pendency at Cooke is established in the September 14, 2020 decision; however, the effective date of pendency is December 8, 2020, the date of the parents' due process complaint notice. But the district is now impermissibly backpedaling on its prior agreement regarding the student's pendency placement and the district fails to recognize that the finding in Application of a Student with a Disability, Appeal No. 20-203 foreclosed this argument because "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" (Application of a Student with a Disability, Appeal No. 20-203). Accordingly, the district will be held to its prior agreement to fund the placement at Cooke as of September 14, 2020.

Turing to the remainder of the parties' dispute, the parents put forth three main arguments to support their position that pendency began on July 1, 2020. First, the parents argue that the September 14, 2020 decision was untimely and should have been issued by July 1, 2020. Second, the parents assert that Cooke was the student's "operative placement" for approximately six and one-half years and therefore, pendency at Cooke was established on July 1, 2020. Third, that equities favor an award of pendency beginning on July 1, 2020. As will be discussed below, the parents did not establish entitlement to pendency as of July 1, 2020, and the IHO decision shall be upheld.[10]

Once a student's "then current educational" placement or pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino, 959 F.3d at 532; Schutz, 290 F.3d at 483-84; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington, 421 F. Supp. 2d at 697; Murphy, 86 F. Supp. 2d at 366; Letter to Hampden, 49 IDELR 197). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings," S.S., 2010 WL 983719, at *1 [emphasis in the original]). And upon a pendency changing event, such changes apply "only on a going-forward basis" (id.). With that said, it has been held that in certain circumstances a court may, on equitable grounds, retroactively adjust a student's pendency placement if a state-level administrative decision in a parent's favor was not issued in a timely manner (see Mackey, 386 F.3d at 164-66; Arlington, 421 F. Supp. 2d at 701; O'Shea, 353 F. Supp. 2d at 457-58; Murphy, 86 F. Supp. 2d at 366-67).

The parents' factual statements in this case suffer the same void of supporting information in their prior appeal for State-level review regarding any delay in IHO De Leon's decision (see Application of a Student with a Disability, Appeal No. 20-203). In their request for review, the parents argue that they "did not contribute in any way to the delay in the issuance of the September 14, 2020" decision (Req. for Rev. at p. 7). The parents contend that the district acknowledges that the delay in rendering the decision was a result of the district's "broken impartial hearing system"

[10] "Under 34 CFR §300.514(a), an unappealed decision is final, and must be implemented. That final decision on the merits, as implemented, becomes the child's current educational placement" (Letter to Hampden, 49 IDELR 197).

(id.). Further, the parents argue that if the timelines were followed the decision would have been rendered by July 1, 2020 (id. at p. 8). These broad conclusory allegations are insufficient to establish that IHO De Leon's decision was untimely.[11]

On the other hand, according to IHO De Leon's unappealed September 2020 decision, the parents filed a due process complaint notice on October 17, 2019; the IHO that presided over the impartial hearing was assigned on October 29, 2019; the impartial hearing was held on May 7, 2020; and the record close date was September 7, 2020 (Parent Ex. E at pp. 1, 4). The September 2019 IHO decision also reflects that "adjournments [were] granted at the request of and with the consent of the parties, or for good cause" (id.).[12] Thus, there is no factual basis in the hearing record to support the parent's allegations and IHO Cohen did not have before her documentation of the extensions granted in the 2019-20 proceeding on which to base a finding that the September 14, 2020 decision was untimely.

Other State-level review decisions tend to further undermine the parent's arguments that the IHO De Leon's decision should be applied to retroactively alter the student's stay put placement. The parents argue that Application of the New York City Dep't of Educ., Appeal No. 20-121 is distinguishable from the present case (Req. for Rev. at p. 8). And although the parents cite to Murphy v. Arlington Cent. Sch. Dist. Board of Educ., 86 F. Supp 2d 354 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002], and Arlington Cent. Sch. Dist. V. L.P., 421 F. Supp 2d 692 [S.D.N.Y 2006], to explain that Cooke retroactively became the student's pendency placement on July 1, 2020, the date of the parent's filing of the due process complaint notice for the current school year at issue, these cases are distinguishable from the present case. In Murphy, the court held that the SRO decision was delayed for nearly three months for "reasons unknown" and "without the consent" of the parents and, thus, the date of the student's change in placement for purposes of pendency became the date the SRO should have rendered its decision (86 F. Supp. 2d at 367). Similarly in Arlington, the court held that the SRO took eight months to reach his decision and there was no suggestion in the hearing record that the parents either consented to or in any way contributed to the delay (421 F. Supp. 2d at 702). Thus, the court held that the parents were entitled to reimbursement from the beginning of the school year, notwithstanding the fact that the SRO issued his decision eight months later (id. at 703).

Even assuming that the above-referenced line of cases addressing the consequences of delayed State-level administrative decisions apply in the case of an allegedly delayed IHO decision, there was an insufficient record before the IHO in the present matter to support a finding that the IHO's decision in the 2019-20 proceeding was untimely, let alone to determine on what

[11] The parents may exercise their right to file a State complaint regarding the conduct of IHO De Leon (see 8 NYCRR 200.21[b].

[12] 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]).

date it should have been issued. Moreover, the facts of Murphy and Arlington are distinguishable from the present case in that in Murphy and Arlington there was no evidence that the parents consented to the delay in the issuance of the SRO decision.

Furthermore, the parents' argument that Cooke is the "operative placement" fails under Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 529 (2d Cir. 2020). Applying the rationale set forth in Ventura de Paulino, courts have explicitly rejected reliance on the operative placement to find that a unilaterally chosen nonpublic school constitutes pendency absent an agreement between the parents and the district (Araujo v New York City Dep't of Educ., 2020 WL 5701828, at *3 [S.D.N.Y. Sept. 24, 2020], reconsideration denied, 2020 WL 6392818 [S.D.N.Y. Nov. 2, 2020], citing Ventura de Paulino, 959 F.35 at 536).[13]

Finally, to base a determination of a student's entitlement to a stay-put placement on "equitable considerations" would undermine its automatic, statutorily defined nature, and a claim for public funding of a student's tuition pursuant to pendency must be evaluated separately from a claim for tuition reimbursement on the basis that the district failed to offer the student an appropriate IEP (see Mackey, 386 F.3d at 162). In Mackey, relied upon by the parents, the equitable considerations favorable to the parents were limited to the issue of timeliness of administrative decisions (Mackey, 386 F.3d at 165). The case clearly distinguishes between a unilateral placement and a pendency placement (Mackey, 386 F.3d at 160-61 ["[a] claim for tuition reimbursement pursuant to the stay-put provision is evaluated independently from the evaluation of a claim for tuition reimbursement pursuant to the inadequacy of an IEP"]), and that an administrative proceeding must be pending for the IDEA's stay-put provision to apply (Mackey, 386 F.3d at 160).

Accordingly, the evidence in the hearing record does not support the parents' contention that Cooke be deemed the student's pendency placement retroactive to July 1, 2020, the date of the parent's filing of a prior due process complaint notice, rather than on September 14, 2020, the date

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[13]Recently, the Second Circuit has further explained that a parent may not unilaterally move a student to a preferred nonpublic school and still receive pendency funding, since it is the district that is authorized to decide how (and where) a student's pendency services are to be provided as per the text and structure of the IDEA and given that the district is the party responsible for funding the pendency services (Ventura de Paulino, 959 F.3d at 532-35). The Court observed that:

> If a parent disagrees with a school district's decision on how to provide a child's educational program, the parent has at least three options under the IDEA: (1) The parent can argue that the school district's decision unilaterally modifies the student's pendency placement and the parent could invoke the stay-put provision to prevent the school district from doing so; (2) The parent can determine that the agreed-upon educational program would be better provided somewhere else and thus seek to persuade the school district to pay for the program's new services on a pendency basis; or (3) The parent can determine that the program would be better provided somewhere else, enroll the child in a new school, and then seek retroactive reimbursement from the school district after the IEP dispute is resolved

(id. at 534). Therefore, the Court concluded that "[r]egardless of whether the educational program that the Students are receiving at [the new nonpublic school] is substantially similar to the one offered at [the prior nonpublic school], when the Parents unilaterally enrolled the Students at [the new nonpublic school] for the 2018-2019 school year, they did so at their own financial risk" (id.).

of the unappealed IHO decision in the 2019-20 proceeding. While the parent is not entitled to the costs of the student's tuition at Cooke pursuant to pendency from July 1, 2020 to September 13, 2020, she "may obtain retroactive reimbursement for [her] expenses" if it is determined that the district failed to offer the student a FAPE, Cooke is an appropriate unilateral placement, and equitable considerations weigh in favor of an award of reimbursement (see Ventura de Paulino, 959 F.3d at 536). And if the student's needs and the program and services delivered at Cooke have remained relatively constant compared to those examined in the 2019-20 proceeding, the parent likewise should be able to easily meet her burden with respect to the appropriateness of the unilateral placement.

VII. Conclusion

Accordingly, the evidence in the hearing record provides no basis to overturn IHO Cohen's decision that the district's obligation to fund the student's placement at Cooke arises from the September 14, 2020 decision of IHO De Leon and, as such, pendency at Cooke began on September 14, 2020. As the parents are not seeking any pendency placement for the student other than public funding for Cooke in this proceeding, there is no need to make determinations regarding the nature of the student's entitlement services pursuant to pendency prior to the September 14, 2020 decision in which the parents prevailed in their unilateral placement claims. The parents remain free to pursue their reimbursement claims at Cooke from July 1, 2020 through September 13, 2020 during the merits phase of the impartial hearing.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 29, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER