The University of the State of New York

The State Education Department
State Review Officer
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No. 20-093

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

Appearances:
The Law Office of Elisa Hyman, PC, attorneys for petitioners, by Erin O'Connor, Esq., and Elisa Hyman, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail M. Eckstein, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining the student's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational programs for the student for the 2019-20 school year. The IHO determined that the student's pendency placement was the placement established, in part, based upon an unappealed IHO decision (November 2018 IHO decision). In addition, the parents appeal from the IHO's final decision, which failed to award all of the relief requested in the due process complaint notice. 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[a]). 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

Given the limited nature of the appeal, a full recitation of facts relating to the student is unnecessary. Additionally, the parties' familiarity with the educational facts and detailed procedural history of the case is presumed and will not be recited here. Briefly, at the time of the impartial hearing in the present matter, the student was eligible for special education as a student

with multiple disabilities and was receiving school-based services delivered at respondent's (the district's) public school, as well as home-based services delivered in the student's home (see Parent Exs. A at p. 1; J at pp. 3-4).[1]

A. Due Process Complaint Notice

In a due process complaint notice dated July 1, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (see Parent Ex. A at p. 1). More specifically, the parents asserted that the district failed to: "timely, thoroughly, and appropriately evaluate" the student; "develop and implement [a] substantively and procedurally valid IEP"; "offer [the student] a timely and appropriate placement"; and "employ appropriate IEP-development and placement procedures" (id. at pp. 1-2). In addition, the parents contended that the district violated their "procedural rights under the IDEA" resulting in the parents' "exclusion from the special education process" (id. at p. 2). More generally, the parents asserted that, in addition to violating the "IDEA," the district "discriminated against [the student] under Section 504 by adopting and implementing blanket policies with respect to the recommendations made on her IEPs and the provision of special education services to her" (id.).[2] The parents further alleged that the district violated "42 U.S.C. § 1983 by adopting policies and customs that deprive[d] [the student] of her right to education under [S]tate and federal law" (id.).

Next, within a section titled "Statement of the Problem," the parents described the student's alleged needs, as well as her history of special education programming and a procedural history of impartial hearings held—and the conclusions therein—dating back to the 2012-13 school year and continuing through the date of the due process complaint notice (Parent Ex. A at pp. 2-7).[3] The parents indicated that, for the 2018-19 school year, the student attended a district public school "with the provision of [a] 1:1 ABA therapist through the entire school day," and received a home-based program consisting of "10 hours of 1:1 SETSS ABA therapy" (id. at pp. 6-7).[4] The parents further indicated that, most recently, in a November 2018 IHO decision—resolving the administrative proceeding the parents brought for the 2018-19 school year—an IHO ordered the

[1] The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]

[2] "Section 504" refers to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794).

[3] As noted, the parties have been involved in due process proceedings since the 2012-13 school year, initially challenging the IEPs developed for the 2012-13 and 2013-14 school years (see Parent Ex. A at pp. 2-7). According to the due process complaint notice, IHOs determined that the district failed to offer the student a FAPE for each school year challenged, and ordered the district to provide the student with compensatory educational services in two decisions that respectively addressed the 2012-13 and 2013-14 school years, and subsequently, the 2016-17 school year (id.). A November 2018 IHO decision was the first time an IHO ordered the district to permit the student to receive home-based instruction from the school-based "push-in teacher" when she was too sick to attend school (id. at p. 7; see Parent Ex. B).

[4] Although not explained in the hearing record, "ABA" typically refers to applied behavioral analysis (see, e.g., Application of a Student with a Disability, Appeal No. 20-116). Similarly, "SETSS" typically refers to special education teacher support services; however, the term "SETSS" is not defined by State regulation and cannot currently be found in any published federal or State policy documentation (see, e.g., Application of a Student with a Disability Appeal No. 16-056).

district to reimburse or directly fund the costs of the student's "full-time 1:1 ABA certified therapist . . . through the entire school day and for (10) hours per week at home, during the 12-month school year"; provide the student with a barrier-free, 8:1+1 special class placement, five 30-minute sessions per week of individual speech-language therapy with a "PROMPT trained therapist," three 30-minute sessions per week of individual occupational therapy (OT), three 30-minute sessions per week of individual physical therapy (PT), and specialized transportation with limited travel time (no more than 60 minutes); allow the "push-in teacher" to work with the student "in the student's home" when the student was "too sick to attend school"; and provide or fund assistive technology supports and services "as appropriate" (id. at p. 7; see Parent Ex. B at p. 12).[5, 6]

Turning back to their concerns about the 2019-20 school year, the parents alleged that the student had not "been evaluated over the course of the last three years," the district failed to provide the student with an "appropriate placement," and failed to "produce a procedurally and substantively adequate IEP" for the student (Parent Ex. A at p. 7). Anticipating any claim by the district that "such an IEP" for the 2019-20 school year existed, the parents indicated that "it ha[d] certainly been fraught with substantive and procedural errors" and then listed approximately 32 allegations that, according to the parents, rose to the level of a denial of a FAPE (id. at pp. 7-9). In addition, the parents described violations of section 504, the State Constitution, and the United States Constitution; the district's "policy and practice" of refusing to respond to "parents' due process complaints" with only "boilerplate form responses" failed to provide parents with "sufficient notice" of the district's positions and thus, interfered with "parents' due process rights"; the district's use of "blanket policies and the availability of resources" when CSEs made program recommendations; and the district's failure to send individuals who "possess the authority to resolve the type of claims raised [therein]" to resolution sessions (id. at p. 9). As a final point, the parents indicated that, although the State Education Department "implemented new licensing requirements for ABA providers," the Department had "not promptly certified [Licensed Behavior Analyst(s) (LBAs)] or ensured that there [were] a sufficient number of them" within the district for the 2019-20 school year, resulting in a "shortage of LBAs" (id. at p. 10).

Next, the parents indicated that the district illegally refused to "implement payments for last-agreed upon/pendency placements and services . . . without an order from an [IHO]" in undisputed pendency placements (Parent Ex. A at p. 10). As a result, parents were "required to retain counsel and incur legal fees" (id.). Anticipating that the district would refuse to implement the student's pendency placement in this proceeding and "insist[ed] upon the issuance of an interlocutory decision from an [IHO]," the parents requested an "immediate pendency hearing" (id. [emphasis in original]).

[5] Although not explained in the hearing record, "PROMPT" is typically used as an acronym for "prompts for restructuring oral muscular phonetic targets"—a method of instruction used by speech-language pathologists (see, e.g., Application of a Student with a Disability, Appeal No. 20-002).

[6] Though sparse, the evidence in the hearing record reflects that, during the 2018-19 school year and consistent with the November 2018 IHO decision, the student's 1:1 ABA provider who pushed-in to the 8:1+1 special class placement to provide services also provided the student with "1:1 ABA services at home when she did not attend school" due to illness (Parent Ex. J at pp. 3-4; see Parent Ex. B at p. 12).

As relief for the alleged violations, the parents requested an interim decision on pendency based on the unappealed, November 2018 IHO decision, as well as an order directing the district to create a "legally valid IEP" that mirrored the educational program ordered by the previous IHO in the November 2018 IHO decision (which was the same educational program and services requested as the student's pendency placement), and to provide compensatory educational services as a remedy for the district's failure to offer the student a FAPE for the 2019-20 school year and for any failure to "provide or comply with interim orders" during the administrative proceeding (Parent Ex. A at pp. 7, 9-11). With regard to the pendency placement, the parents specifically requested that the order include the following language: "On days that [the] student [was] too sick to attend school, the push-in teacher may work in the student's home" (id. at p. 10). The parents also requested an order directing the district to authorize funding for "[a]ny afterschool or home-based services" at the "'enhanced rates'" and to provide round-trip transportation for the requested program and services (id. at p. 11).

