The University of the State of New York

The State Education Department
State Review Officer
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No. 21-178

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Thomas W. MacLeod, Esq.

Cuddy Law Firm, PLLC, attorneys for respondents, by Benjamin M. Kopp, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from that portion of the decision of an impartial hearing officer (IHO) which directed the district to continue the pendency program for respondent's (the parent's son) after the close of the proceeding and place the student in a nonpublic school. The parent cross-appeals from the IHO's decision not to direct the district to develop a specific program for the 2021-22 school year. The appeal must be sustained. 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

As the parties are familiar with the student's educational history as well as the history of the proceedings involving the student, they will not be recited in detail.

A. Due Process Complaint Notice

The parent filed a due process complaint notice challenging the student's educational programs for the 2016-17, 2017-18, and 2018-19 school years, which resulted in an IHO decision,

dated February 4, 2019, finding that the district failed to offer the student a free appropriate public education (FAPE) for those school years (see Parent Ex. B). As part of that decision, the district was directed to develop an IEP for the student that included: 40 hours of in-school and at-home applied behavior analysis (ABA) services by a licensed board certified behavior analyst (BCBA); "'a structured, multisensory special education program with a limited student to teacher ratio with expertise in an early-grade remediation of reading, writing, and math deficits, for students with a history of autism spectrum symptoms, inattention-hyperactivity, information processing, neurocognitive, and intellectual deficiencies, anxiety symptoms, social and behavioral, adaptive functioning, and associated learning difficulties, for a better-focused and personalized instruction'"; counseling services consistent with the recommendations contained in a 2018 neuropsychological evaluation report; two 30-minute sessions per week of individual occupational therapy (OT); one 30-minute session per week of OT in a group (2:1); three 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of speech-language therapy in a group (2:1); one 30-minute session per week of individual physical therapy (PT); five hours per month of parent counseling and training by the BCBA who supervises the in-home ABA services; a full-time 1:1 toileting paraprofessional; a full-time 1:1 crisis management paraprofessional; and specialized door-to-door transportation with a paraprofessional (id. at pp. 23-24).

Relevant to this proceeding, a CSE convened on September 19, 2019 to develop an IEP for the student for the 2019-20 school year (see Parent Ex. H). Finding the student was eligible for special education as a student with autism, the September 2019 CSE recommended a 12-month, 6:1+1 special class placement in a specialized school (id. at pp. 1, 25-26). Additionally, the CSE recommended one 30-minute session per week of counseling in a group (3:1); two 30-minute sessions per week of individual OT; one 30-minute session per week of OT in a group (2:1); two 30-minute sessions per week of individual PT; three 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of speech-language therapy in a group (2:1); one 90-minute session per month of parent counseling and training (id. at pp. 25-26). The CSE also recommended the support of a 1:1 behavior support paraprofessional and a 1:1 transportation paraprofessional (id. at p. 26).

A CSE convened on June 10, 2020 to develop an IEP for the student (see Parent Ex. D). Finding that the student remained eligible for special education as a student with autism, the June 2020 CSE recommended a 12-month, 6:1+1 special class placement in a specialized school (id. at pp. 1, 15-16). The June 2020 CSE recommended the same related services as had been recommended for the student in the September 2019 IEP, except the June 2020 CSE split one of the 30-minute PT sessions into two 15-minute sessions and added an additional 30-minute session of group speech-language therapy (compare Parent Ex. D at pp. 15-16, with Parent Ex. H at pp. 25-26). The June 2020 CSE also added supports for school staff, including mandated reporter training, progress monitoring training, and positive behavior intervention strategies training (Parent Ex. D at p. 16).

By due process complaint notice dated August 26, 2020, the parent asserted that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years (see Parent Ex. A). As an initial matter, the parent requested that the student receive pendency services based on the February 4, 2019 IHO decision, adding that although the decision did not direct a specific placement, language directing the district to place the student in "an appropriate program"

indicated that the district must explore placing the student in a nonpublic school if the district schools were not appropriate (id. at pp. 1-2). Turning to the merits of the parent's allegations, the parent asserted that the district did not evaluate the student's behavioral needs prior to the September 2019 and June 2020 CSE meetings; the district did not timely reconvene the CSE after the parent sent the district a privately obtained neuropsychological evaluation report in November 2019; the September 2019 and June 2020 CSEs did not recommend a research-based methodology, such as ABA, for the student; the September 2019 and June 2020 CSEs did not recommend an appropriate program for the student—continuing virtually the same program that had been found to be inappropriate for the student for the 2018-19 school year; the recommended parent counseling and training workshops were not individualized; the annual goals included in the September 2019 and June 2020 IEPs were not measurable and did not address the student's needs; and the district predetermined parts of the student's program, refusing to consider ABA services, a nonpublic school placement, or a recommendation that included both crisis management and toileting paraprofessionals for the student (id. at pp. 6-9).[1]

For relief, the parent requested—in addition to a pendency finding, a declaration that the district denied the student a FAPE for the 2019-20 and 2020-21 school years, and compensatory relief—an order directing the CSE to reconvene and develop an IEP to include 40 hours per week of in-school and at-home ABA services provided by a BCBA; placement in a setting for children with autism, language delays and attention deficit hyperactivity disorder (ADHD); staff trained in evidence-based interventions; a low student to teacher ratio; a class with students with similar cognitive and academic levels and without significant behavioral challenges; evidence-based reading interventions for reading remediation; intensive, individualized remediation for writing; intensive, individualized, multisensory remediation for math; visual aids; integration of sensory demands; problem solving and conflict resolution through illustrative social stories; a peer model or buddy system throughout the day; preferential seating; social skills training; meaningful, measurable annual goals in all areas of need; related services, including two 30-minute sessions per week of individual OT, one 30-minute session per week of OT in a group (2:1), two 30-minute sessions per week of individual PT, three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a group (2:1), counseling in a frequency and duration sufficient to implement the recommendations from the student's evaluations, and five hours per month of parent counseling and training by the BCBA who oversees the student's ABA program; an appropriate assistive technology device; the support of a full time 1:1 behavior support paraprofessional and a full-time 1:1 transportation paraprofessional; and specialized door to door transportation with a paraprofessional (Parent Ex. A at pp. 9-11).

The parties entered into an agreement as to the student's pendency placement, which provided that the student would receive pendency services based on the February 4, 2019 IHO decision from the filing of the due process complaint notice on August 26, 2020 through the issuance of a final decision in this matter (Parent Ex. C; see Parent Ex. B; IHO Ex. V at p. 1). The agreed upon pendency services consisted of: 40 hours per week of ABA services; counseling with use of ABA; one 30-minute session per week of individual OT, one 30-minute session per week

[1] The parent also objected to the district's remote learning plans developed in April, May, and June 2020 (Parent Ex. A at pp. 7-8).

of OT in a group (2:1), two 30-minute sessions per week of individual PT, three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a group (2:1), five hours per month of ABA parent counseling and training; the support of a full-time 1:1 toileting paraprofessional and a full-time 1:1 crisis management paraprofessional; and specialized transportation (Parent Ex. C). The agreement also indicated that the student's program would be "a structured multisensory special education program with . . . expertise in an early-grade remediation of reading, writing, and math deficits, for students with a history of autism spectrum symptoms, inattention-hyperactivity, information processing, neurocognitive, and intellectual deficiencies, anxiety symptoms, social and behavioral, adaptive functioning, and associated learning difficulties, for a better-focused and personalized instruction" with "a limited student to teacher ratio" (id. at pp. 1-2).

B. Impartial Hearing Officer Decision

After prehearing conferences were held on January 29, 2021 and March 5, 2021, an impartial hearing convened on April 13, 2021 and concluded on June 18, 2021 after five total days of proceedings (Tr. pp. 1-187).[2] In a decision dated July 16, 2021, the IHO determined "[t]here [wa]s little disagreement between the parties regarding the fundamental FAPE issue for the 2019-2020 and 2020-2021 school years" (IHO Decision at p. 4). The IHO noted that the district did not present a case and did not object to the requested compensatory relief, other than to the parent's request for duplicate related services (id.). Finding that the parties disagreed as to whether the student benefitted from the related services the student received without the presence of an ABA provider, the IHO reviewed the testimony of the student's physical therapist, ABA provider, and parent, then determined that the student did not receive ABA services prior to December 3, 2020, the student was unable to access his related services appropriately without the ABA provider, and accordingly any related services provided to the student before December 3, 2020 would be treated as not having been provided to the student (id. at pp. 5-6). As compensatory education for the denial of a FAPE for the 2019-20 and 2020-21 school years, the IHO ordered the district to provide 210 hours of speech-language therapy, 126 hours of OT, 84 hours of PT, and 1,680 hours of ABA services less any services which were already provided through pendency—other than related services provided during the 2020-21 school year prior to December 3, 2020 (id. at pp. 6, 9).

The IHO next addressed the parent's request for an order directing the district to provide the student with a specific program for the 2021-22 school year (IHO Decision at pp. 7-8). The IHO determined that the parent did not raise the 2021-22 school year as an issue in the due process complaint notice and noted that the district did not agree to include the student's 2021-22 school year program as an issue for the hearing (id. at p. 7). The IHO found that because the 2021-22 school year was not properly raised, the district would be prejudiced if she addressed it, while the parent would not be prejudiced as she could still file a due process complaint notice regarding that school year (id.). The IHO then reviewed the parent's request as one for equitable relief for the district's denial of FAPE for the 2019-20 and 2020-21 school years and determined that ordering a specific program for the 2021-22 school year would be inappropriate "as the specifics of that program must be fleshed out in a hearing with respect to that school year" (id. at p. 8).

