The University of the State of New York

The State Education Department
State Review Officer
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No. 19-088

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioners, by Vanessa Jachzel, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining their son's pendency (stay put) placement during a due process proceeding challenging the respondent's (the district's) issuance of a local diploma to the student in June 2019. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

As relevant to the present matter, during the 2018-19 school year, the student attended twelfth grade at a district public high school (see Dist. Ex. 2 at p. 1). A CSE convened on December 3, 2018 and developed an IEP for the student with an implementation date of December 17, 2018 (see id. at pp. 1, 19-21, 28). Finding that the student remained eligible for special education as a student with autism, the December 2018 CSE recommended that the student attend a 15:1 special class for math, English language arts (ELA), and social studies in a "[n]on-

[s]pecialized" school (id. at pp. 1, 20, 27-28).[1] The CSE also recommended that the student receive two 40-minute sessions of occupational therapy (OT) per week (one individually and one in a group of three); one 40-minute session of psychological services per week in a group of two; three 60-minute sessions of speech-language therapy per week individually and one 40-minute session per week of speech-language therapy in a group of five; services of a full-time 1:1 paraprofessional; adaptive physical education five times per week; and assistive technology consisting of a touch-screen tablet with an external keyboard and case for use in school and at home (id. at pp. 7, 19-21). For summer 2019, the CSE recommended a program that mirrored the program recommended for the 10-month portion of the school year, with the exception of the special class, which for the summer consisted of a recommendation for an 8:1+1 special class ("ASD Program"), and the addition of school nurse services on an "as needed" basis (id. at pp. 19-23). The district provided the parents with prior written notice on December 21, 2018 (Dist. Ex. 3).

On June 24, 2019, the district notified the parents that the student had met all graduation requirements and would be graduating with a local diploma in June 2019, "using the compensatory option" (Dist. Ex. 5 at p. 1). The notice also detailed options for the student and family to consider if the student wanted to pursue a Regents diploma, as well as "[o]ther post-secondary options [that] were discussed" (id. at pp. 1-2).

A. Due Process Complaint Notice

The parents filed a due process complaint notice dated June 24, 2019 (Parent Ex. A at p. 1). On July 24, 2019, the parents amended their due process complaint notice and alleged that the district denied the student a free appropriate public education (FAPE) by improperly issuing the student a local diploma (Parent Ex. B at pp. 1, 6).[2] The parents asserted that the CSE misled them into believing that the student would not be graduating in June 2019 and would remain eligible for special education instruction and related services during the 2019-20 school year but that the district instead unilaterally issued the student a local diploma without providing the parents with prior written notice (id. at pp. 1, 3-5). The parents also argued that the district improperly used a compensatory option or safety net scoring, without the required permission, to manipulate the student's scores on his Regents examinations, resulting in the student graduating with a local diploma rather than a Regents diploma (id. at pp. 3-4). Further, the parents asserted the district failed to provide the student with transition services (id. at p. 4).

The parents also alleged that the student's functional levels, as reported in the December 2018 IEP, called into question the validity of at least some of the high school credits the student purportedly earned, as it would have been impossible for him to meet standard criteria in ELA and math and earn high school credit for doing so, while functioning at a "fifth grade math level and a

[1] The student's eligibility for special education as a student with autism is not in dispute (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[2] The parents also alleged that the district's actions were discriminatory and violated the student's rights under the United State Constitution, the State Constitution, the Americans with Disabilities Act, and section 504 of the Rehabilitation Act of 1973 (Parent Ex. B at p. 6).

fourth grade reading level" (Parent Ex. B at p. 5). Further, the parents argued that the student had yet to achieve many of his IEP annual goals or post-secondary goals (id.).

With regard to the December 2018 CSE, the parents alleged that "[u]pon information and belief," the CSE did not include all required members (Parent Ex. B at p. 5). The parents also asserted that the IEP failed to include annual goals "to address many identified areas of need, including maintaining focus and attention or developing higher level math skills" (id.).

For summer 2019, the parents noted that, "[u]pon information and belief," the district had implemented a program for the student but that said program did not align with the program recommended in the December 2018 IEP and that the student "may not [have] be[en] receiving all of his related services" or transportation from the district (Parent Ex. B at p. 5).

The parents "invoke[ed] their pendency rights" and alleged that the student's last-agreed upon placement was pursuant to the December 2018 IEP (Parent Ex. B at p. 6). For relief, the parents requested that an IHO order the district to rescind the student's local diploma, reconvene a CSE to develop an IEP that would allow the student to work towards achieving a Regents diploma, and place the student in "appropriate vocational programs" aligned with the student's stated post-secondary goals (id. at pp. 6-7). The parents also requested that the district be required to provide or fund compensatory education services for any services required by the December 2018 IEP but not provided to the student during summer 2019 and reimburse the parents for the costs of transportation for such time (id. at p. 7).

B. Impartial Hearing Officer Decision

On August 8, 2019, an impartial hearing was held for the purposes of determining the student's pendency placement and services (Tr. pp. 1-20). During the impartial hearing, the district representative indicated that the student was receiving special education in a summer program "because the parents were upset with the student having graduated [and] the school agreed to allow him to stay for the extended school year"; however, the district representative indicated that the student's "services would end . . . in August when the summer school year [wa]s over" (Tr. pp. 11-12). The district insisted that it be permitted to set forth its position on pendency after the IHO indicated on the record that he intended "to give [the student] pendency" (Tr. p. 14). The district argued that, because the student had graduated and received a local diploma, he was no longer entitled to a pendency placement (Tr. pp. 15-16). In the alternative, the district requested that, if the IHO found that the student was entitled to pendency, the 15:1 special class be limited to the subjects in which the student had not yet passed Regents examinations (Tr. p. 16). At this point, the IHO stated he was "going to amend what [he had] said" because the parties did not know "whether or not the student would be in the same school" (Tr. pp. 16-17). Accordingly, the IHO indicated that he would order that the student continue to receive pendency through the date of the IHO's final decision "unless he is no longer in that school[,] [m]eaning that if that school says he cannot attend anymore, then there's no place for him to have those services" (Tr. p. 17). The parents' attorney attempted to argue that the district should be required to continue the student's program but the IHO interjected and stated his understanding that he "ha[d] no right to tell the school to allow [the student] to stay there" and that the district's continuation of the program was "a substantive issue," not a pendency issue (Tr. pp. 17-18). Finally, in response to the parents' attorney's inquiry, the IHO clarified that the school that the student was attending during summer

2019, not the school that he attended prior to graduation, would be the school which could allow the student to continue (Tr. pp. 18-19).

In an interim decision, dated August 8, 2019,[3] the IHO determined that the student's pendency was based on the December 2018 IEP and he listed the program and services set forth in that IEP (Interim IHO Decision at pp. 1-2).[4] The IHO indicated that the district high school (which the student had attended prior to graduation) "ha[d] allowed [the student] to continue at their school for the summer" (id. at p. 1). The IHO determined that he would "extend the services, as pendency, listed in the 12/3/18 IEP through the summer and if the high school allows his attendance past the summer then the pendency will continue until" the IHO issued his final decision (id.).

IV. Appeal for State-Level Review

The parents appeal from the IHO's interim decision,[5] asserting that the IHO erred in failing to properly order the district to provide the student with a pendency placement and services. Initially, the parents note that the IHO's decision included an inaccuracy when it indicated that, for summer 2019, the student was attending the district public high school from which he graduated in June 2019. The parents assert that the student was actually attending a different public high school for summer 2019. Next, the parents assert that the IHO erred when he verbalized during the impartial hearing that he would order pendency but then revised his statement after allowing the district to make an argument. The parents allege that the IHO ignored the legal standard for pendency when he conditioned the student's continued receipt of services at the start of the school year on whether or not "the high school allows his attendance past the summer." The parents argue that "[a] student's right to pendency is absolute and cannot be overruled by the whims of school personnel" or otherwise depend on the location at which the student was receiving services. The parents also allege that their challenge to the district's issuance of a local diploma to the student triggered the student's right to pendency, since graduation represents a change in placement. Finally, the parents set forth factual allegations indicating that they attempted to send the student to the district high school on the first day of the 10-month portion of the 2019-20 school year but that he was turned away. The parents allege that the district continues to refuse to implement pendency services for the student.

