The University of the State of New York

The State Education Department
State Review Officer
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No. 15-029

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 New York City Department of Education

Appearances:
Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioner, Olga Vlasova, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Theresa Crotty, Esq., of counsel

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 from the decision of an impartial hearing officer (IHO) to the extent the IHO did not find that respondent (the district) failed to offer an appropriate educational program to her son for the 2014-15 school year and did not award certain requested relief. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The hearing record reflects that the student demonstrates delayed cognitive, academic, feeding, sensory regulation, language processing, activities of daily living (ADLs), and fine and gross motor skills, and deficits in social/emotional/behavioral functioning (Dist. Exs. 2-9; Parent Ex. W). For the 2012-13 school year, the student attended an 8:1+2 special class in a State-approved nonpublic preschool and received speech-language therapy, occupational therapy (OT), physical therapy (PT), and five hours per week of home-based special education itinerant teacher (SEIT) services, pursuant to an IEP developed by a district Committee on Preschool Special Education (CPSE) (Tr. pp. 193-94; Parent Ex. Z at p. 8). In September 2013, the student began attending a 12:1+2 special class in another nonpublic preschool, where he continued to receive

related services and home-based SEIT services, in addition to the assistance of a 1:1 paraprofessional (Tr. pp. 194-95; Parent Ex. U at p. 1; see Parent Ex. R at p. 14).

In October 2013, the student received a diagnosis of a severe feeding disorder from a privately-obtained feeding evaluation conducted by an interdisciplinary team of professionals affiliated with a center for pediatric feeding disorders (Parent Ex. W). The report of the evaluation recommended that the student attend a "day feeding program" consisting of "intensive feeding therapy" provided by a multidisciplinary feeding team to increase the variety and textures of foods the student ate and to improve his ability to self-feed (id. at p. 5).

A CSE convened on March 13, 2014, to conduct an annual review and to develop an IEP for the 2014-15 school year (Parent Ex. D). In addition to receiving a diagnosis of a severe feeding disorder, the student reportedly had also received diagnoses of an autism spectrum disorder, an attention deficit hyperactivity disorder (ADHD), and a moderate intellectual disability (Dist. Ex. 2; Parent Exs. A at p. 2; Q; W at p. 5; X; Y).

The March 2014 CSE found the student was eligible for special education and related services as a student with autism (Parent Ex. D at p. 1).[1] The CSE recommended 12-month school year services consisting of placement in a 6:1+1 special class in a specialized school with speech-language therapy, PT, OT, and adapted physical education (id. at pp. 9-10).[2] The March 2014 CSE also recommended the provision of parent counseling and training (id. at p. 9).

In April 2014, the student was medically cleared to begin an "intensive day patient feeding program" at a center for pediatric feeding disorders, participating in four sessions per day over five weeks (Parent Exs. M; N). The student did not attend school during the five-week feeding program (Parent Ex. L).

In a final notice of recommendation (FNR) dated May 9, 2014, the district summarized the special education programs and related services recommended by the March 2014 CSE and identified the particular public school site to which the district assigned the student to attend for the 2014-15 school year (Parent Ex. E). The parent indicated her disagreement with the assigned public school site and program recommendations in writing on June 3, 2014 (id.).

A CPSE convened on May 19, 2014, to develop the student's IEP for summer 2014 (Parent Ex. B).[3] The CPSE continued to recommend placement in a 12:1+2 special class in a State-approved nonpublic preschool special education program with the related services of speech-language therapy, OT, and PT (id. at p. 17). The CPSE also recommended eight hours per week

[1] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (34 CFR 300.8 [c][6]; 8 NYCRR 200.1[zz][1]).

[2] However, as the student was considered a preschool student with a disability eligible to receive services under the auspices of the CPSE through August 2014 (see Educ. Law §§ 3202[a]; 4410[1][i]; 8 NYCRR 200.1[m][2]), the IEP did not call for implementation of the recommended services until September 2014 (Parent Ex. D at pp. 1, 9).

[3] The May 2014 CPSE IEP reflects both that the CPSE met on May 19 and on June 10 (Parent Ex. B at pp. 1, 21); as the parties do not dispute the date of the meeting it is not further discussed.

of home-based SEIT services and a full time 1:1 paraprofessional to assist the student at school (id.).

After rejecting the recommended public school site, the parent requested that the CSE reconvene and consider a nonpublic school placement (Dist. Ex. 1 at p. 1). The CSE met on July 21, 2014, and issued another IEP which, with the exception of documenting the purpose of the meeting and the parent's concerns with the assigned public school site, was identical to the March 2014 IEP (compare Parent Ex. D, with Dist. Ex. 1). By FNR dated August 11, 2014, the district identified a second public school site to which the student had been assigned for the 2014-15 school year (Parent Ex. F). The parent rejected this assigned public school site in writing on August 14, 2014 (id.).

A. Due Process Complaint Notice

By due process complaint notice dated August 27, 2014, the parent requested an impartial hearing (Parent Ex. A). The parent alleged that the March 2014 CSE was not properly composed, failed to provide a copy of the student's IEP in a timely fashion, and that the district had impeded the parent's right to participate in the development of the student's IEP (id. at p. 5). The parent also alleged that the IEP developed at the March 2014 CSE meeting was not appropriate because it did not provide sufficient detail regarding the student's needs, failed to adequately address the student's behavioral, feeding, or sensory needs, and improperly discontinued the recommendation for home-based SEIT services (id. at pp. 4-5). The parent further contended that the recommended assigned public school sites were not appropriate because it could not adequately address the student's feeding and sensory needs (id. at p. 4).

B. Facts Post-Dating the Due Process Complaint Notice

In a "school location letter" dated September 23, 2014, the district offered a third public school site option for implementing the student's IEP for the 2014-15 school year and included prior written notice (Dist. Ex. 10). The parent responded in writing on October 9, 2014, indicating that she had visited the public school site on two occasions and found that it was inappropriate (Parent Ex. G at p. 4).

C. Impartial Hearing Officer Decisions

1. Pendency

During a hearing related to pendency held September 24, 2014, the parent advised the district of her intention to seek compensatory services for the period of time beginning September 4, 2014, due to the district's failure to have a pendency placement in place for the student on the first day of school (Tr. pp. 20-21). By interim decision dated September 29, 2014, the IHO ordered that the district provide the student with a pendency placement consistent with the student's May 2014 CPSE IEP (Sept. 29, 2014 Interim IHO Decision at p. 3). The IHO indicated that she would reserve determination on the parent's claim for compensatory services until she rendered her final decision on the merits (id.).

On November 4, 2014, the parties proceeded to an impartial hearing on the merits, at which time the parent informed the IHO that the district had not offered a pendency placement that complied with the September 29, 2014 interim decision (Tr. pp. 38-50). The parent argued that the district's offer of a 12:1+1 special class to implement the student's pendency placement was not comparable to a 12:1+2 special class (id.). By second interim decision dated November 10, 2014, the IHO directed the district to provide a pendency classroom with a student-to-staff ratio of 12:1+2 in accordance with the May 2014 CPSE IEP and the September 29, 2014 interim decision (Nov. 10, 2014 Interim IHO Decision at p. 2). The IHO also requested that the parties prepare briefs on the issue of whether or not a comparability analysis applied to pendency placements such that the student's school-age pendency placement was required to be identical to the student's nonpublic preschool program (id.; Tr. pp. 50-56).

The impartial hearing continued on three additional hearing dates, concluding on December 12, 2014 (Tr. pp. 29-365). On the final hearing date, the parent again asserted that the district had failed to offer an appropriate pendency placement that complied with the interim decisions on pendency (Tr. pp. 342-62). By third interim decision dated December 19, 2014, the IHO ordered the district to immediately arrange for the student to receive related services on site during the school day (Dec. 19, 2014 Interim IHO Decision at p. 7). The IHO further ordered the district to coordinate staff, teachers, and providers to ensure that the student's pendency placement was implemented in a manner that met the student's needs (id.).

2. Findings of Fact and Decision

The IHO issued her decision on the merits on January 23, 2015 (IHO Decision). With regard to the student's pendency placement, the IHO determined that the district's attempt to implement the placement in a public school did not constitute a change in placement from the May 2014 CPSE IEP and that the parent's request for full day SEIT services was not comparable to the student's preschool IEP (id. at pp. 5-8). With regard to the parent's claim for compensatory services for the district's failure to timely provide a program to implement the student's pendency placement, the IHO determined that since the claim was not included in the due process complaint notice and had arisen within the context of the impartial hearing, the parent would have to request another hearing to obtain compensatory relief (id. at pp. 3, 9).

Addressing the merits, the IHO found that a 6:1+1 special class in a specialized school was reasonably calculated to meet the student's needs (IHO Decision at pp. 13-14). The IHO further found that the student did not require home-based SEIT services and noted that the student had not made significant progress with home-based services (id. at p. 14).

The IHO then considered the parent's claim that the annual goals contained in the March 2014 IEP were inappropriate and determined that the goals were consistent with the student's current functioning (IHO Decision at pp. 14-15). Although the IHO determined that the IEP goals were appropriate, she ordered the district to convene a CSE to amend the student's IEP to include several goals requested by the parent in the due process complaint notice relating to feeding, tracing, and vocabulary skills, and to consider whether to add an annual goal relating to balance skills (id. at pp. 14-16). The IHO ordered the district to reconvene a CSE within two weeks of the date of her decision, including the student's related services providers and "any medical

professional needed to develop the feeding goals" (id. at p. 16). The IHO also ordered the CSE to amend the IEP to provide a full time 1:1 paraprofessional and to include specific instructions for the paraprofessional to follow during "eating times" within the management needs section of the IEP; to conduct a functional behavior assessment (FBA) of and develop a behavioral intervention plan (BIP) for the student; to amend the IEP to indicate when periodic reports of the student's progress toward the annual goals would be provided to the parent; and to provide an offer of placement within three weeks of the date of the decision (id. at pp. 16-17).

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO erred in determining that the district offered the student a FAPE but nonetheless ordering changes to the student's IEP. The parent argues that the IHO erred by failing to address her claims that the student required "feeding therapy" and that the student was entitled to compensatory services for the district's failure to implement his pendency placement from September 4, 2014, through December 1, 2014. The parent asserts that although the IHO properly found that the district did not develop an FBA and BIP, or appropriate goals to address all of the student's needs, she erred in not finding these failings to constitute a denial of a FAPE. The parent also challenges the IHO's determination that the student did not require home-based SEIT services to receive educational benefit from the recommended program. The parent also asserts that the district failed to recommend an appropriate public school site. The parent explicitly does not appeal from the remainder of the IHO's findings.

In an answer, the district responds to the parent's allegations with admissions and denials, and argues to uphold the IHO's decision in its entirety. In addition, the district asserts that it has complied with the IHO's order to reconvene a CSE to amend the student's 2014-15 IEP to reflect the changes set forth in the IHO's decision. With regard to the parent's claims concerning pendency, the district argues that several pendency placements were offered and rejected by the parent and that SEIT services were provided to the student during the relevant time period. The district also claims that the parent was required to raise her claim for compensatory services in the due process complaint notice in order for it to be considered in this appeal. The district also notes that the parent challenged the appropriateness of the March 2014 IEP in the due process complaint notice and the district accordingly offered testimony from participants in the March 2014 CSE meeting. The district contends that the evidence presented at the hearing is also relevant to the IEP developed at the July 2014 CSE meeting.

In a reply, the parent argues that the district should be precluded from defending the July 2014 IEP since the district did not present testimony from participants in the July 2014 CSE meeting.

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. 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; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New 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. Florida 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 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 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]; Perricelli, 2007 WL 465211, at *15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

Except for in circumstances not applicable here, the burden of proof is on the school district during an impartial hearing (Educ. Law § 4404[1][c]).

VI. Discussion

A. Preliminary Matters—Scope of Review

1. Relevant IEP

At the outset, in her reply the parent argues that the district should be precluded from using evidence presented at the hearing related to the March 2014 IEP for the purpose of defending the

July 2014 IEP. The district contends that the documentary evidence related to the March 2014 CSE meeting and resulting IEP, as well as the testimony of two participants in the March 2014 CSE meeting, are relevant to the development of the July 2014 IEP, because no substantive changes were made to the March 2014 IEP at the July 2014 CSE meeting and the meeting was convened at the request of the parent after she had visited and rejected the first public school site offered by the district.

The parent's improper use of a reply notwithstanding,[4] the parent's request to preclude the district from defending the July 2014 IEP based on the development of the March 2014 IEP is without merit. Initially, the parent does not distinguish between the two IEPs when stating her claims regarding the district's alleged failure to offer the student a FAPE. Furthermore, the record reflects that the March 2014 CSE was convened for the purpose of conducting the student's annual review and developing an IEP for the 2014-15 school year (Tr. at pp. 113, 124; Parent Exs. C; D at p. 1; E). The record supports the district's argument that the parent requested the July 2014 CSE meeting after rejecting the district's recommended program and assigned public school site, and that no changes were made to the content of the IEP (compare Parent Ex. D, with Dist. Ex. 1; see Parent Ex. E). The record also reflects that the purpose of the July 2014 CSE meeting was to discuss the parent's request for the student's placement in a nonpublic school (Dist. Ex. 1 at p. 1). The hearing record therefore supports a conclusion that the evidence concerning the March 2014 CSE and March 2014 IEP is relevant to the appropriateness of the July 2014 IEP. Nevertheless, the July 2014 IEP is the most recent IEP for the 2014-15 school year that predated the due process complaint notice, and is accordingly the appropriate subject of this decision's analysis. As such, documents available to the district at the time of the July 2014 CSE meeting that were not available at the time of the March 2014 CSE meeting are considered when analyzing the appropriateness of the program offered by the district.

2. Pendency Claims

The IHO did not address the parent's claim for compensatory services premised on the district's failure to provide pendency services until December 1, 2014. The IHO determined that the parent was required to request another impartial hearing to address this claim and the district as well reiterates that the parent was required to raise this claim in the due process complaint notice.

I find that the IHO erred by failing to address this claim. The IHO issued three interim orders on pendency but reserved making a determination on the parent's request for compensatory services until rendering her findings of fact and decision on December 29, 2014. The parent provided notice to the district of her intent to seek compensatory services for the district's failure to implement the student's pendency placement during the first day of the impartial hearing on September 24, 2014 (Tr. pp. 20-21). A student's right to pendency automatically arises as of the

[4] State regulation provides that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer of the State Education Department, except a reply by the petitioner to any procedural defenses interposed by the respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). As the reply does not address any procedural defenses raised by the district and exceeds the permissible scope of such a pleading, the allegations raised therein will not be considered.

filing of the due process complaint notice, and therefore, is one particular issue that generally is not contained in a due process complaint which an administrative hearing officer nevertheless may and should address promptly. In this case, the IHO issued three interim orders addressing the issue of the student's pendency placement, thus clearly operating with the understanding that she had jurisdiction to address issues regarding the student's pendency placement.[5] Furthermore, the IDEA confers broad remedial authority upon an IHO to address any lapse in pendency services (see Forest Grove Sch. Dist., 557 U.S. at 239). In the interests of judicial economy and finality, the parent's claim for compensatory services will be addressed herein.