B. Impartial Hearing Officer Decision

On September 17, 2019, the parties proceeded to an impartial hearing, and on that date, presented their respective positions regarding the student's pendency (stay-put) placement (see Tr. pp. 1-13).[7] The parents' attorney pointed to a summary of a "prior order" (November 2018 IHO decision) in the due process complaint notice to specify the services sought for the student's pendency placement (Tr. pp. 4-5; see Parent Ex. A at pp. 7, 10; see generally Parent Ex. B). As relevant here, the parents' attorney asserted that the student's pendency placement included that when the student was "too sick to attend school, the push-in teacher, the ABA teacher, may work in the student's home" (Tr. pp. 4-5). In response, the district representative challenged the parents' position, arguing that the student's pendency placement—based upon the November 2018 IHO decision—did not include the delivery of instruction in the student's home when she was too sick to attend school, the full-time ABA services, or the provision or funding of assistive technology supports and services (see Tr. pp. 5-7; Parent Ex. B at p. 12).[8]

At that time, the IHO conducted an off-the-record review of the November 2018 IHO decision (see Tr. p. 7; see Parent Ex. B at p. 12). Resuming the impartial hearing, the IHO explained that pendency was both a "placement" and a "program" (Tr. pp. 7-8). The IHO noted that, in the November 2018 IHO decision, the previous IHO concluded that the "placement and services sought by the [p]arent[s] provide[d] educational instruction specifically designed to meet the . . . unique needs of the student and [were] necessary to permit her to benefit from instruction" (Tr. p. 8). Nevertheless, the IHO stated that he would not "grant all of the services requested as part of the pendency order"—noting, for example, that the parents' attorney requested speech-language therapy two times and those services "only actually appear[ed] once in the [November 2018 IHO] decision" (Tr. p. 8). According to the IHO, the student's pendency placement consisted of the following: a 12-month school year program, an 8:1+1 special class placement in a barrier-

[7] At the impartial hearing held on September 17, 2019, the IHO entered two documents proffered by the parents—with no objections from the district representative—into the hearing record as evidence (see Tr. pp. 1, 3-4; see generally Parent Exs. A-B).

[8] Other than noting these discrepancies, the district representative agreed with the student's pendency placement as articulated by the parents' attorney (see Tr. pp. 5-6; Parent Exs. A at pp. 7, 10; B at p. 12).

free classroom, five 30-minute sessions of individual speech-language therapy services using "PROMPT," three 30-minute sessions of individual OT and individual PT, limited travel time special education transportation (not to exceed 60 minutes), and the "full-day ABA in school and [10] hours a week at home" (Tr. pp. 8-9). The IHO denied the parents' request to include assistive technology supports and services as part of the pendency placement (see Tr. p. 9). With regard to the request to include "permission" for the "push-in teacher" to work with the student when she was too sick to attend school, the IHO found that it was "not really part of the student's program" but rather, comprised a "manner in which the program might be provided" (Tr. p. 9). As such, the IHO stated that he declined to include it in the pendency decision (see Tr. p. 9). The IHO further noted, however, that "it would be up to the parties to work out how the student [was] to receive services if she [was] too sick to attend school" and "[c]ertainly if it [was] [for] an extended period" (Tr. p. 9).

In an interim decision on pendency dated September 25, 2019, the IHO ordered the district to provide the following as the student's pendency placement; a 12-month school year program, "[p]lacement in a barrier free 8:1:1 class," five 30-minute sessions per week of individual speech-language therapy with a "PROMPT trained therapist," three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, limited travel time ("not to exceed 60 minutes") special education transportation, "[f]ull-time 1:1 ABA therapy (the entire school day)," and 10 hours per week of home-based ABA therapy (IHO Ex. III at p. 2). In addition, the IHO ordered the district to provide the pendency placement retroactive to the date of the due process complaint notice, to wit, July 1, 2019 (id.).

On October 24, and December 18, 2019, the IHO conducted status conferences to review the progress made by the parties in their attempt to potentially resolve the matter through settlement (see Tr. pp. 14, 21). The parties returned for the impartial hearing on January 28, 2020 (see Tr. pp. 30, 34). At that time, the district representative confirmed that the district would not present any testimonial or documentary evidence (see Tr. pp. 34-35). The parents' attorney confirmed their intention to present the direct testimony of "one primary witness" through an affidavit entered into the hearing record as evidence and that the parents would not testify (Tr. p. 35; see generally Parent Ex. K).[9] Turning next to opening statements, the district representative stated that the district was "conceding it failed to offer this student a [FAPE]" for the 2019-20 school year" (Tr. p. 37). The IHO then confirmed with the district representative—and the district representative agreed—that the district was not taking "any position with respect to the relief requested by the [p]arent[s]" (Tr. p. 37).

