The University of the State of New York

The State Education Department

State Review Officer

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No. 20-197

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

Appearances:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Brian Davenport, Esq.

The Law Office of Steven Alizio, PLLC, attorneys for respondents, by Steven J. Alizio, Esq. and Justin B. Shane, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals, 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) regarding the student's pendency placement during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student for the 2019-20 and 2020-21 school years. 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

A. Prior Administrative Proceedings

Due to the interlocutory nature of this appeal, the hearing record is sparse with respect to information regarding both the student's educational history and the procedural history of this matter with much of the information derived from the parents' due process complaint notice and the parties' pleadings.

According to the parents, they filed a prior due process complaint notice on October 2, 2018, alleging that the district failed to fund an independent educational evaluation (IEE) in the form of a "comprehensive neuropsychological evaluation" (Parent Ex. A at pp. 2-3). Thereafter, the parents amended the due process complaint notice to include claims that the district denied the student a free appropriate public education (FAPE) for the 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, and 2018-19 school years (id. at p. 3; see Parent Ex. B at p. 3). According to the parents, on January 12, 2019, the IHO issued an interim order in the prior matter directing the district to fund an independent neuropsychological evaluation and a functional behavioral assessment, and to develop a behavioral intervention plan for the student (Parent Ex. A at p. 3).

On November 17, 2019, the IHO issued a decision (see generally Parent Ex. B). The IHO determined that the district did not present any witnesses or produce sufficient documentary evidence and that, accordingly, the evidence confirmed that the district denied the student a FAPE for 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, and 2018-19 school years (Parent Ex. B at p. 4). The IHO further found that the district failed to address the student's interfering behaviors at any point during his academic career, which also resulted in a denial of FAPE (id. at p. 6). Finally, the IHO determined that the student was entitled to compensatory education services (id. at pp. 4-6). Specifically, the IHO ordered compensatory educational services as follows:

> 1. The [district] shall fund up to 600 hours of multi-sensory tutoring by EBL Coaching at a rate of $125/hour or by a similarly qualified provider at that provider's reasonable rate;
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> 2. The [district] shall fund up to either (a) 460 hours of in-school services from a Board Certified Behavior Analyst ("BCBA") at a rate of up to $250/hour or, if parent elects, (b) 460 hours of in-school services from a Registered Behavior Technician ("RBT") at a rate of up to $125/hour with up to 138 hours of in-school BCBA supervision at a rate of up to $250/hour; and
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> 3. The [district] shall fund up to 138 hours of at home parent-training by a BCBA at a rate of up to $250/hour; and
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> 4. The [district] shall reimburse the Parent in the amount of $2,350 for tutoring expenses incurred by Parent. (id. at p. 6).

The November 17, 2019 IHO decision was not appealed.

Turning to the student's educational history subsequent to the filing of the prior administrative proceeding, according to the parents, the CSE convened on June 19, 2019 to develop the student's IEP for the 2019-20 school year (Parent Ex. A at p. 4). The parents contended that the June 2019 CSE recommended placement of the student in a 12:1+1 special class with special education teacher support services (SETSS) in math two times per week and English Language Arts (ELA) two times per week, together with related services consisting of one 30-minute session per week of group (5) counseling; two 30-minute sessions per week of group (2) occupational therapy; one 30-minute session per week of individual psychological services; and

two 30-minute sessions per week of individual speech-language therapy (id.).[1] According to the parents, in January 2020, pursuant to the November 17, 2019 IHO Decision, the district provided the student with BCBA services three days per week for four hours per day in school, "two hours per week of intensive, multi-sensory academic and executive functioning" tutoring outside of school, and two hours per week of parent training by a BCBA (Parent Ex. A at p. 5; Dist. Ex. 1 at p. 2).

The CSE convened on May 28, 2020 and found the student eligible for special education as a student with a learning disability and developed the student's IEP for implementation beginning May 29, 2020 (see Dist. Ex. 1). The May 2020 CSE determined that the student had significant management needs, and that his "cognitive/academic deficits, ADHD, ODD, and Anxiety impede[d] his ability to participate in a [g]eneral [e]ducation setting" requiring "the support of a small and structured class along with additional academic interventions and related services to continue to make progress toward grade level standards" (id. at p. 12). The May 2020 CSE recommended placement in a 12:1+1 special class for ten periods per week in math; 10 periods per week in ELA; five periods per week in social studies; and 5 periods per week in science (id. at p. 20). The CSE also recommended two periods per week of group SETSS in ELA and two periods per week of group SETSS in math (id. at pp. 20-21). The May 2020 CSE further recommended one 25-minute session per week of counseling in a group of 5; two 30-minute sessions per week occupational therapy (OT) in a group of 2; and two 30-minute sessions per week of individual speech-language therapy (id. at p. 21). Additionally, the CSE determined that the student required the support of an individual health paraprofessional to monitor his peanut allergy during lunch (id.).

B. Due Process Complaint Notice

In a due process complaint notice dated September 28, 2020, the parents generally alleged that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years (see Parent Ex. A). The parents alleged several procedural and substantive violations by the district with respect to both the June 2019 and May 2020 IEPs (Parent Ex. A at pp. 7-8). In connection with both IEPs, the parents alleged that the CSEs failed to recommend BCBA services, "intensive academic or executive functioning supports," or 12-month services (id. at pp. 4-7). The parents sought findings that the student was denied a FAPE for the 2019-20 and 2020-21 school years; requested a change in the student's educational program for the 2020-21 school year to consist of BCBA services for four hours per day for three days per week, two hours per week of parent training, and two hours per week of multisensory tutoring; and further sought compensatory education (id. at p. 9).

Relevant to this appeal, the parents sought pendency based on the November 17, 2019 IHO Decision, which the parents described in the due process complaint notice, as follows: a special education program consisting of four hours per day for three days per week of BCBA services; two hours per week of at-home parent training by a BCBA; and two hours per week of academic tutoring outside of school (Parent Ex. A at pp. 8-9). The parents asserted that the district was

[1] "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).

implementing this program based on the January 2019 IHO Decision from the prior administrative proceeding and that it therefore was the student's last agreed upon placement (id. at p. 8). The parents further asserted that even if the delivery of the compensatory services was not an agreed upon placement, it should be considered the student's operative placement for the purpose of pendency (id.). In the alternative, the parents explained that the district should be required to replenish any compensatory services used in delivering this program to the student, because those services were not being used for their intended compensatory purpose but were being used to deliver the student's current educational programming (id. at p. 9 n. 3).

C. Impartial Hearing Decision

A pendency hearing was held on November 10, 2020 (Tr. pp. 1-26). In an interim decision dated November 11, 2020, the IHO determined that the November 17, 2019 IHO Decision was pendency and rejected the district's argument that the November 17, 2019 IHO Decision was strictly a compensatory award (IHO Decision at p. 4). The IHO noted that the November 17, 2019 IHO Decision ordered the district to provide the student with "four hours a day, 3 days per week of in-school BCBA, two hours per week of at-home parent training by a BCBA, and two hours per week of multisensory tutoring" (id. at p. 3). The IHO further noted that the parents' attorney represented that the district provided these services to the student, also noting that BCBA services were provided by Breakthrough Foundations and tutoring services were provided by EBL Coaching (id.at p. 4). The IHO directed the district to fund, pursuant to pendency: four hours per day, three days per week of in-school BCBA and two hours per week of at-home parent training by a BCBA, to be provided by Breakthrough Foundations or a similar agency and two hours per week of multisensory tutoring, to be provided by EBL Coaching or a similar agency (id.).

IV. Appeal for State-Level Review

The district appeals. The central issue on appeal is whether the November 17, 2019 IHO Decision can properly be the basis for pendency. The district argues that it cannot.

The district contends that the IHO erred in finding that pendency is based on an award of compensatory education services, as it does not constitute an educational program. The district argues that at the pendency hearing, the district representative erred in asserting that the May 2020 IEP was pendency as the May 2020 IEP was contested and was not the last agreed upon placement. It is now the district's contention that an April 20, 2012 IEP was the last agreed upon placement and, therefore, established pendency. The district argues that the IEPs from the 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, and 2018-19 school years were all in dispute, and therefore, the only IEP not in dispute was the April 2012 IEP. The district attached a copy of the April 2012 IEP to its request for review as exhibit "SRO 1" seeking its admission as additional evidence.

In their answer, the parents allege that the November 17, 2019 IHO Decision is the student's "operative placement" and became a part of the student's current educational placement as the district agreed to implement those services in January 2020 and continued to provide those services during the 2020-21 school year. The parents argue that the district's implementation of the services ordered in the November 17, 2019 IHO Decision constitutes an agreement, and therefore, the delivery of those services is the last agreed upon placement and a basis for pendency. Although not mentioned during the hearing, the parents clarified that the student was also receiving the

services identified in the May 2020 IEP and that those services established a baseline for pendency. In the alternative, the parents contend that equitable considerations can be considered in an award of pendency and that here, equitable considerations warrant an award directing the district to fund the student's services as pendency. Further, the parents argue that the district's additional evidence should not be accepted as part of the hearing record, as the district waived its right to assert that the April 2012 IEP was pendency as it was not raised at the hearing.[2] The parents argue that neither the April 2012 IEP nor the May 2020 IEP constitute pendency.

V. Applicable Standards

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, 959 F.3d at 531; 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

[2] With its request for review, the district submits as additional evidence one document identified as SRO 1 (see Req. for Rev. Ex. 1). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the proffered document was available at the time of the impartial hearing, and it is not necessary to resolve the issues presented on appeal, and, therefore, I decline to exercise my discretion to consider this exhibit as additional evidence.

[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. 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]; 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).

VI. Discussion

At the forefront of this matter is the November 17, 2019 IHO Decision and its impact on pendency. First and foremost, there must be clarification as to what the November 17, 2019 IHO Decision specifically ordered, as the IHO had incorrectly noted that the decision ordered the district to provide the student with a specific program. As discussed below, the November 17, 2019 IHO Decision did not identify an educational program for the student. This becomes evident when reviewing how the parties' arguments have changed from the parents' due process complaint notice, through the hearing in front of the IHO, and then up to the current appeal.

In connection with the prior due process complaint notice, dated October 2, 2018, the IHO determined that the district failed to provide the student with a FAPE for the 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, and 2018-2019 school years (Parent Ex. B at pp. 3-4). The IHO recognized that compensatory education is an award to "catch-up the student to where he should have been if a FAPE had not been denied" (id. at p. 5). Accordingly, the IHO ordered compensatory education services for the district's failure to provide the student with a FAPE over

six school years (id. at pp. 5-6).[3] The IHO made a compensatory education award of "600 hours of multi-sensory tutoring by EBL Coaching"; either "460 hours of in-school services" from a BCBA or, "460 hours of in-school services from a RBT with up to 138 hours of in-school BCBA supervision"; and "138 hours of at home parent-training by a BCBA" (id. at p. 6). The November 17, 2019 IHO Decision did not specify the frequency or duration of the services, nor did the decision specify when the services must start or end. Rather, the November 17, 2019 IHO Decision directed the district to fund a total amount of services (id.). In addition, the compensatory education award itself directed that services be provided "in-school"; however, it did not define the rest of the student's in-school program (id.).

In their due process complaint notice, the parents requested pendency based upon the November 17, 2019 IHO Decision. Specifically, the parents argued that the student's pendency placement should consist of the following: (a) four hours per day, three days per week, of in-school, BCBA services; (b) two hours per week oft at-home parent training by a BCBA, and (c) two hours per week of out of school academic tutoring (Parent Ex. A at p. 8). According to the parents, the above listed services had been implemented by the district since January 2020 (Tr. pp. 6-7, 16; Parent Ex. A at p. 5; Dist. Ex. 1 at p. 2).

During the hearing, the parents requested that pendency be based upon the implementation of the compensatory services awarded in the November 17, 2019 IHO Decision, arguing that the district agreed to the provision of those services by not appealing from the November 17, 2019 IHO Decision. When questioned at the hearing, the parents' counsel argued that since January

[3] Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

2020, the district was implementing the services enumerated above within the school and the services were "provided and incorporated into the student's program" (Tr. pp. 6-7, 16; Parent Ex. A at p. 5; Dist. Ex. 1 at p. 2). The parents did not identify what the student's program consisted of, other than the services identified in the due process complaint notice. The parents further argued that the implemented services manifested an agreement between the parties (Tr. pp. 16-17). Significantly, the parents' attorney argued that "there's no applicable IEP that can be utilized in terms of pendency" and "[t]here's no rational basis to determine that this May 28th, 2020 IEP should constitute pendency" (Tr. pp. 8, 15). At the hearing, the parents also contended that the district failed to offer any pendency placement (Tr. pp. 15, 17-18).

The district on the other hand argued at the hearing that the May 2020 IEP was pendency, and the November 17, 2019 IHO Decision should not be considered pendency because it was an award of compensatory education for a "deprivation of FAPE" and is a different legal remedy than pendency (Tr. pp. 13-14). Further, the district argued that granting pendency in the services requested by the parents "would ultimately result in [the] [p]arent[s] being prematurely awarded the final relief sought pursuant to the newly filed due process complaint, thereby circumventing the impartial hearing process" (Tr. p. 14).

Based upon the representations made by the parties at the hearing, the IHO issued her decision. At the hearing, the IHO stated that the May 2020 IEP is not the "basis for the student's pendency" as it was not the last agreed upon IEP and was disputed (Tr. p. 18). The IHO held that the November 17, 2019 IHO Decision ordered the district to provide the student, "with four hours a day, 3 days per week of in-school BCBA, two hours per week of at-home parent training by a BCBA and two hours per week of multisensory tutoring" (IHO Decision at p. 3). Further, the IHO apparently agreed with the parents' argument that since the district was implementing these services it became the student's "operative placement" (IHO Decision at p. 4). However, in making this finding, the IHO missed a critical factor regarding the November 17, 2019 IHO Decision. The November 17, 2019 IHO Decision only ordered that the district fund a total amount of compensatory services; it did not define the hours, days, or set a time frame for the implementation of the awarded services, and it did not give the district any discretion as to those factors (Parent Ex. B at p. 6). Accordingly, the district's funding of the compensatory services cannot be considered an agreement as to the frequency and duration of the delivery of those services, which would be required to support an argument that those services constituted an educational program for the student. In addition, consistent with the above, the parties are not permitted to consider the compensatory services awarded in the November 17, 2019 IHO Decision in developing future IEPs for the student, as they are awarded to remedy a past violation, rather than to offer the student a FAPE going forward (see Boose v. Dist. of Columbia, 786 F.3d 1054, 1056 [D.C. Cir. 2015] [noting that an IEP is required to "provide some educational benefit going forward," while the purpose of compensatory education is to "undo[] damage done by prior violations"] [quotations omitted]).[4]

[4] To the extent that the parents argue that the compensatory services were not being used to remedy a past denial of FAPE, but were being used in order to make the district's current programming appropriate for the student, the parents may be entitled to additional compensatory educational services if the IHO ultimately rules in their favor on the merits of their claims.

The only part of the November 17, 2019 IHO Decision that could be read as requiring some form of agreement from the district was that the compensatory "in-school" BCBA services were supposed to be provided "in-school," meaning they would have to have been coordinated with the student's school program. However, as discussed below, the parties' failed to otherwise discuss the student's school program during the hearing, leaving the IHO without sufficient information to determine the student's pendency placement.

Although the parents were adamant at the hearing that the district did not offer a pendency placement and that the May 2020 IEP did not constitute pendency, in their answer, the parents stated that they believed the district would continue to implement all services mandated in the May 2020 IEP during the pendency of the proceeding (Ans. at p. 3 n. 2). According to the parents, services recommended in the May 2020 IEP are not in dispute as to pendency and serve as a baseline for pendency in this matter (id.). The parents alleged that the "[p]endency [p]rogram has been implemented in conjunction with the IEP-mandated services since January 2020" (id.). The May 2020 CSE included recommendations for placement in a 12:1+1 special class, as well as group SETSS, counseling, OT, and speech-language therapy (Dist. Ex. 1 at pp. 20-21).

However, neither party explained that the student was receiving the services set forth in the May 2020 IEP during the pendency hearing (see Tr. pp. 1-26). As set forth fully above, at the hearing, the parents represented that the district failed to offer a pendency placement and that there was no applicable IEP for pendency purposes (see Tr. pp. 8, 15, 17-18). Whether the lack of information was accidental, intentional, or a result of confusion between the parties, the failure to present information regarding the student's placement and the implementation of the May 2020 IEP resulted in the IHO rendering a decision as to the student's pendency without having a full picture of the special education and related services that were being provided to the student.

In determining pendency, the IHO is required to look at the "then current placement" which 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, 653 Fed. App'x at 57-58). "[T]he dispositive factor in deciding a child's 'current educational placement' should be the Individualized Education Program ("IEP") ... actually functioning when the 'stay put' is invoked" (Drinker by Drinker v Colonial School Dist., 78 F3d 859, 867 [3d Cir 1996]). Unfortunately, at the hearing the parties failed to present a complete picture of the student's program to the IHO and omitted the fact that the May 2020 IEP was being implemented and the parents only raised this fact in their answer. Although the district argued that the May 2020 IEP was pendency it did not argue that the IEP was being implemented for the student. Additionally, the district does not argue on appeal that the May 2020 IEP constitutes the student's pendency placement because it is being disputed by the parent. Accordingly, as the IHO's decision was not based on a full picture of the student's placement, it must be reversed. Additionally, as the parties have not agreed to the student's pendency placement at this point in the hearing, the parties may request that the IHO reconsider the student's pendency placement at which time they should be prepared to provide the IHO with their positions and the

basis for those positions, which should include a complete picture of the services the student was receiving.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's decision dated November 11, 2020, the decision of the IHO must be reversed.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the IHO's Interim Order on Pendency dated November 11, 2020 is reversed.

Dated: Albany, New York
February 10, 2021

STEVEN KROLAK
STATE REVIEW OFFICER