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], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the traditional requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 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]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not require that a student must remain in a particular site or location (Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 171 [2d Cir. 2014] [holding 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 . . .[, i]nstead, it guarantees only the same general level and type of services that the disabled child was receiving"]). Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]).

The IHO determined—and the parties agreed—that the student's pendency placement was set forth in the May 2014 CPSE IEP and consisted of placement in a 12:1+2 special class with the related services of speech-language therapy, OT, and PT, the assistance of a full time 1:1 paraprofessional during the school day, and eight hours per week of home-based SEIT services (Sept. 29, 2014 Interim IHO Decision at p. 3). The district contends that the parent has either received these services or rejected its offers to implement the student's pendency placement. The

[5] At the same time, if a pendency issue first arises very near the conclusion of the hearing process it may, in some circumstances, be understandable if an IHO chose not to delay matters with the pendency issue and instead quickly reached a final decision in the hearing process.

parent contends that the district's failure to implement the services to which the student was entitled requires an award of compensatory services.

The record is unclear as to precisely what services the student received during the pendency of the hearing. It appears that the parent rejected several offers by the district to implement the student's pendency placement in public school sites based on her impressions of their appropriateness for the student, but accepted home-based SEIT services (Tr. pp. 38-56). The hearing record does not reflect that the district made any offer to implement the entirety of the student's pendency placement prior to on or about October 30, 2014, approximately eight weeks after the beginning of the ten-month school year on September 4, 2014 (Parent Exs. BB; CC). Since the district did not offer to provide the student with the entirety of the program and services to which he was entitled under pendency, relief is warranted; however, the parent was not entitled to decline to accept the pendency services proffered by the district and demand different services that she preferred the student receive (Tr. pp. 7-9, 49-53, 344-45; see T.M., 752 F.3d at 171; Mackey, 386 F.3d at 160-61; A.W. v. Bd. Of Educ., 2015 WL 3397936, at *5 [N.D.N.Y. May 26, 2015]).

For failing to implement the student's pendency placement, the district is directed to provide the student with compensatory services equivalent to eight weeks of services pursuant to the May 2014 CPSE IEP: 12 hours of speech-language therapy, 8 hours of OT, and 8 hours of PT. However, it appears that the student received SEIT services for at least some portion of this time period (Tr. p. 38), and the hearing record does not reflect what portion of the 64 hours of home-based SEIT services to which the student was entitled pursuant to pendency he received during these eight weeks. The parties are directed to examine the student's records, confer and determine the amount of SEIT services the student improperly missed due to the district's failure to implement his pendency placement at the beginning of the school year, after which the district is directed to provide the student with make-up services. Furthermore, to compensate the student for the district's failure to provide him with approximately 200 hours of instruction in a 12:1+2 classroom (approximating a student-to-adult ratio of 4:1) during the first eight weeks of the school year; the district is directed to provide compensatory services in the amount of 50 hours of 1:1 instruction provided by a special education teacher. In addition, with regard to the approximately four week period from October 30, 2014, through December 1, 2014,[6] although the district offered several public school sites to implement the student's pendency placement, the hearing record also reflects that the district was not ready to fully implement the student's pendency placement, offering a 12:1+1 special class instead of the 12:1+2 special class the parties agreed constituted the student's pendency placement. While this was a relatively minimal failure, and no award is made for the majority of the services missed during this time period because the parent chose not to send the student to a public school placement (see, e.g., French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471-72 [2d Cir. 2011]), I find that the student is entitled to one hour of 1:1 instruction provided by a special education teacher for each week from October 30, 2014, through December

[6] The hearing record reflects that the student began attending the public school pendency placement, although intermittently, on December 1, 2014 (Tr. p. 351).

1, 2014, during which the district failed to provide a pendency placement in conformity with the May 2014 CPSE IEP.[7]

B. Appropriateness of the July 2014 IEP

As discussed above, the substantive content of the July 2014 IEP is identical to that of the March 2014 IEP. Since the information considered by the March 2014 CSE formed the basis for both the March 2014 IEP and July 2014 IEP, a brief discussion of the student's needs as identified in the evaluative reports before the March 2014 CSE meeting is necessary.

The hearing record reflects that the evaluative information in existence at the time of the March 2014 CSE meeting included a March 2013 educational progress report, a March 2013 speech-language therapy progress report, a March 2013 OT progress report, a March 2013 PT progress report, a December 2013 OT progress report, a December 2013 educational progress report, a January 2014 social history update, a January 2014 speech-language therapy evaluation, a February 2014 letter from the student's pediatric endocrinologist, and a February 2014 classroom observation, as well as the student's then-current CPSE IEP (Tr. pp. 122-23, 130, 138, 161; Dist. Exs. 2; 4-9; Parent Exs. R; T; U; V).[8] The parent testified that she provided the district with additional documents the day after the March 2014 CSE meeting, including an October 2013 interdisciplinary feeding evaluation, the February 2014 letter from the student's pediatric endocrinologist, and March 2014 prescriptions for OT, PT, and feeding on an "as needed" basis (Tr. pp. 209-11; Dist. Exs. 2-3; Parent Ex. W).

According to the March 2013 educational progress report, the student demonstrated delays in cognition, communication, fine and gross motor skills, adaptive behavior, and social/emotional functioning (Dist. Ex. 8 at pp. 1-3). The progress report also indicated that the student demonstrated "progress in all areas while in the classroom" (id. at p. 2; see Parent Ex. U).

A March 2013 service provider progress report identified the student's speech-language needs, indicating that the student demonstrated delays in the areas of receptive, expressive, and pragmatic language, as well as social skills (Dist. Ex. 9 at pp. 1-2). The progress report also indicated that the student demonstrated progress in both receptive and expressive language skills (id. at p. 1; see Parent Ex. T).

The March 2013 OT annual report indicated that the student demonstrated difficulties with visual-motor skills, visual-perceptual skills, self-help skills, and fine motor skills (Dist. Ex. 7 at

[7] The district's insistence on an IHO order to provide the student with services pursuant to pendency is inconsistent with the IDEA (Tr. pp. 15, 54), as a child's stay put placement is to be implemented automatically and not through the issuance of an administrative order (Zvi D., 694 F.2d at 906 [holding that "implicit in the maintenance of the status quo is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent before the parent requested a due process hearing. To cut off public funds would amount to a unilateral change in placement, prohibited by the Act"]).

[8] However, the hearing record is not clear what materials were considered by the March 2014 CSE.

pp. 1-2). The report noted that the student was able to feed himself using utensils with moderate assistance and verbal cues (id. at p. 2; see Parent Ex. V).

A March 2013 PT annual report described the student's gross motor needs, indicating that the student presented with difficulties in the areas of gross motor skills, specifically balance, muscle strength, jumping, walking stairs, and ball throwing/catching (Dist. Ex. 6). The report noted that the student demonstrated "great improvements on gross motor skills" (id.).

A January 2014 social history update indicated that the student was in "good overall health" (Dist. Ex. 5). The social history also indicated that the student was almost fully toilet trained, but required assistance with grooming and self-care skills (id.). The report noted that the student could sometimes feed himself independently, but often needed assistance from an adult (id.). The report also noted that the student demonstrated progress in all areas including managing belongings, play skills, and transitions (id.). According to the social history, the student "benefits from his one to one paraprofessional" relative to remaining engaged and alert (id.). The report indicated that the student was "'absent'" when not prompted to maintain attention to a task (id.).

A February 2014 classroom observation described the student's functioning and behavior in his 12:1+2 special class in his preschool program (Dist. Ex. 4 at p. 1). The report also indicated that the student listened to the teacher introduce the good morning song, but then appeared distracted (id.). According to the report, the student ate slowly, required additional time to eat, and required assistance from his paraprofessional to eat (id.). As part of a teacher interview, the teacher indicated that the student demonstrated difficulties with changes, interacting with peers, and required assistance with feeding (id.). The report also indicated that the student shared attention with adults and peers, copied simple designs, identified primary colors and shapes, repeated back four word sentences, and repeated back three numerals (id.). The report noted the student could not yet play cooperatively with peers, lacked coping skills relative to unexpected changes in routine, and could not maintain attention for five minutes (id.).

1. Home-Based SEIT Services

The parent asserts that the student requires home-based SEIT services to address his needs. Upon review of the hearing record, the evaluative information does not support a finding that the student required home-based services in order to receive educational benefit.

The parent further alleges that the IHO did not have a reasonable basis for finding the student could progress in school without home-based SEIT services and that the student required home-based SEIT services to retain and internalize skills learned during the school day, generalize skills, and reinforce skills lost to regression from breaks in instruction.[9] Specifically, the parent contends that the student required home-based SEIT services based upon evaluative reports that showed the student progressed with SEIT services and that the SEIT provider recommended the continuation of services in order for the student to acquire, retain, and generalize skills (see Parent

[9] In addition, the student's home-based SEIT provider during the summer 2014 testified that the student required home-based SEIT services to learn and solidify skills because of the student's difficulties with memory and attention (Tr. pp. 284-85).

Exs. H; I; K; L; R). According to an April 2014 progress report prepared by a home-based SEIT provider, the student's "progress in meeting his goals is very slow" and other reports completed by the student's SEIT providers also reflected that the student made minimal progress while receiving home-based services (Parent Ex. K; see Parent Exs. H; I; L). In contrast, within the classroom setting the evaluative information indicates that the student demonstrated progress in academics, play skills, language processing, and motor skills (Dist. Exs. 5-6; 8 at p. 2; 9). A review of the evaluative information available to the CSE does not reflect that the evaluators recommended home-based services (Dist. Exs. 4-9; Parent Exs. T-W). While the parent emphasizes that one of the student's SEITs recommended home-based SEIT services (Parent Ex. L), there is no indication in the evidence in the hearing record that this document was provided to the July 2014 CSE.

Although the parent believes the student required home-based SEIT services to derive educational benefit, the record indicates that the primary purpose of these services was to enable the student to acquire, retain, and generalize skills. Several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]).

The hearing record indicates that the July 2014 CSE designed a program that was reasonably calculated to provide the student with educational benefit. The July 2014 IEP incorporated the information detailed above as well as the input provided by the parent into the student's present levels of performance (Dist. Ex. 1 at pp. 1-3). Based upon the student's present levels of performance, the July 2014 CSE developed annual goals to target the student's areas of need (id. at pp. 1-3, 5-9). The July 2014 IEP contained approximately 11 annual goals and 35 short-term objectives in the areas of academics, language development, communication, and fine and gross motor skills (id. at pp. 5-9). The evidence in the hearing record shows that, consistent with the student's needs as identified in the IEP and in conformity with State regulations, the July 2014 CSE recommended a 12-month school year program in a 6:1+1 special class in a specialized school (id. at p. 10). State regulations provide that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). According to the evidence in the hearing record, the student exhibited such "highly intensive" management needs (see Dist. Exs. 4-9; Parent Ex. W). The district speech teacher and school psychologist who attended the March 2014 CSE meeting testified that the CSE recommended a 12-month school year in a 6:1+1 special class placement in a specialized school based on the student's significant cognitive and language delays (Tr. pp. 117-18, 160-61).

The July 2014 CSE recommended both related services and accommodations to address the student's needs. The testimony of the speech teacher, who also served as district representative at the March 2014 CSE meeting, reflects that the CSE recommended related services of speech-language therapy and OT to address the student's expressive, receptive, and pragmatic language and fine motor skills (Tr. pp. 121-22). The July 2014 CSE also recommended PT and parent

counseling and training (Dist. Ex. 1 at p. 10). To address the student's management needs, the July 2014 IEP included the following accommodations and supports: structure and routine throughout the day, positive reinforcement for appropriate behaviors and during transitions, modeling, verbal and visual prompts, redirection, hand-over-hand assistance, increased processing time, picture cards for communication, sensory/movement breaks as needed, and access to sensory toys (id. at p. 3).

Based on the forgoing, the hearing record supports a finding that the district offered the student an appropriate educational program that would address his significant needs during the school day and does not indicate that the student required additional home-based services in order to receive educational benefits.

2. Feeding Needs

The parent also contends that the student requires "feeding therapy" to address his needs relating to feeding. Initially, the parent does not specify precisely what she means by "feeding therapy," which is not defined by the IDEA, State statute or regulation The parent does not clarify why the student's demonstrated needs in the area of feeding could not be addressed by the provision of speech-language therapy and OT. However, as set forth below, the evaluative information used to form the basis of the July 2014 IEP indicated needs in the area of feeding, and the hearing record reflects that the student's delays in feeding skills were related to oral motor and sensory needs (Tr. pp. 94-95; Parent Exs. M at pp. 1-2; T at p. 3; W at pp. 2-3).

As noted above, the March 2013 educational progress report indicated that the student required physical prompts to feed himself but would sometimes feed himself independently with utensils (Dist. Ex. 8 at p. 2). The student's teacher reported that the student demonstrated regression, specifically with regard to feeding, after holidays and school breaks (id. at p. 3). The teacher indicated that the student was beginning to eat "stage-2 baby food and crackers" before a school break, but after returning to school, he refused to eat any food and it "took a long time for him to start to accept stage-1 baby food" (id.). According to the March 2013 OT progress report, the student was able to feed himself with utensils with moderate assistance and verbal cues and was able to wipe his hands and face with minimal to moderate tactile assistance (Dist. Ex. 7 at p. 2).

The October 2013 interdisciplinary feeding evaluation report described the student's medical, social, and feeding history, as well as his present medical conditions (Parent Ex. W at pp. 1-6). The evaluation report noted that the student demonstrated a severe delay regarding toleration of textures, extremely limited variety of foods accepted, and only drank water from a cup with a straw and milk from a baby bottle; and provided a diagnosis of a severe feeding disorder characterized by food refusal, minimal food variety, and an inability to manage age-appropriate textures (id. at p. 5). The evaluator further described the student as exhibiting a delay correlating to the feeding skills of a child aged 12-to-18 months (id. at pp. 4-5). The evaluator stated that the student required intensive services to improve his feeding skills and volume (id. at p. 5). The evaluation also indicated that the student currently had a very limited dietary repertoire and remained on a puree diet (id. at p. 2). The report indicated the student required "intensive services to improve his feeding skills and volume" (id. at p. 5). In summary, the evaluation stated that "due

to the aforementioned feeding and oral motor impairments" the student was recommended for the center for pediatric feeding disorder's "day feeding program," which would focus on treating oral motor, sensory, behavioral, and medical issues (id.). The report indicated treatment goals were to include increasing the variety of pureed table foods and the textures of food the student could tolerate, to transition to cup drinking, and to increase self-feeding (id.). The interdisciplinary team that participated in the evaluation recommended that: (1) the parent should end meals when the student verbalizes that he does not want any more because he may be full; (2) the parent should reduce the number of pureed meals and offer more "chewables;" (3) the parent should start each meal with three cookies to assist the student in transitioning; (4) the parent should use a timer for all meals and limit each meal to 30 minutes; and (5) the speech pathologist who participated in the evaluation should consult with the student's school-based speech-language provider (id. at pp. 5-6).

The information provided in the December 2013 preschool progress report was relied upon by the March 2014 CSE and much of the report appears on the July 2014 IEP (compare Parent Ex. U, with Dist. Ex. 1). The student's preschool special education teacher described the student as unable to tolerate certain textures of food and as a result ate pureed food (Parent Ex. U at p. 4). She also indicated that the student was able to use utensils and "scoop his food on his own" (id.). Likewise, the December 2013 OT progress report relative to the student's ADLs appears verbatim on the July 2014 IEP (compare Parent Ex. V at p. 3, with Dist. Ex. 1 at p. 3).

The January 2014 speech-language evaluation and the December 2013 OT progress report also described the student's needs related to feeding (see Parent Exs. T; V). The January 2014 speech-language evaluation indicated that the student ate a reduced variety of tastes and textures and that he did not like to try novel food, tastes, and textures (Parent Ex. T at p. 3). The report indicated that the student ate pureed food and would gag or spit out any small solid pieces of food in the puree (id.). The evaluative report indicated that within the classroom, the student ate cereal with a spoon independently (id.). The December 2013 OT progress report indicated the student ate slowly and that feeding him lunch took a long time (Parent Ex. V at p. 3). The report also indicated that the student fed himself yogurt for a snack, but at lunch time when he was fed by a paraprofessional, the student did not open his mouth wide enough to fit the bowl of the spoon in his mouth, kept his cheeks tight, and opened his lips only minimally in front (id.). The report also noted the student's intake of food with each spoonful was minimal and therefore it took a long time for him to eat (id.).

The February 2014 classroom observation and the January 2014 social history update also identified the student's needs related to feeding (Dist. Exs. 4; 5). The classroom observation indicated that during snack time, the student ate slowly and required assistance from his paraprofessional to eat, as well as requiring additional time to eat (Dist. Ex. 4 at p. 1). According to the January 2014 social history update, the student was described as a "picky eater who refuses to try new foods," and as able to feed himself independently at times, but often needed assistance from an adult (Dist. Ex. 5). The student's nonpublic preschool social worker also indicated that the student predominately ate pureed food, along with dry cereal (id.). According to the district representative, the student's social worker also stated during the March 2014 CSE meeting that the student refused the pureed food sent from home and often requested dry cereal, yogurt, and soup provided by the nonpublic preschool (Tr. p. 131).

The hearing record indicates that the July 2014 CSE was aware of the student's needs related to feeding and the July 2014 IEP adequately identified the student's needs in the area of feeding (Dist. Ex. 1 at pp. 2-3). Specifically, the July 2014 IEP indicated the student's difficulties with feeding related to tolerating food textures and sensory processing (id. at p. 2). The IEP also reflected that the student primarily ate pureed food, but also ate crackers, cereal, and yogurt (id. at pp. 2-3). The July 2014 IEP indicated that a paraprofessional fed the student, but he was beginning to self-feed with monitoring (id. at p. 3). The IEP noted, as indicated above, that the student did not open his mouth wide enough during feeding to fit the bowl of the spoon into his mouth, his cheeks remained tight during feeding, and he opened his lips minimally, resulting in long meal times (id.). The IEP further indicated that the student's doctor had approved "[m]ultidisciplinary therapies centered around feeding" to assist the student with independent feeding (id.).

The parent testified that the March 2014 CSE discussed the student's needs related to feeding and that she was told feeding therapy would be included on the IEP (Tr. pp. 204, 209). Specifically, the parent testified that during the March 2014 CSE meeting, she informed the CSE members of the student's feeding difficulties, including not fully opening his mouth when eating, refusing to eat solid foods, vomiting when introduced to new foods, and vomiting and gagging when pureed food was not completely smooth (Tr. pp. 206-08). The district school psychologist who attended the March 2014 CSE meeting testified that she was aware of the student's feeding disorder diagnosis and the recommended feeding protocol (Tr. pp. 169-73). The school psychologist further testified that the CSE took this into account and that the student's feeding needs could be met by the provision OT and speech-language therapy (Tr. pp. 166-67, 171-73).

The district representative also testified that it was noted during the March 2014 CSE meeting that a paraprofessional assisted the student with feeding, but that the student was beginning to feed himself and was monitored by a paraprofessional (Tr. pp. 128-30). The district representative also testified that based on the student's progress in feeding, which included eating more solid foods and a better ability to feed himself, the IEP addressed the student's needs (see Tr. pp. 128-31). However, the IEP did not include a paraprofessional to monitor the student during mealtimes, or otherwise provide any supervision for the student while eating (Dist. Ex. 1). The district representative further testified that the March 2014 CSE did not recommend "feeding therapy" because the October 2013 feeding evaluation neither recommended "feeding therapy" nor stated that "feeding therapy" was educationally necessary for the student (Tr. p. 129). However, as set forth above the multidisciplinary feeding evaluation indicated the student demonstrated significant feeding needs and recommended "intensive services" beyond the feeding therapy the student was then receiving at his preschool (Parent Ex. W at pp. 5-6).

Despite the fact that the July 2014 IEP identified the student's feeding needs, the CSE did not include any annual goals, accommodations, or services in the IEP to address such needs, nor did the annual goals in the areas of OT or speech-language therapy address these needs (see Dist. Ex. 1). The district's failure to provide any services or goals specifically aimed at addressing the student's needs relating to feeding constituted a denial of a FAPE under the circumstances of this case; however, the IHO's order that the CSE amend the student's IEP to add a feeding goal and a full time 1:1 paraprofessional, and mandating the coordination of teachers, providers, and medical professionals to address the student's feeding needs, constitutes an appropriate remedy for the violation (IHO Decision at pp. 16-17). Given that the district asserts that it has complied with the

IHO's order and does not appeal from any portion of that decision, it is not clear from the hearing record that "feeding therapy" as such must be included as a related service on the student's IEP to enable the student to derive benefit from his educational program.[10] However, to ensure that the student's needs are fully considered, the district is directed to convene a CSE, that includes the participation of the student's providers from the center for pediatric feeding disorders and a district school physician, within 30 days of the date of this decision, to determine whether the student requires additional services beyond those directed by the IHO to appropriately address his feeding needs.[11]

C. Assigned Public School Site Claims

Having found that the district failed to offer the student a FAPE for the 2014-15 school year, the parent's claims relating to the district's three recommended assigned public school sites—that the school sites posed safety hazards to the student, related services would be pushed in to the classroom, and the student would not be provided with assistance during meal times—need not be addressed in detail. The IHO did not address these claims because she directed the district to convene a CSE, make specific changes to the IEP, and offer a placement that could implement the revised IEP (IHO Decision at pp. 16-17). Even if the IHO had considered the parent's claims relative to the implementation of the July 2014 IEP and the assigned public school sites, they are nevertheless speculative in nature.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88, 195; see R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 8-9 [2d Cir. 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013]; D.N. v. New York City Dep't of Educ., 2015 WL 925968, at *7 [S.D.N.Y. Mar. 3, 2015]; J.F. v. New York City Dep't of Educ., 2015 WL 892284, at *5 [S.D.N.Y. Mar. 3, 2015]; see also R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *2-*3 [2d Cir. Mar. 19, 2015]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; Grim, 346 F.3d at 381-82; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]). Accordingly, the parent cannot prevail on her claim that the district would have failed to implement the July 2014 IEP at any of the assigned public school sites because a retrospective analysis of how the district

[10] The parent also argues that the IHO erred by finding the district offered the student a FAPE and nonetheless ordering the district to make changes to the 2014-15 IEP. Although it is unnecessary to pass on the merits of this argument due to the resolution of this appeal, the Second Circuit has held that an IHO or SRO may properly determine that the program offered by a district was adequate to provide a FAPE to a student and yet direct the district supplement the appropriate IEP with additional services (see R.E., 694 F.3d at 188; T.Y. v. New York City Bd. of Educ., 584 F.3d 412, 417-419 [2d Cir. 2009]).

[11] Having found that the district failed to offer the student a FAPE, it is unnecessary to address the parent's arguments that the IHO erred in not finding a denial of a FAPE premised on the district's failure to conduct an FBA, develop a BIP, or include certain goals in the July 2014 IEP. Furthermore, the relief awarded by the IHO with respect to these claims—which was not appealed by the district—appropriately addressed any deficiencies in the IEP development process.

would have executed the student's July 2014 IEP at the assigned public school sites is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186). Here, it is undisputed that the parent rejected all three of the proposed public school sites that the student could have attended. Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parent's claims (id.). Accordingly, the parent cannot prevail on her claims that the assigned public school sites would not have properly implemented the July 2014 IEP.[12]

VII. Conclusion

In summary, the IHO erred in determining that the district offered the student a FAPE for the 2014-15 school year and that the parent was required to request another impartial hearing to seek compensatory education services for the district's failure to provide a pendency placement for the student. The findings of fact and decision of the IHO are affirmed in all other respects. I have considered the parent's remaining contentions and find them to be without merit or unnecessary to address in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated January 23, 2015, is modified by reversing those portions which found that the district offered the student a FAPE for the 2014-15 school year and held that the parent was required to request a separate impartial hearing to seek compensatory education services for the district's failure to implement the student's pendency placement; and

IT IS FURTHER ORDERED that the district shall provide the student with compensatory services consisting of 12 hours of speech-language therapy, 8 hours of OT, 8 hours of PT, and 50 hours of 1:1 instruction provided by a special education teacher; and

IT IS FURTHER ORDERED that the district shall provide the student with home-based SEIT to the extent he did not receive the full amount of such services to which he was entitled—as discussed above—during the period of September 4, 2014 through October 30, 2014, as well as one hour of 1:1 instruction provided by a special education teacher for each week the district was not prepared to fully implement the student's pendency placement during the period of October 30, 2014 through December 1, 2014; and

[12] To the extent some courts have indicated that there may be a limited "life and safety" exception to the general rule precluding challenges to an assigned public school site the student never attended (see N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*15 [S.D.N.Y. June 16, 2014]), the hearing record does not support a finding that the district denied the student a FAPE on that basis in this case. Furthermore, while the Second Circuit has held that a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y. v. New York City Bd. of Educ., 584 F.3d 412, 420 [2d Cir.2009]). The district is required to implement the written IEP and parents are within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

IT IS FURTHER ORDERED that the district shall convene a CSE—which CSE shall include the participation of the student's providers from the center for pediatric feeding disorders as well as a district school physician—to determine whether the student requires additional services beyond those directed by the IHO to be included in the student's IEP in order to appropriately address his feeding needs, within 30 days of the date of this decision.

Dated: **Albany, New York**
June 8, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER