The University of the State of New York

The State Education Department
State Review Officer
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No. 22-112

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Springville-Griffith Institute Central School District

Appearances:
Harris Beach PLLC, attorneys for respondent, by Jeffrey J. Weiss, Esq., and Andrew R. Mark, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals, 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 her son's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2019-20 through 2022-23 school years. The appeal must be sustained in part and the matter remanded to the IHO for further administrative proceedings.

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

Due to the interlocutory nature of this appeal, the hearing record is limited with respect to information regarding the student's educational history.[1] Briefly, according to the parent, the

[1] The district submitted eight documents as the hearing record without identification numbers or letters along with two interim decisions of the IHO and a record certification. Those documents will be identified by a title and/or date in citations herein. Advocates for the parent submitted an additional ten documents with an assortment of identification letters and numbers. Purportedly the proffered documents were entered into evidence at a hearing

student moved to the district in summer or fall 2019, and prior to that time had attended a 6:1+1 special class and received related services pursuant to a May 28, 2019 IEP (see May 18, 2022 Due Process Compl. Notice at p. 1; Apr. 21, 2022 Due Process Compl. Notice at p. 1). The parent indicates that, after moving to the district, the student attended two different out-of-district Board of Cooperative Educational Services (BOCES) programs pursuant to IEPs developed by the district's CSE without meetings (see May 18, 2022 Due Process Compl. Notice at p. 2; Apr. 21, 2022 Due Process Compl. Notice at p. 2).

For the 2020-21 school year (third grade), a CSE convened on May 19, 2020 and recommended a 6:1+3 special class in an out-of-district BOCES program located at a school in the Holland Central School District (Holland BOCES); adapted physical education; three 30-minute sessions per week of individual occupational therapy (OT); five 15-minute sessions per week of individual counseling; and three 30-minute sessions per week of small group counseling; as well as a 1:1 aide (Parent Pendency Brief, Ex. A at pp. 1, 8-9, 11).[2] The May 2020 CSE also determined that the student was eligible to receive special education programming during July and August as part of a 12-month program (id. at pp. 1, 9-10).[3] The recommended 12-month services consisted of a 6:1+3 special class at the Holland BOCES program; group adapted physical education, daily for 30 minutes; individual OT, three times weekly for 30 minutes; and small group counseling, three times weekly for 30 minutes (id.).

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date that took place after the IHO issued the interim decision on pendency that is the subject of this appeal. Pursuant to State regulation, "[w]here a party has appealed an interim decision of an [IHO] . . . , the board of education shall include in the record transmitted to the Office of State Review copies of the entire record . . . developed as of the date of the interim decision" (8 NYCRR 279.9[d]). As the documents proffered by the parent were not part of the record developed as of the date of the interim decision, they were properly excluded from the hearing record on appeal filed by the district. To the extent the parent requests that the documents be considered as additional evidence, generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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 the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, the documents could have been offered at the impartial hearing, and, ultimately, they are not necessary in order to render a decision. Two of the proffered documents are already included in the hearing record as exhibits to the parties' pendency briefs. In addition, several of the propositions for which the parent cites the other documents are undisputed and/or supported by information included in other portions of the hearing record. Accordingly, I have not considered the documents submitted by the parent.

[2] The May 2020 IEP was included in the hearing record as an attachment to the parent's pendency brief. Although the copy attached to the parent's pendency brief bears the identification "D#67," it appears that this numeration is unrelated to the present matter; for purposes of this decision, the document is cited as exhibit A to the parent's pendency brief and by reference to its consecutive pagination.

[3] The IHO and the parties refer to special education programming provided during July and August as extended school year, "ESY" services or "summer services"; however, State regulation refers to these services as 12-month services (8 NYCRR 200.4[d][2][x]). Accordingly, these services will be referred to as 12-month services within this decision except in quoting the record wherein the terms "ESY," "extended school year" or "summer services" are used.