[3] The IHO's interim decision addressing pendency was originally mis-dated August 4, 2019 (Aug. 4, 2019 Interim IHO Decision at p. 2). For purposes of this decision, all citations to the IHO's interim decision are to the corrected version, dated August 8, 2019.

[4] The IHO listed the program and services in total without making a distinction as to which aspects were specific to either the 10-month portion of the school year or the summer program (see Interim IHO Decision at pp. 1-2).

[5] In their respective pleadings, the parents and the district cite to transcript pages and exhibits that are not part of the hearing record on appeal and appear to be citations from a transcript of a subsequent impartial hearing date held on the merits of the case, as well as exhibits entered into evidence on that date (Req. for Rev. at ¶¶ 2-3, 11-15; Answer at n.2 & ¶ 7). Additionally, the hearing record filed with the Office of State Review included district exhibits 2 through 11 but only exhibits 2 through 6 were entered into evidence during the impartial hearing date devoted to pendency (see Tr. pp. 6-7; Dist. Exs. 2-6); the exhibits that were not entered into evidence on August 8, 2019 have not been considered.

The parents request that the district be required to provide the student with a pendency placement and services pursuant to and consistent with the December 2018 IEP immediately and while these proceedings, including any appeals, are pending. The parents also request that the district be required to provide or directly fund compensatory education services for its failure to provide pendency services as of September 5, 2019.

In its answer, the district generally responds to the parent's allegations. In contrast to its argument at the impartial hearing, the district changed its position on appeal and now states that it no longer contests the parents' request for an order that the district provide the student with a pendency placement and services pursuant to and consistent with the December 2018 IEP during the pendency of these proceedings as opposed to having the student's pendency placement terminate at end of summer 2019. The district concedes that the student is entitled to pendency even though he graduated because the parents challenge the student's graduation in this proceeding.

However, the district asserts that the student is not entitled to any compensatory education for missed pendency services. In its first argument, the district asserts that the parents' request for compensatory education services is not an appeal from an adverse IHO determination and, therefore, is not properly appealed. Alternatively, the district asserts that it should not be held responsible for not providing services to the student as of September 2019 since, at the time of the impartial hearing, there was a genuine dispute as to what the student was entitled to under pendency and that the district acted in accordance with the IHO's interim decision, which limited the scope of pendency services. The district requests that an SRO dismiss the parents' compensatory pendency services claims.

In a reply, the parents assert that, as the IHO's decision was improper, the district cannot rely on it to justify not providing the student with his pendency placement and services.

V. Applicable Standards

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

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 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]). Pendency, has the effect of an automatic

injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents and 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 (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy 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]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

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]; see R.E. v. New York City Dep't of Educ.,

694 F.3d 167, 184-85 [2d Cir. 2012]; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Pendency Placement

As summarized above, the district now agrees with the parent that the student is entitled to pendency notwithstanding the fact that the district issued him a local diploma. The district also does not contest the parent's allegation that the IHO erred by giving the district public school discretion as to whether or not it provided the student with pendency services at the start of the 10-month school year.

With regard to pendency or stay put after graduation, the district and parent are in agreement that a student should remain in a stay-put placement at least in instances where one of the purposes of the pending proceedings is to challenge that change in placement, such as whether the disabled student met the requirements for graduation (see R.Y. v. Hawaii, 2010 WL 558552, at *6-*7 [D. Haw. Feb. 17, 2010] [noting that the right to stay put was not extinguished because the parents were challenging whether student was entitled to a regular high school diploma]; Tindell v. Evansville-Vanderburgh Sch. Corp., 2010 WL 557058, at *2-*4 [S.D. Ind. Feb. 10, 2010]; Cronin v. E. Ramapo Cent. Sch. Dist., 689 F. Supp. 197, [S.D.N.Y. 1988] [finding that stay put continued after the district graduated the student because the parents contended that that student had not attained the recommended targets established for him in the educational program]).

In this case, the IHO's interim decision, which not only linked the pendency to a particular school location but gave that particular school location discretion as to whether or not to implement pendency, was erroneous as its terms were contrary to settled law. 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). Moreover, the right to a pendency placement attaches when a due process complaint is filed with the school district and continues for the duration of a proceeding (Zvi D., 694 F.2d at 908).