Next, the parents' attorney made an opening statement, which included a description of the relief requested (see Tr. pp. 38-41). Specifically, the parents' attorney indicated that the evidence in the hearing record supported the following requested relief: a "continuation of [the student's] current program, which [was] push-in one-to-one ABA, SETSS push-in services to her current classroom, . . . an 8:1:1 classroom, with full-day one-to-one support and instruction" (Tr. p. 38). In addition, the parents' attorney indicated that, as further relief, they sought to continue the student's related services, consisting of five 30-minute sessions per week of speech-language

[9] At the impartial hearing held on January 28, 2020, the IHO entered approximately nine documents proffered by the parents—with no objections from the district representative—into the hearing record as evidence (see Tr. pp. 35-37; see generally Parent Exs. C-K).

therapy, three 30-minute sessions per week of PT, three 30-minute sessions per week of OT, and 10 hours per week of "home-based one-to-one SETSS instruction" (Tr. pp. 38-39). Finally, the parents' attorney requested that the IHO order the district to fund an "independent neuropsychological evaluation" at a "reasonable market rate," as well as special education transportation with limited travel time (60 minutes or less) (Tr. p. 39-41).

After acknowledging the "affidavit testimony" for the parents' sole witness, the IHO inquired as to whether the district wished to cross-examine the witness (Tr. p. 41). The district representative declined that opportunity (see Tr. p. 41). As such, the IHO noted then that the matter was "ready to wrap up," and offered each party the chance to make a closing statement; both parties declined (Tr. pp. 41-42). Prior to concluding the impartial hearing, however, the IHO permitted the parents' attorney to elaborate on the original opening statement (see Tr. p. 43). At this point, the parents' attorney reiterated that, as relief, the parents sought to continue the student's then-current program, and in addition, specifically noted that the hearing record included evidence concerning the student's "diagnosis and health conditions" and demonstrating that the student experienced "frequent absences from school due to her underlying conditions" (Tr. pp. 43-44). Therefore, the parents' attorney requested that "when the student [was] physically unable to attend school but available for learning and instruction, that those services be provided in the home so as to prevent the student's regression and to maintain mastery of skills and/or goals that she'[d] attained previously" (Tr. p. 44). According to the parents' attorney, the hearing record contained evidence supporting "this underlying claim" (Tr. p. 44). The IHO then concluded the impartial hearing (see Tr. pp. 44-45).

By decision dated April 20, 2020, the IHO initially recited the parties' respective positions, noting specifically that the district conceded that it failed to offer the student a FAPE for the 2019-20 school year and "took no position with respect to the relief requested" by the parents (see IHO Decision at pp. 2, 5). As part of the findings of fact and conclusions of law, the IHO determined that, based upon a review of the "documentary evidence and affidavit testimony," the parents were "entitled to the requested relief" (id. at p. 4). The IHO further determined that by failing to challenge either the "factual assertions" made by the parents or their "request for relief," the district "tacitly admitted that the [s]tudent [was] entitled to the requested program and services, and to the requested IEE" (id.). Additionally, the IHO indicated that the "relief requested [was] supported by the testimony and documentary evidence" (id.).

In light of these findings, the IHO ordered the district to provide the student with the following for the "entire 2019-2020 [12-]month school year": a barrier-free, 8:1+1 special class placement; five 30-minute sessions per week of individual speech-language therapy with a "PROMPT trained therapist"; three 30-minute sessions per week of individual OT; three 30-minute sessions per week of individual PT; special education transportation with limited travel time ("not to exceed 60 minutes"); "[f]ull-time 1:1 ABA therapy (entire school day)"; and 10 hours per week of home-based ABA therapy (IHO Decision at p. 4). In addition, the IHO ordered the district to fund a neuropsychological IEE of the student at a "reasonable market rate" and by an "independent provider" selected by the parents (id. at p. 5).

IV. Appeal for State-Level Review

The parents appeal. Initially, the parents appeal from the IHO's interim decision on pendency, arguing that the IHO erred by failing to include their request for "push-in at home" services as part of the student's pendency placement. With respect to the final decision on the merits, the parents argue that the IHO failed to issue an explicit finding that the district failed to offer the student a FAPE for the 2019-20 school year. The parents also argue that, similar to the interim decision on pendency, the IHO failed to include their request for the "1:1 instruction to be provided as a push-in or in the home" service, which resulted in a change in the student's placement that was not supported by the evidence in the hearing record. In addition, the parents contend that the IHO did not consider or issue rulings on all of the issues raised in the due process complaint notice, including whether the IHO had jurisdiction over issues raised under section 504 and section 1983. Relatedly, the parents assert that the IHO failed to find that the district adopted discriminatory policies that violated section 504 and therefore, resulted in a failure to offer the student a FAPE.[10] Finally, the parents argue that the IHO failed to award compensatory educational services for the district's failure to implement the student's pendency placement in a timely manner. As relief, the parents seek an order finding that the district failed to offer the student a FAPE for the 2019-20 school year; directing the district to "fund" services provided to the student in the home; and granting the "relief" requested in the due process complaint notice, including compensatory educational services.

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision in its entirety.

[10] With regard to the parents' contentions that the IHO failed to address the section 504 and section 1983 claims raised, an SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504, section 1983, or claims with respect to alleged systemic violations, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]). Likewise, as compensatory damages are not available in the administrative forum under the IDEA, neither an IHO nor an SRO has jurisdiction to award any remedy for a claim under section 1983 (see Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see R.B. v. Bd. of Educ. of the City of New York, 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, even if the IHO had addressed these claims, an SRO would have no jurisdiction to review any portion of a parents' claims regarding section 504, section 1983, or systemic violations or policy claims, and to the extent such claims are asserted in this proceeding on appeal, such claims will not be further addressed.

V. Discussion

A. Interim Order on Pendency

The parents argue that the IHO erred by failing to include language in the interim order on pendency that would allow the student—when too sick to attend school—to receive home-based instruction from the school-based ABA provider, as ordered by the IHO in the unappealed, November 2018 IHO decision. In response, the district argues that it is a part of the district's obligation to determine how to implement the student's pendency placement, and moreover, the use of a permissive word—"such as 'may' as opposed to the compulsory 'shall'" in the November 2018 IHO decision supports the IHO's conclusion that such language pointed to how to implement the pendency placement and was therefore "not part of the underlying pendency program."

The IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. 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 (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

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

D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. 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 [OSEP 2007]).

Upon review, the evidence in the hearing record reflects that, at the impartial hearing, the parties initially agreed that the November 2018 IHO decision—a prior unappealed IHO decision—formed the basis of the student's pendency placement during the administrative proceedings (see Tr. pp. 5-6; Parent Exs. A at p. 10; B at p. 12). The November 2018 IHO decision provided that "on days that student is too sick to attend school, the push-in teacher may work in the student's home" (Parent Ex. B at p. 11).

When the district representative objected to including this specific language from the November 2018 IHO decision, the IHO reviewed the decision off-the-record to examine the district representative's objection and to more fully understand the contents of the November 2018 IHO decision (see Tr. pp. 5-7). Eventually, the IHO explained the student's pendency placement, noting that she would not include the contested language as part of the pendency placement because, in her words, "that [was] not really part of the student's program" but rather, was the "manner in which the program might be provided" (Tr. pp. 7-9). According to the IHO, it would remain the parties' obligation to "work out how the student [was] to receive services if she [was] too sick to attend school" (Tr. p. 9).

However, by simply stating this as a rationale for finding the student's pendency placement, the IHO erred. To be clear, a prior unappealed IHO decision—as here, the November 2018 IHO decision—alone, and regardless of whether the parties agree, established the student's educational placement for the purposes of pendency (see Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]). It appears that both the parties and the IHO overlooked this fact, and thereafter, attempted to construct the student's pendency placement without the

benefit of critically examining or investigating the special education program and related services ordered in the November 2018 IHO decision that the student was actually then-currently receiving.

As an initial matter, the district did not appear in the proceeding regarding the 2018-19 school year that resulted in the November 2018 IHO decision, and the IHO relied on the evidence submitted by the parents, including testimony that "the student need[ed] instruction at home when she is physically unable to attend school during the school day so that she d[id] not regress" (Parent Ex. B at pp. 5-6, 7). Although the IHO used the word "may" in directing relief, the relief itself had been requested by the parents to remedy a deficiency identified in the evidence presented by the parents (see Parent Ex. B at pp. 3, 7, 11).

Additionally, had the IHO inquired, the evidence in the hearing record, while sparse, revealed that during the 2018-19 school year the student was attending an 8:1+1 special class in a district public school and notably, when she was too sick to attend school, the student received home-based instruction from her school-based ABA provider (see Parent Ex. J at pp. 1, 3-4, 8). Specifically, the ABA provider attested that she provided the student with "1:1 ABA services at home when she did not attend school" due to illness and in order to prevent regression (id. at p. 4).

Consequently, as the parents correctly argue, the IHO erred by failing to include this language from the November 2018 IHO decision as part of the student's pendency placement. As a result, the IHO's interim decision on pendency is modified to reflect that when the student is too sick to attend school, she may receive home-based instruction from the school-based ABA provider, in accord with the November 2018 IHO decision.

B. Final Decision on the Merits

On this point, the parents argue that the IHO erred by failing to make an explicit finding that the district failed to offer the student a FAPE for the 2019-20 school year and by failing to address and make findings on all of the issues raised in the due process complaint notice. In addition, the parents argue that the IHO's final decision—similar to the interim decision on pendency—failed to include language permitting the student to receive home-based instruction from the school-based ABA provider when she was too sick to attend school, which resulted in a change in the student's educational placement and which was not supported by the evidence in the hearing record. In response, the district argues that even if the IHO did not explicitly state that the district failed to offer the student a FAPE in the decision, "it is plainly evidence that the IHO determined such," and no further action is required. In addition, the district contends that the decision as to whether "ABA services . . . should be provided either at home or in school on a forward-going basis should be made by the CSE members." The district further contends that providing ABA services at home—as part of the student's IEP—constitutes a "significant change" in the student's program, and thus, the IHO correctly declined to award such as relief.

According to the evidence, the district representative conceded that the district failed to offer the student a FAPE at the impartial hearing and affirmatively indicated that the district would not present any evidence to defend the district (see Tr. pp. 21, 23, 30, 34-35, 37). In the decision, the IHO acknowledged the district's concession on the issue of FAPE for the 2019-20 school year (see IHO Decision at p. 2). In its answer, the district does not now argue to withdraw its concession or, alternatively, argue that the district offered the student a FAPE for the 2019-20 school year (see

generally Answer). Thus, it is unclear what more, if anything, an IHO—or now an SRO—would be required to include in a written decision to clarify the district's position or to explicitly state that the district failed to offer the student a FAPE for the 2019-20 school year when the district representative clearly conceded this point at the impartial hearing and otherwise failed to present any evidence in its defense. As a result, the parents' argument must be dismissed.

With respect to the parents' contention that the IHO failed to address and make findings on all of the issues raised in the due process complaint notice concerning the 2019-20 IEP, it is unclear what allegations the parents refer to, especially where, as here, the parents alleged that the district failed to offer the student a FAPE for the 2019-20 school year because an IEP was never developed for the student (see Parent Ex. A at pp. 1-2, 7). Taken together with the district's concession that it failed to offer the student a FAPE and that the hearing record contains no evidence that an IEP for the 2019-20 school year ever existed, there would be no reason for the IHO to address issues raised in the due process complaint notice, much less address issues alleged by the parents upon information and belief and in anticipation of the district potentially asserting a position that an IEP for the 2019-20 school year did exist (id. at pp. 7-9). As such, the parents' arguments must be dismissed.

Turning next to the parents' argument that the IHO erred by failing to include language in the final decision that permitted the student to receive home-based instruction from the school-based ABA provider when she was too sick to attend school, the 2019-20 school year has ended—and more significantly, the nonexistent IEP for the 2019-20 school year has long since expired—and in accordance with its obligation to review a student's IEP at least annually, a CSE should have already convened to review and revise, if necessary, the student's program and develop a new IEP for the student for the 2020-21 school year (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). Thus, the parents' request to modify the IHO's final decision to include this language amounts to a request to circumvent the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Student X, 2008 WL 4890440, at *16 [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).[11] At this juncture, there is no basis for modifying the IHO's final decision for a school year that has ended and for an IEP that, according to the parents, never existed.

Nevertheless, as a reminder to both parties, State regulations mandate that a student may receive instruction at home or outside of school for a variety of reasons (see 8 NYCRR 100.10, 175.21[a], 200.6[i]). For example, students may be home schooled by their parents (8 NYCRR 100.10); students with disabilities may receive home or hospital instruction as a placement on the

[11] In addition, federal and State regulations also require a CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that, if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). State regulation further provides that, if appropriate, an IEP must be revised to address "any lack of expected progress toward the annual goals and in the general education curriculum," "the results of any reevaluation conducted . . . and any information about the student provided to, or by, the parents," or "the student's anticipated needs" (8 NYCRR 200.4[f][2][i-iii]).

continuum of services (8 NYCRR 200.6[i]; see 8 NYCRR 200.1[w]); or students may receive homebound instruction if they are "unable to attend school because of physical, mental, or emotional illness or injury" (8 NYCRR 175.21[a]; see Educ. Law 3602[1][d]).[12] State regulation defines home and hospital instruction as "special education provided on an individual basis for a student with a disability confined to the home, hospital or other institution because of a disability" (8 NYCRR 200.1[w]). State regulation addressing home and hospital instruction as a placement on the continuum of services mandates the following:

> Students with disabilities who are recommended for home and/or hospital instruction by the [CSE] shall be provided instruction and appropriate related services as determined by the [CSE] in consideration of the student's unique needs. Home and hospital instruction shall only be recommended if such placement is in the [LRE] and must be provided: (1) a minimum of five hours per week at the elementary level, preferably one hour daily; or (2) a minimum of 10 hours per week at the secondary level, preferably two hours daily.

(8 NYCRR 200.6[i]). Therefore, while the undersigned declines to modify the IHO's final decision in this matter to include home-based instruction when the student is too sick to attend school for a school year that has expired, the CSE should consider the parents' concerns on this issue and, consistent with regulations, make such a recommendation if required for the student to receive a FAPE.

C. Relief

On appeal, the parents request an order directing the district to provide the student with compensatory educational services for the failure to "implement pendency on a timely basis," arguing that the IHO failed to address this request.

The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; Student X, 2008 WL 4890440, at *25, *26 [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by

[12] Districts must be careful not to confuse generalized homebound requirements with the in-home instruction identified in the IDEA (see In re New Jersey Dept. of Educ. Complaint Investigation C2012-4341, 2012 WL 4845648, at *4 [N.J. Super Ct. App. Div. Oct. 11, 2012] [finding that a district could not avoid its obligation to provide special education home instruction by classifying a student's disorder as a "chronic medical condition" that only entitled him to homebound services]; see also Questions and Answers on Providing Services to Children with Disabilities During an H1N1 Outbreak, 53 IDELR 269 [OSERS 2009] [noting that, while students with disabilities have the same right to homebound services that nondisabled students would have under the same circumstances, a district has specific obligations toward students with disabilities, including an obligation to convene a CSE to change the student's placement and modify the contents of his IEP, if warranted]).

the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

In this instance, as argued by the district, the hearing record contains no evidence that the district failed to timely implement the student's pendency placement and significantly, neither the parents nor the evidence in the hearing record point to any specific services that the district failed to deliver or otherwise fund pursuant to the interim decision on pendency. As such, the parents' request must be dismissed. However, in the event the parents can identify a specific service that the student was due under pendency, which was not provided during the pendency of this proceeding, the parents may pursue any such allegation by either filing a new due process complaint notice alleging a non-speculative implementation failure, by filing a State complaint against the district through the State complaint process for failure to implement the IHO's pendency decision, or by seeking enforcement through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005]).

VI. Conclusion

In summary, although the evidence in the hearing record supports the parents' contention that the IHO erred in determining the student's pendency placement, neither the present posture of this matter nor the evidence in the hearing record supports a basis to otherwise disturb the IHO's final decision.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's interim order on pendency, dated September 25, 2019, is modified to the extent that the IHO failed to include language permitting the student to receive home-based instruction from the student's school-based ABA provider when the student was too sick to attend school.

Dated: **Albany, New York**
December 7, 2020

STEVEN KROLAK
STATE REVIEW OFFICER