According to the parent, subsequent CSE meetings took place on March 19, 2021, October 7, 2021, and March 18, 2022 and recommended that, for the 2021-22 (fourth grade) and 2022-23 (fifth grade) school years the student attend a 12-month school year program in an 8:1+2 special class in an out-of-district "'behavioral class' placement" along with related services (see Apr. 21, 2022 Due Process Compl. Notice at p. 3). The parent also indicated that, in April 2022, the school to which the district assigned the student to attend would "no longer accept [the student] in their program" (id. at p. 4). According to the parent, a CSE convened on May 12, 2022 and recommended a 6:1+1 special class "at the Erie 2 BOCES LoGuidice Educational Center," (LoGuidice BOCES) which was "44 miles" from the family's home (June 14, 2022 Due Process Comp. at p. 5).

For the 2021-22 school year, the student continued to attend the 6:1+3 special class at the Holland BOCES pursuant to pendency arising from a separate impartial hearing (see May 18, 2022 Due Process Compl. Notice at p. 1).[4, 5]

A. Due Process Complaint Notices and Intervening Events

By due process complaint notice dated April 21, 2022, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years (April 21, 2022 Due Process Compl.). The parent challenged the process of and the recommendations made at the March 2022 CSE meeting (id. at pp. 4-8). For relief the parent sought a change in placement (to include a 12:1+1 special class in a district public school with consultant teacher, 1:1 aide, and related services) and compensatory education (id. at pp. 8-10). The parent also requested a "stay put" pendency placement for the student, as reflected in an IEP dated May 28, 2019 developed by the student's prior district of residence (id. at p. 12).

The parent submitted a second due process complaint notice, dated May 18, 2022, which alleged that the district failed to offer the student a FAPE for the 2019-20, 2020-21, and 2021-22 school years and included claims challenging September 2019, October 2019, December 2019, May 2020, March 2021, and October 2021 IEPs (May 18, 2022 Due Process Compl. at pp. 5-8). The parent sought similar relief as set forth in the April 2022 due process complaint notice with some differences to the requested placement, including that the student attend a 15:1 special class for English language arts (ELA) and mathematics and receive integrated co-teaching (ICT) services for other subjects and consultant teacher, 1:1 aide, and resource room services, and additional compensatory education (compare May 18, 2022 Due Process Compl. at pp. 8-10, with April 21, 2022 Due Process Compl. at pp. 8-10).

[4] The parent requested impartial hearings via due process complaint notices dated February 11, 2021, April 13, 2021, and October 20, 2021, which an IHO consolidated, and which were the subject of a prior State-level administrative appeal that upheld the dismissal of the parent's complaints but modified the IHO's decision to provide that the dismissal be without prejudice (see Application of a Student with a Disability, Appeal No. 22-032; see also Apr. 21, 2022 Due Process Compl. Notice at pp. 3-4).

[5] The parent indicated that the student's pendency was pursuant to the May 2019 IEP developed by the student's prior school district of residence (see May 18, 2022 Due Process Compl. Notice at p. 4); however, the program described appears to be that recommended in the May 2020 IEP developed by the district's CSE (see Parent Pendency Brief, Ex. A).

The parent submitted a third due process complaint notice, dated June 14, 2022, which set forth allegations challenging the May 2022 CSE process and IEP recommendations, and again proposed a change in placement and compensatory education among other relief (June 14, 2022 Due Process Compl. at pp. 5-12).[6]

Within her June 2022 due process complaint notice, the parent summarized discussions held at a resolution meeting that took place on June 8, 2022 (June 14, 2022 Due Process Compl. at p. 5). According to the parent, the district described that the student was "aging out" of the Holland BOCES program but that a new 6:1+3 special class BOCES program would be starting at the Holland Middle School for the 2022-23 school year and the district offered the parent placement for the student in that class as a resolution to the parent's complaints (id.). The parent disagreed with the proposal (id.).

B. Impartial Hearing Officer Decision

During a prehearing conference on June 21, 2022, the IHO and the parties discussed consolidating the three due process complaint notices, and then turned to the question of where the district would implement the student's pendency placement during the summer portion of the 12-month school year (see June 21, 2022 Tr. pp. 1-40).[7] The parties agreed that the student's then-current placement "in a 6-1-3 in the Holland Middle School in a BOCES program" was also his placement for pendency purposes for all of the 12-month school year (id. at pp. 22-23, 28-29). However, counsel for the district noted that there was a problem with implementing the student's pendency in the current location because "the BOCES program housed in . . . Holland Middle School w[ould] be closed [for] summer" and acknowledged that the district would need to "find another comparable program closest to the student's home" (id. at pp. 23-24). Counsel for the district also stated that the Holland BOCES placement would be "back we believe in the fall" for pendency (id. at p. 29). The parent's advocate noted that the "program the[] [district] want[ed] to place [the student] in for summer [wa]s 44 miles from the parents' home," which was not an acceptable distance (id. at pp. 25, 33). The IHO and the parties then discussed other options for implementing the student's 12-month pendency services and agreed to do research and reconvene to further discuss pendency on June 28, 2022 (id. at pp. 29-39).

The parties and the IHO met again on June 28, 2022 and continued to discuss consolidation of the due process complaint notices and options for implementing the student's pendency during summer 2022 (see June 28, 2022 Tr. pp. 1-24). Counsel for the district related that the LoGuidice BOCES program, which the parent objected to because of its distance from the student's home, remained the option that the district was offering, but that a placement at "North Collins" had been discovered and was being considered as a possible placement closer to the student's home (id. at

[6] The district responded in writing to all three of the parent's due process complaint notices (June 24, 2022 Dist. Response to Due Process Compl. Notice; May 31, 2022 Dist. Response to Due Process Compl. Notice; May 2, 2022 Dist. Response to Due Process Compl).

[7] The transcripts of the three hearing dates composed of the prehearing conferences held in this matter are not consecutively paginated; therefore, references to transcript pages will include the date of the proceedings.

pp. 6-9, 14). The parties expressed interest in investigating the availability of the "North Collins" program and agreed to look into that and then reconvene (id. at pp. 8-10).

In an interim decision dated June 28, 2022, the IHO consolidated the parent's three due process compliant notices described above into a single proceeding, finding that consolidation was reasonably indicated because all three cases were substantively similar, differing by school year, but addressing the same set of facts and circumstances (June 28, 2022 Interim IHO Decision at pp. 1-2).

On July 5, 2022, the IHO and the parties met again for another prehearing conference to continue discussing options for implementing the student's pendency placement for summer 2022 (see July 5, 2022 Tr. pp. 1-39). Counsel for the district stated that "unfortunately, the North Collins option did not come to fruition because the program was full" (id. at p. 4). Counsel for the district further related that, although other options had been investigated by district staff, the LoGuidice BOCES program remained the placement that the district would offer to implement 12-month services for pendency purposes, but that now a variance would be required because that program was full as well (id. at pp. 4-6). Counsel for the district also stated that LoGuidice BOCES "didn't obtain any related service providers for this program" and that, "while they [we]re accepting students," it would just be "instruction for the six weeks" of the 12-month services (id. at p. 6). The IHO and the parties continued to discuss options for the student, including possible summer camps and obtaining private related services (id. at pp. 6-10). The parent's advocate noted that she "did send a letter over th[at] morning . . . requesting that [the student] go to the [LoGuidice BOCES] program" before learning that the program was full and would require a variance but acknowledged that there were not "a whole lot of options at th[at] point" and indicated she would discuss the option with the parent (id. at p. 10). At that point, it was generally understood that the parties would go forth to memorialize an agreement whereby the student would attend a 6:1+1 special class in the LoGuidice BOCES program (with a variance for an additional student) with a 1:1 aide as the pendency placement for summer 2022 and that the parties would endeavor to arrange related services for the student with the understanding that the district would provide make-up services for any related services that were not provided (id. at pp. 12-13, 29-34).

By letter dated July 11, 2022 the parent's advocates wrote to the IHO, district's counsel, and the district's director of special education stating that the district had not offered the required pendency placement for the student for the summer that consisted of "a special class 6:1+3 and the related service of group counseling 3 times weekly for 30 minutes, individual [OT] 3 times weekly for 30 minutes and adapted physical education daily for 30 minutes as reflected in [the student's] IEP dated May 19, 2020" (Dist. Pendency Brief, Ex. 1).[8] The letter stated that the parent had been unable to secure any private related services providers who could travel to the LoGuidice BOCES location and could not agree to send the student to the pendency placement that the district was "capable and willing to supply as [it was] not appropriate or in [the student's] best interest" (id. at p. 2).

[8] The parent's July 2022 letter was included in the hearing record as an attachment to the district's pendency brief. For purposes of this decision, the document is cited as exhibit 1 to the district's pendency brief and by reference to its consecutive pagination.

On July 14 and July 19, 2022, respectively, the parent and the district submitted written pendency briefs to the IHO concerning the student's pendency placement for summer 2022 (Parent Pendency Brief; Dist. Pendency Brief). The parent, through her advocate, indicated that she had rejected the proposed pendency placement consisting of the LoGuidice BOCES program given the distance of the program from the family's home and the lack of related services (id. at p. 1). In addition, the parent noted that no variance had yet been approved for the student to attend the LoGuidice BOCES program as the seventh student in a 6:1+1 special class or, at best, had been approved at least five instructional days after the summer program began (id. at pp. 1-2). The parent requested a finding that pendency was based on the May 2020 IEP and that the district "did not offer the pendency placement required for [the student] for the summer of 2022" (id. at p. 2). In addition, the parent sought compensatory education to make-up for the summer placement, including at least five but up to 30 instructional days (five hours each day), as well as 30 30-minute sessions of adapted physical education, 18 30-minute sessions of individual OT, and 18 30-minute sessions of small group counseling (id.).

The district argued that it "fulfilled its obligation to offer the Student a pendency placement for the summer of 2022" and that any award of compensatory education should be limited to related services (Dist. Pendency Brief at p. 1). The district argued that the 6:1+1 special class at the LoGuidice BOCES program with a 1:1 aide was "a comparable and substantially similar" extended school year placement for the student (id. at pp. 1-2). Further, the district attributed the need to obtain a variance for the program to delay caused by the parent's failure to accept the proposed pendency placement sooner (id. at p. 2). The district asserted that, given its offer of a comparable program, any award of compensatory education services should be limited to related services that the LoGuidice BOCES program would have been unable to provide (i.e., OT and counseling services) (id. at p. 3). The district further opined that the parent's lack of cooperation in securing a pendency placement for the student for summer 2022 was an equitable consideration that warranted denying her request for compensatory education services (id.).

In a decision dated July 25, 2022, the IHO determined that the student "ha[d] now participated in a 6:1:1 or 6:1:3 pendency program for several years," which had "become a de facto educational placement" (July 25, 2022 Interim IHO Decision at p. 1). The IHO further found that the Loguidice BOCES program, "consisting of a 7:1:1 paradigm, augmented by the assignment of a 1:1 paraprofessional aide" was "substantially similar" to the student's pendency placement (id. at pp. 5, 6). The IHO found that, although the district's offer to implement the student's 12-month pendency services at LoGuidice BOCES rather than at Holland BOCES represented a change in location, the "Lo[G]uidice program [wa]s essentially offering the same general level and type of services that the disabled child was receiving, as the classes, individualized attention and additional services [the student] w[ould] receive" were "functionality identical" to the Holland BOCES program the student had been attending (id. at pp. 5-6 [internal quotations omitted]). The IHO also opined that the district was "not required to develop programming for one child alone" (id. at p. 6).

With respect to transportation, the IHO found that the parent had not proven a need for abbreviated travel time and there was no requirement that the pendency program remain in a particular site or location (July 25, 2022 Interim IHO Decision at pp. 5-6).

With respect to related services, the IHO found that, "given the parties' mutual agreement that related services c[ould]not be provided at Lo[G]uidice during the 2022 summer, the parties agree[d] that those related services that have not been provided w[ould] be offered . . . commencing on or about September 2022" (July 25, 2022 Interim IHO Decision at p. 6).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in determining that the district's offer to implement the student's 12-month services in a 7:1+1 special class at LoGuidice BOCES with a 1:1 aide and without related services was consistent with the student's pendency placement. The parent contends that the program and services set forth in the May 2020 IEP constituted the student's pendency placement and that the district's proposed program differed too much to be considered substantially similar and, instead, represented a change in placement. The parent contends that pursuant to the May 2020 IEP the student's pendency 12-month services consisted of a 6:1+3 special class placement with a 1:1 "personal aide" assigned to him all day, group adapted physical education, one time daily for 30 minutes, and the related services of individual OT, three times weekly for 30 minutes per session, and small group counseling, three times weekly for 30 minutes per session. The parent argues that, in comparison, the district's offered implementation of pendency did not provide the same level of adult supervision and lacked required related services. Accordingly, the parent asserts that the IHO's determination that the district's offer was "functionally identical" was error.

The parent also contends that the IHO erred in finding that the change in distance from the pendency location at Holland BOCES to LoGuidice BOCES, a placement which was much further from the student's home and would necessitate a bus ride of more than one hour, was consistent with the proper pendency for the student.

For relief, the parent requests reversal of the IHO's finding that the student's 12-month services under pendency could be implemented at the LoGuidice BOCES program, a finding that the district's failure to implement the student's pendency denied the student a FAPE, an order to provide compensatory education and services, and an order for the CSE to convene to determine if the failure to implement the student's pendency necessitates further educational services due to regression.

In an answer, the district responds to the parent's material allegations with admissions and denials and asserts that the IHO's pendency determination should be upheld in its entirety. Initially, the district argues that the parent's request for review should be rejected for failing to include a notice of request for review as required by State regulation and for failing to contain a "clear and concise statement of the issues presented for appeal with each numbered and set forth separately" as required by State regulation. The district next asserts that the parent's argument that the IHO incorrectly identified the student's 12-month services under pendency is moot because the 12-month portion of the school year is now complete, and the student never attended the offered program.[9] Relatedly, the district contends that the parent's request for compensatory pendency

[9] Here, the parent's request for compensatory pendency services to correct past wrongs, namely the district's failure to implement pendency, remains a live controversy, and, therefore, I decline to dismiss this matter as moot (see Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 219 [N.D.N.Y. 1993] [finding that a demand for

services is not yet ripe because the parent requests compensatory education for a denial of FAPE in the underlying proceeding, the merits of which have not yet been determined.

V. Applicable Standards

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, 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 (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. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[10] 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 to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi

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compensation to correct past wrongs remains as a live controversy even if parents are satisfied with student's current placement]; see also Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]).

[10] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

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).

Once a 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; Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; 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 Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; Letter to Hampden, 49 IDELR 197 [OSEP 2012]). 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 (Schutz, 290 F.3d at 483-84; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197).

VI. Discussion

A. Compliance with Practice Regulations

The district contends that the request for review must be dismissed for failing to comply with State regulations governing the initiation of the review and the form requirements for pleadings (see 8 NYCRR 279.4[a]; 279.8[c][1]-[3]).

State regulations provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]).

In relevant part, Section 279.8 of the State regulations requires that a request for review shall set forth:

> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c][2]-[3]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

In this instance, the district argues that the parent's request for review is not clear and concise, but rather contains long, meandering allegations, and that the request for review fails to cite to the relevant page numbers in the IHO's interim decision on several occasions (Answer ¶¶ 27-30). Upon review of the request for review, I find that, contrary to the district's argument, the request for review adequately identifies the specific findings of the IHO which the parent appeals and explains the grounds for review or modification of those findings. Therefore, I decline to find that the request for review fails to comply with State regulations governing the initiation of the review and the form requirements for pleadings on that basis.

The district also argues that the parent's appeal should be dismissed because it fails to contain a notice of request for review. Each request for review filed with the Office of State Review must contain a "Notice of Request for Review," the content of which is set forth in State regulation and generally notifies a responding party of the requirements with respect to preparing, serving, and filing an answer to the request for review (8 NYCRR 279.3; 279.4[a]). Here, while the lack of a notice of request for review does violate State regulation, the district does not allege that that its ability to timely prepare, serve, or file an answer was compromised or prejudiced in any way. Accordingly, the lack of notice in this instance does not warrant the dismissal of the parent's request for review as the district requests.

B. Pendency Placement

On appeal, the parties agree that the May 2020 IEP sets forth the student's pendency placement (see Req. for Rev. ¶¶ 4-5; Answer ¶ 4). Therefore, the crux of the dispute regarding the pendency placement is whether, as the parent contends, the IHO erred by finding that the district's offer to provide the student's 12-month pendency placement in a 6:1+1 special class placement (with a variance for an additional student) at the LoGuidice BOCES program with a 1:1 aide and no related services was substantially similar to the pendency placement arising from the May 2020 IEP.

Whether a student's educational placement has been maintained under the meaning of the pendency provision may, under certain circumstances, depend on whether the educational program is "substantially and materially the same" as the student's educational program for the prior school year (Letter to Fisher, 21 IDELR 992 [OSEP 1994]; see Application of a Student with a Disability, Appeal No. 16-020). The United States Department of Education's Office of Special Education Programs identified a number of factors that must be considered in determining whether a move from one location to another constitutes a change in educational placement, including: whether the educational program in the student's IEP has been revised; whether the student will be educated with nondisabled peers to the same extent; whether the student will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement is the same option on the continuum of alternative placements (Letter to Fisher, 21 IDELR 992). Student-to-staff ratio is also a relevant factor in determining whether a student's program has changed (M.K. v. Roselle Bd. of Educ., 2006 WL 3193915, at *14-*15 [D.N.J. Oct. 31, 2006]; Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 60-61 [D.N.H. 1999]; Application of a Child with a Disability, Appeal No. 05-028). State regulations define a change in program as "a change in any one of the components" of an IEP, which includes the size of the special class in which a student is recommended to receive services and related services, as well as 12-month services and adapted physical education (8 NYCRR 200.1[g]; 200.4[d][2][v][a], [b][2]; [viii][d]; [x]).

Here, there is no dispute between the parties that the student's 12-month services program under pendency consisted of a 6:1+3 special class in a BOCES program; group adapted physical education, daily for 30 minutes; individual OT, three times weekly for 30 minutes per session; and small group counseling, three times weekly for 30 minutes per session (Parent Pendency Brief Ex. A at pp. 1, 9-10; see Req. for Rev. ¶¶ 4-5; Answer ¶ 4).[11] There is also no dispute between the

[11] The parent also alleges that the student's pendency 12-month servcies included a 1:1 aide assigned to the student and individual reading instruction. Although the May 2020 IEP does not list a 1:1 aide among the 12-month services, it does recommend a 1:1 aide for the student with specified service dates of "06/10/2020-06/09/2021," encompassing the 12-month portion of the school year (Parent Pendency Brief, Ex. A at pp. 8-10). The IEP is arguably ambiguous on this point insofar as all of the recommendations for services and accommodations included the same service dates of "06/10/2020-06/09/2021" (see id. at pp. 8-9). Yet, for the 12-month services, the IEP lists the program and service recommendations rather than specifying that the student would "receive the same special education program/services as recommended above" (id. at pp. 9-10). To the extent the CSE included the 1:1 aide on the IEP as a supplementary aide or program modification/accommodation, rather than as a "Special Education Program / Service[]," the former which were not reiterated under the 12-month services section, the IEP as a whole tends to support the parent's interpretation (id. at pp. 8-10). Ultimately, however, the question of the 1:1 aide being part of the 12-month services is not determinative of the issues in this appeal. As for individual reading instruction, a reference in the present levels of performance of a later-developed,

parties that the Holland BOCES program was not available to implement the student's pendency placement during summer 2022 (see June 21, 2022 Tr. p. 23; Req. for Rev. ¶ 8). The district offered to implement the student's 12-month services program under pendency in a 6:1+1 special class at the LoGuidice BOCES program (with a variance for an additional student) with a 1:1 aide without the provision of the related services required by the IEP that is the basis of pendency for the student (Req. for Rev. ¶¶ 1, 5-6; Answer ¶¶ 6, 20).

The proposed move of the program from Holland BOCES to LoGuidice BOCES does not, on its own, constitute a change of placement since, as noted above, 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, 629 F.2d at 753, 756). However, the proposed 6:1+1 LoGuidice BOCES program (with a variance for an additional student) with a 1:1 aide and without related services amounts to a change in placement notwithstanding the district's intentions to provide make-up related services at a later date. If the district had attempted to make such a change to the student's program, it would have required a substantive change in the student's IEP to adjust the special class ratio and remove related services (see 8 NYCRR 200.1[qq]; 200.6[e]). The district made admirable attempts to identify a substantially similar program for the student after the Holland BOCES program became unavailable but did not ultimately succeed in locating such a placement for summer 2022. While the parent's advocate demonstrated a willingness to negotiate with the district and agree to an alternative pendency placement for summer 2022, the parent did not ultimately agree to the change during the impartial hearing (July 5, 2022 Tr. pp. pp. 12-13, 29-34; Dist. Pendency Brief, Ex. 1).

In light of the above, the proposed 12-month services in a 6:1+1 special class (with a variance for an additional student) at LoGuidice BOCES program with a 1:1 aide but without the provision of the related services constitutes a failure to maintain the student's educational placement under pendency and the offered educational placement was not "substantially and materially the same" as the student's pendency educational program. Accordingly, the IHO's determination to the contrary must be reversed (July 25, 2022 Interim IHO Decision at p. 6).

Having found that the district did not offer a substantially similar pendency placement for the student for summer 2022, the student may be entitled to some relief for the lapse in pendency. The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

unimplemented IEP that the student received specialized reading support during the 2021-22 school year does not lead to the conclusion that such instruction became part of the student's pendency placement.

Here, the appropriate remedy is a remand to continue these proceedings (see 8 NYCRR 279.10[c] [providing that a State Review Officer is authorized to remand matters back to an IHO to take additional evidence or make additional findings]). Accordingly, the IHO's decision must be vacated and the matter remanded to the IHO for further proceedings relating to the parent's claim for compensatory pendency services arising from the district's failure to implement the student's 12-month services pendency program as set forth above. Upon remand, the IHO shall fully develop the hearing record on each issue that must be ruled upon in order to address the parent's claim for compensatory pendency services. The IHO may direct the parties to present evidence supporting their respective positions at the hearing. Specifically, the parent should articulate for the IHO how much and what form of compensatory education she seeks. Additionally, the parent should state the period of time she is seeking for the student to be able to use any such compensatory education award. Further, information regarding the student's present ability to use the compensatory education services being sought may be relevant in light of the student's educational placement, under pendency or otherwise, at the time the IHO renders a subsequent interim order contemplated herein. Lastly, as may be relevant to a determination of the appropriate compensatory pendency order, I note State regulation which provides that students shall be considered for 12-month services "in accordance with their need to prevent substantial regression" (8 NYCRR 200.1[eee], 200.6[k][1]; see 8 NYCRR 200.1[aaa]).[12]

VII. Conclusion

Having determined that the IHO erred in finding that the district offered to implement the student's 12-month services in pendency, the case is remanded to address the parent's request for compensatory pendency services. I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated July 25, 2022 is vacated in its entirety; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings in accordance with this decision.

Dated: **Albany, New York**
October 6, 2022

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[12] Generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (id.).