The parties also agree that the student's pendency placement should be based on the December 2018 IEP. Therefore, the parents' appeal of the IHO's interim decision is sustained and the district shall be required to provide the student with the placement and services set forth the December 2018 IEP (see Dist. Ex. 2 at pp. 19-22) from the point in time when the parents filed the due process complaint notice and continuing to do so until such time as the relevant administrative and judicial proceedings comes to their final conclusion (see Zvi D., 694 F.2d at 908; see also T.M., 752 F.3d at 171; M.R. v. Ridley Sch. Dist., 744 F.3d 112, 124 [3d Cir. 2014] [holding that a student's entitlement to a stay put placement comes into existence when "proceedings conducted pursuant to the IDEA begin"]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 643 [S.D.N.Y. 2011] [finding that a student's pendency entitlement was "triggered . . . when [the parents] filed the due process demand notice"]).

B. Compensatory Education Services

While the parties agree that the district is obligated to provide the student with a stay-put placement based on the December 2018 IEP during the pendency of these proceedings, they disagree as to whether the district is obligated to provide the student with compensatory services to remedy the lapse in the student's receipt of services for at least the beginning of the 2019-20 school year.

In its answer, the district alleges that the parents' request for compensatory education was not properly asserted on appeal, since the IHO had not ruled upon such a request. In light of this defense, by letter dated October 3, 2019, the undersigned directed the district to provide an update regarding the underlying impartial hearing, including whether or not the question of the student's entitlement to compensatory education as relief for the district's alleged failure to implement pendency was an issue addressed during the impartial hearing, along with whether or not the IHO had issued a final decision in this matter and, if so, whether either party was considering appealing such decision (see 8 NYCRR 279.6[d]; 279.10[b]).[6] This inquiry was intended to avoid an unnecessary and/or inadvertently conflicting decision between the undersigned and the IHO on the same issue, and to discern whether it would be more prudent to postpone a definitive ruling on the issue in the present appeal in the event it was also revisited by the IHO in a subsequent or final decision with a better developed record based on events that transpired after the summer 2019 concluded.[7]

The district responded and noted that the parents' counsel set forth in her opening and closing statements during the impartial hearing that the parents intended to pursue a compensatory remedy to make up for the lapse in pendency. The district also provided a copy of the IHO's final decision that was dated September 22, 2019 and indicated that the district had been served by the parents with a notice of intention to seek review. With its letter, the district attached excerpts of the transcript of the impartial hearing post-dating the IHO's interim decision that took place on September 11, 2019, including excerpts of the parents' opening and closing statements (Supp. Ex. 1) and an exchange between the IHO and the district representative (Supp. Ex. 4), the IHO's final decision (Supp. Ex. 2), and the parents' notice of intention to seek review of the IHO's final decision (Supp. Ex. 3).[8] The parents responded and noted that, although they did provide notice of their intention to seek compensatory pendency services as an issue for the IHO to decide during the impartial hearing, they did not have the ability to present specific evidence regarding a compensatory remedy given that they were unsure until September 5, 2019, less than a week before the impartial hearing date, that the district would not be implementing pendency. With their letter,

[6] The district was also directed to file a copy of the IHO decision with the Office of State Review, if one had been issued.

[7] One can imagine that if, the IHO had issued a final decision in favor of the parents, some relief awarded with respect to the merits could easily overlap with relief awarded for a lapse in pendency services.

[8] Exhibits attached to the parties' letters were labeled by the parties as Exhibits A and B (attached to the parents' letter) and Exhibits 1-4 (attached to the district's letter). For purposes of this decision, these exhibits are referenced as supplementary exhibits with the respective letter or number designations used by the parties (see Supp. Exs. A-B, 1-4).

the parents attach a document, which is an email exchange dated August 21, 2019, and September 4, 2019, between the parents' counsel and the district implementation unit (Supp. Ex. A) and an excerpt of the transcript of the student's mother's testimony during impartial hearing proceedings that took place on September 11, 2019 (Supp. Ex. B).