[2] In an interim decision dated March 5, 2021, the IHO ordered the district to fund an FBA of the student (IHO Ex. I).

Nevertheless, the IHO directed the district "to continue to implement the pendency program until an appropriate IEP is developed" further ordering the district to place the student in an appropriate nonpublic school if the district does not have an appropriate school to implement the pendency program (id. at pp. 8-9).[3]

IV. Appeal for State-Level Review

The district appeals from the IHO's decision directing the district to continue the student's pendency placement beyond the date of the final decision in this matter and directing the district to place the student in a nonpublic school.

The parent answers the district's appeal and cross-appeals from the IHO's finding that the issue of the 2021-22 school year was outside the scope of the hearing and decision not to direct the district to provide the student with a specific program for the 2021-22 school year. As part of the answer, the parent asserts that the district's appeal is moot, as the current appeal has continued the student's pendency regardless of the IHO's decision. The parent also submits additional evidence with the answer with cross-appeal.

The district answers the cross-appeal and requests that the cross-appeal be dismissed for failure to comply with the practice regulations in that the cross-appeal was not properly verified. The district asks that the parent's additional evidence be rejected asserting it is not necessary. Further, the district asserts that the appeal is not moot because it is contingent on a future event, the development of "'an appropriate IEP,'" and that if it is moot the capable of repetition yet evading review exception to mootness should apply.[4]

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New

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[3] The IHO also incorporated her interim order directing the district to fund a functional behavioral assessment (FBA) into the final order (IHO Decision at pp. 6, 9; see IHO Ex. I).

[4] In a letter dated September 9, 2020, counsel for the parent indicated that the parent would not respond to the district's reply and answer to the cross-appeal because "any further argument would be repetitious of what is already addressed on the face of her Answer and Cross-Appeal and the Verification thereof."

York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, 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]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

1. Scope of Review

Initially, I note that in its request for review, the district does not challenge the IHO's determination that the district denied the student a FAPE for the 2019-20 and the 2020-21 school years or the IHO's award of compensatory education as relief. As such, those determinations have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 8 NYCRR 279.8[b][4]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The appeal in this matter is limited to two main issues, the IHO's directive that the district continue the student's pendency placement after the issuance of the IHO's final decision and the parent's request that the district be directed to provide the student with a specific program.

2. Compliance with Practice Regulations

The district requests that the parent's answer with cross-appeal be dismissed for failure to comply with the regulations governing practice before the Office of State Review. More specifically, the district asserts that the answer with cross-appeal was not properly verified because it was verified by the attorney instead of by the parent.

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

[5] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

In this instance, the district is correct that the attorney's verification of the parent's answer with cross-appeal is not in compliance with State regulation (see Application of the Bd. of Educ., Appeal No. 21-154; Application of a Student with a Disability, Appeal No. 20-079; Application of the Dep't of Educ., Appeal No. 20-027). Additionally, rather than respond to the district's allegation that the answer with cross-appeal was not properly verified, counsel for the parent declined to submit a reply stating in a letter "any further argument would be repetitious of what is already addressed on the face of [the parent's] Answer and Cross-Appeal and the Verification thereof." As a matter within my discretion I decline to dismiss the parent's answer with cross-appeal on this ground in this instance given limited number of times their attorney has appeared in this forum (see Application of the Dep't of Educ., Appeal No. 21-118; Application of a Student with a Disability, Appeal No. 20-049).

However, counsel for the parent is now cautioned that his verification of the pleadings is unacceptable the and the parent must verify pleadings in appeals to the Office of State Review (8 NYCRR 279.7[b]). Additionally, "while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's or a particular attorney's repeated failure to comply with the practice requirements" (Application of a Student with a Disability, Appeal No. 19-060; Application of a Student with a Disability, Appeal No. 19-058; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

B. Continuing Pendency Directive

The district appeals from the IHO's decision directing that the district continue the student's pendency placement after the final order in the proceeding.

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] cert. denied sub nom. Paulino v. NYC Dep't of Educ., 2021 WL 78218 (U.S. Jan. 11, 2021); 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).

While the parent argues that the IHO's order was intended as an equitable remedy for the denial of a FAPE and that the IHO simply referred to the program requested by the parent as the pendency program (Answer with Cross-Appeal ¶3), the IHO expressly decided that "it would be inappropriate for me to order a program for the 2021-2022 school year, as the specifics of that program must be fleshed out in a hearing with respect to that school year" (IHO Decision at p. 8). Accordingly, the IHO's directive to "continue to implement the pendency program until an appropriate IEP is developed" must be taken for what it is, a directive ordering the continuance of pendency after the issuance of the final decision.

Although there is some authority for the position that pendency can include funding through the current school year prior to the conclusion of the pending proceeding and the end of the school year (see T.M., 752 F. 3d at 172 [finding it was within the district court's authority to order pendency services through the end of the present school year]), I have not found, nor has the IHO or parent's attorney cited to, any authority to support the IHO's order continuing the student's pendency placement after the issuance of the final decision. One of the core features of the IDEA is the information gathering and sharing about the student, the collaborative meeting processes, and consensus-building features during educational planning that were envisioned by Congress when it created procedures for evaluating students, developing their IEPs, and then reviewing the students' performance in the current special education programming— it should go without saying a student's programming should grow and change over time in accordance with the student's need. This process works overwhelmingly well for the vast majority of special education students in this country, and the IHO's directive to merely continue the stay-put placement "until an appropriate IEP is developed" is divisive given the litigation history of the parties in this case and is more likely to further undermine the constructive, collaborative statutory process that the IDEA calls

the parties to engage in. It appears to me that the benefit of third-party assistance in the IEP planning process—such as IEP facilitation, mediation, or third-party consultation—would be of greater benefit to the student rather than resorting to educational planning through the litigation process.

However, at this point, the parent is correct in that due to the filing of the appeal in this matter, regardless of the IHO's directive, the student is entitled to continue in his pendency placement for the duration of this appeal process (see M.R. v. Ridley Sch. Dist., 744 F.3d 112, 125 [3d Cir. 2014][school districts must continue funding a student's pendency placement until final resolution of all IDEA proceedings, including appeals]).[6] Nevertheless, the proper course of action is to vacate the IHO's directive continuing pendency until an appropriate IEP is developed; the order directing pendency in this proceeding will end at the issuance of this decision, unless an action is brought challenging this decision in court.[7]

C. 2021-22 School Year

The parent cross-appeals from the IHO's determination that it would have been improper to make a determination directing the district to provide the student with a specific program for the 2021-22 school year.

The parent raises a number of allegations in an attempt to argue that the IHO should have addressed the 2021-22 school year and should have directed that the district recommend, in an IEP, essentially the same program as was being provided to the student through pendency. Upon review, none of those arguments bear any merit as the IHO correctly determined that any issues regarding the program recommended for the 2021-22 school year should be addressed in a hearing reviewing those recommendations (IHO Decision at p. 8).

In this instance, directing a specific placement for the 2021-22 school year, without any evidence as to the program recommended for the 2021-22 school year, or the evaluative information upon which such a recommendation was based, would tend to undermine the district's continuing obligations to the student and the procedural process of the IDEA. That is, an award of a specific program for the 2021-22 school year and beyond would tend to circumvent the very statutory process that Congress envisioned, under which the CSE is the entity tasked with meeting every year at the very least to review information about the student's progress under current educational programming and periodically assess any changes in the student's continuing needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y Oct. 30,

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[6] It appears that, as part of a case filed in district court, the parties have entered into an additional stipulation agreeing these administrative proceedings were not yet final and that pendency will continue through the end of this proceeding (see Answer with Cross-Appeal Ex. 2).

[7] As the student's entitlement to pendency will end at the issuance of this decision, it is unnecessary to address the district's additional argument that the IHO should not have directed the district to place the student in a nonpublic school as part of pendency if an appropriate district school was not available.

2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]; Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).[8]

With respect to the 2021-22 school year, according to the hearing record, a CSE already convened in June 2021 to develop an IEP for the student (Tr. pp. 123-24). The June 2021 IEP was not entered into the hearing record; however, on appeal, the parent submitted a due process complaint notice showing that the parent has already challenged the June 2021 IEP in a separate proceeding (see Answer with Cross-Appeal Ex. 1). As there is already a proceeding challenging the student's programming for the 2021-22 school year, and the parties will have an opportunity to present their evidence and arguments as to the program developed for the 2021-22 school year in that proceeding, it would be unwise to rule upon the student's programming as a part of this proceeding, when the parties have not presented evidence or arguments as to what an appropriate program would be for the student for the 2021-22 school year.

VII. Conclusion

As set forth above, the IHO's order directing pendency to continue after a final decision is issued in this matter must be vacated. Additionally, the IHO's decision not to award a specific program for a school year that was not part of the proceeding was reasonable and will not be disturbed.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated July 16, 2021, is modified by reversing that portion which directed the district to continue to fund the student's pendency program until an appropriate IEP is developed.

Dated: **Albany, New York**
September 24, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER

[8] These concerns simply do not arise in the same way in retrospective, unilateral placement cases in which the public school district's responsibility to assess the student and continue to propose an appropriate public school placement typically continues uninterrupted and there is only a deviation in the delivery of services that changes while the student is unilaterally placed at the parent's own risk.