A review of the hearing record and the parties' letters in response to the undersigned's inquiry, along with the exhibits attached thereto, reflects that, at least for the time period after September 2019, it appears that the issue of compensatory education due to a lapse in pendency services was not further explored in any depth during impartial hearing on the merits or in the IHO's final decision, leaving the IHO's interim decision as the IHO's final treatment of the issue.[9] Although the parents raised their desire for such a remedy during the impartial hearing on the merits (see Supp. Ex. 1 at pp. 1-2), given the IHO's August 2019 determination that pendency following the summer would be provided at the discretion of the public high school (Interim IHO Decision at p. 1), the district's failure to implement the student's pendency placement after September 2019 was likely inconsequential to the IHO and at the same time directly attributable to the IHO's interim decision currently being challenged. Indeed, it appears that the IHO sought to limit testimony about the district's alleged failure to implement pendency after September 2019, albeit this is gleaned from a limited excerpt of the transcript of the proceedings that took place on September 11, 2019 (Supp. Ex. B at p. 1). Finally, the parent's notice of intention to seek review of the IHO's final decision is relatively specific in listing the issues for which the parents would seek review and the IHO's failure to order compensatory pendency services in the final decision was not among them (Supp. Ex. 3 at pp. 1-3).[10] The foregoing supports a finding that the parents' request for compensatory education services due to a lapse in pendency after September 2019 should be reviewed this appeal from the IHO's interim decision on the issue of pendency with little reason for concern that it will unduly overlap with the IHO's final decision in this matter or any appeal therefrom.

There is no dispute among the parties that the district stopped implementing the student's pendency placement as of September 2019. The district's only argument as to the merits of the parents' request for compensatory pendency services is that it should not be held responsible for acting in conformance with the IHO's interim decision, even if the interim decision was in error.

The district cites no legal authority for its position that it is not responsible for remediating the violation of the student's stay put placement due to its reliance upon an intervening interim

[9] In his final decision, the IHO did address the parents' allegations pertaining to the district's failure to implement pendency during summer 2019 and their request for compensatory education services relating thereto (Supp. Ex. 2 at p. 11). The parents have not sought compensatory education for a lapse in pendency for summer 2019 in the present appeal. The IHO's consideration in the final decision of the implementation of pendency during summer 2019 does not preclude review of a compensatory remedy arising from an alleged lapse in pendency after September 2019 in the present appeal from the IHO's interim decision.

[10] While the parents' delineation of issues in the case information statement accompanying the notice of intention to seek review does not "preclude [them] from raising additional issues in their pleadings for review" (8 NYCRR 279.2[e]), it offers some hint of the possible areas of inquiry that the parents may pursue further in an appeal from the final decision.

decision that applied an erroneous view of the law, namely, an improper application of the law with respect to the student's pendency placement that ended the student's right to pendency mid-proceeding as described above (see e.g., Somoza v. New York City Dep't of Educ., 475 F. Supp. 2d 373, 393 [S.D.N.Y. 2007] [remanding to an IHO to determine appropriate compensatory education after finding claims were not time-barred], rev'd, 538 F.3d 106, 112 [2d Cir. 2008] [noting trial court rulings for a preliminary injunction are reviewed under an abuse of discretion standard, which includes "error of law," and finding claims were time-barred and thereby absolving the district of providing compensatory education]). To the contrary, as stated by the Second Circuit, the stay put injunction is an "automatic" one imposed upon the district at the outset of the proceedings (Zvi D., 694 F.2d at 906). The error in this case belongs to the district first and it remains the district's responsibility to make the student whole. The district cannot shield itself from its stay-put violation and its resultant compensatory education responsibilities to the student by pointing to reliance upon an IHO decision that is erroneous as a matter of law, especially when even the district admits the decision was incorrect.[11] Accordingly, the district's argument is without merit and I turn to the parents' request for relief to remedy the district's failure to implement the students' pendency.

With regard to calculating an award of compensatory education, 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 [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 [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]).

By the letter dated October 3, 3019, the undersigned also directed the district to "advise whether or not, assuming that the student is deemed entitled to compensatory education, the district could stipulate as to what an hour-for-hour compensatory award would include in order to remedy any lapse in the delivery of the stay put program and services set forth in the December 2018 IEP." In its October 7, 2019 letter the district responded. Basing its calculation on a lapse of services from September 5, 2019, through the date that the district believed this decision would be issued (November 9, 2019), the district calculated that the lapse of pendency services would total nine weeks. Based on this timeframe and the services set forth on the December 2018 IEP, the district stipulated that compensatory pendency services would consist of: 45 hours each of ELA services, math services, social studies services, and adapted physical education services; nine 40-minute group sessions each of psychological services, OT, and speech-language therapy; nine 40-minute sessions of individual OT; 27 hours of individual speech-language therapy; a 1:1 health paraprofessional for 45 days, and the provision of transportation. In their response letter dated

[11] In a criminal law context, a court might similarly state that a "mistake of law" is no defense to an intentional or willfulness element. The district is not, despite any good intention otherwise, trapped by the IHO's interim decision in this context, because, at any time, it could have simply agreed to provide the student's pendency placement (or any other pendency placement that the parties could agree upon in accordance with 20 U.S.C. § 1415[j]).

October 9, 2019, the parents indicated that the district "accurately characterized" the compensatory services based on the December 2018 IEP but added that the services should also include the provision of assistive technology, in the form of a touch screen tablet, external keyboard, and carry case. The parents also stated that, should the student remain out of school after the November 9, 2019 date the district used to calculate pendency services, then those services should be increased proportionately.

In this case, the district has not provided the student with his pendency services and instruction, starting on or about September 5, 2019. To remedy the district's failure to implement the student's pendency, the district is ordered to provide the student with compensatory education based on the December 2018 IEP. Such make-up services should be calculated on an hour-by-hour basis, with the computation of days to start as of September 5, 2019 and to continue through the date of this decision.

As a final observation, while I appreciate the candor of its legal representatives, it is profoundly disturbing that, although the district now does not contest that the student is entitled to his stay-put placement and services during the pendency of these proceedings, the district officials, according to its October 7, 2019 letter, continue to refuse to implement the student's pendency placement and intend to continue to so refuse at least until the date of the undersigned's decision. To the extent the district is awaiting an order of some sort in order to effectuate its pendency obligations to this student, the district is again reminded that it is its obligation to implement a student's stay-put placement automatically as required by the well-settled law of this Circuit (Zvi D., 694 F.2d at 906). If there is no dispute as to the student's last-agreed upon placement or such a dispute dissipates, the district has no basis for further awaiting a decision from either an IHO or an SRO to implement the student's pendency placement and services (see Letter to Goldstein, 60 IDELR 200 [OSEP 2012]).

VII. Conclusion

Based on the above, the IHO erred in providing a district public school with discretion to determine whether or not the student would receive his stay-put placement and services during the pendency of the underlying proceedings. Further, the district has continuously failed to implement the student's pendency placement beginning on September 5, 2019 and the student is entitled to compensatory education services to remedy the district's failure.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's interim decision, dated August 8, 2019, is modified by reversing that portion that provided that the student's pendency placement would continue during the 10-month portion of the 2019-20 school year only if the district high school allowed him to attend;

IT IS FURTHER ORDERED that the district shall provide the student his pendency placement as set forth in the December 3, 2018 IEP, until a final adjudication of the underlying cause of action is realized; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree to the delivery of services in a different form, the district shall provide the student with hour-by-hour compensatory education consisting of the following weekly placement and services based on the December 2018 IEP multiplied by the number of weeks during which the district has failed to implement the student's pendency placement beginning on September 5, 2019 through and including the date of this decision: a 15:1 special class for 15 hours per week (5 hours each in the areas of ELA, math, and social studies), two 40-minute sessions of occupational therapy (OT) per week (one individually and one in a group of three); one 40-minute session of psychological services per week in a group of two; three 60-minute sessions of speech-language therapy per week individually and one 40-minute session per week of speech-language therapy in a group of five; services of a full-time 1:1 paraprofessional; adaptive physical education five times per week; and assistive technology consisting of a touch-screen tablet with an external keyboard and case for use in school and at home.

Dated: **Albany, New York**
October 29, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER