The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 16-033

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

Appearances:
Charity Guerra, Acting Special Assistant Corporation Counsel, attorneys for respondent, Theresa Crotty, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied, in part, the parent's request for compensatory educational services. 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

In this case, the student has continuously attended the same charter school within the district since kindergarten (2013-14 school year) (see Tr. pp. 334-36).[1] On May 14, 2014, a CSE convened to conduct the student's annual review and to develop an IEP for the 2014-15 school year (first grade) (see Parent Ex. B at pp. 1, 13). Finding that the student remained eligible for special education and related services as a student with a speech or language impairment, the CSE recommended that the student receive integrated co-teaching (ICT) services in a general education classroom for mathematics (10 times per week) and ICT services in a general education classroom

[1] The evidence in the hearing record did not include the student's IEP for the 2013-14 school year (see generally Tr. pp. 1-392; Parent Exs. A-X; IHO Exs. I-V). At the impartial hearing, the parent testified that in kindergarten during the 2013-14 school year at the charter school, the student attended a general education classroom with special education teacher support services (SETSS), and received speech-language therapy and OT services (see Tr. pp. 335-36). The parent also testified that although the student was recommended to receive ICT services during the 2013-14 school year "or have—be around general ed[ucation] students"—the student did not receive ICT services during the 2013-14 school year (Tr. pp. 335, 337).

for English language arts (ELA) (15 times per week) at a charter school (id. at pp. 8, 12).[2] In addition, the May 2014 CSE recommended one 30-minute session per week of individual occupational therapy (OT), two 30-minute sessions per week of OT in a small group, one 30-minute session per week of individual physical therapy (PT), one 30-minute session per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a small group (id. at p. 9).[3] The May 2014 CSE also recommended daily group paraprofessional services to assist with the student's orientation and mobility needs (id.).

For the beginning of the 2014-15 school year, the student attended a first grade classroom at the charter school, which was staffed with one regular education teacher and one special education teacher (see Parent Ex. E at p. 1; see also Tr. pp. 338-39). However, due to the student's "lack of progress across academic subjects," the charter school returned the student to a "general education kindergarten class" on December 1, 2014 "for all subjects" (Parent Exs. E at p. 1; P at p. 2).[4] The kindergarten classroom the student attended from December 2014 through the conclusion of the 2014-15 school year was staffed with two regular education teachers and did not offer ICT services (see Parent Ex. E at pp. 1-3; see also Tr. p. 339).

By letter dated March 26, 2015, the parent wrote to a district CSE chairperson to advise that the student had not received "any [OT] since the start of this school year" despite attempts to resolve the situation with the district (Parent Ex. C). At that time, the parent requested a "meeting" to discuss how to resolve this issue (id.).

On May 28, 2015, a CSE convened to conduct the student's annual review and to develop an IEP for the 2015-16 school year (see Parent Ex. F at pp. 1, 11). At this meeting, while the May 2015 CSE found that the student remained eligible for special education and related services, the CSE changed the student's eligibility category from speech or language impairment to intellectual

[2] The student's eligibility for special education programs and related services as a student with a speech or language impairment for the 2014-15 school year is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[3] According to the May 2014 IEP, the student received a total of two 30-minute sessions per week of speech-language therapy and two 30-minute sessions per week of OT since "September 2013" (Parent Ex. B at pp. 1-3; see Parent Ex. U at p. 1). The May 2014 IEP further indicated that the student benefitted from having a "SETSS teacher push into his classroom as well as small-group instruction" (Parent Ex. B at p. 3; see Parent Ex. T at p. 2).

[4] The hearing record did not include any evidence that a CSE was convened in order to return the student to a kindergarten classroom and change the student's educational placement, or whether the district otherwise knew that the charter school returned the student to a kindergarten classroom in December 2014 due to a lack of progress (see generally Tr. pp. 1-392; Parent Exs. A-X; IHO Exs. I-V). The hearing record also did not include any evidence that the district knew that as of December 1, 2014, the student was no longer receiving ICT services consistent with the recommendations in the May 2014 IEP (see generally Tr. pp. 1-392; Parent Exs. A-X; IHO Exs. I-V). Generally, if a student's IEP includes a recommendation for a special class or particular special education program or service, a charter school is required to either establish the special class or service,, arrange to have the district of residence provide such special class or service to the student, or contract with another provider (see "Charter Schools and Special Education," at ¶¶ 17-19, Charter School Office [Oct. 30, 2013], available at http://www.p12.nysed.gov/psc/specialed.html ; see also Educ. Law § 2853[4]).

disability (compare Parent Ex. B at p. 1, with Parent Ex. F at p. 1).[5] The May 2015 CSE recommended that the student be placed in a 12:1+1 special class placement for mathematics (10 times per week) and a 12:1+1 special class placement for ELA (15 times per week) at a community school (see Parent Ex. F at pp. 7, 11). In addition, the May 2015 CSE recommended the following related services: one 30-minute session per week of individual OT, one 30-minute sessions per week of OT in a group, one 30-minute session per week of individual PT, one 30-minute session per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group (id.). The May 2015 CSE also recommended that the student participate in alternate assessment and receive special transportation accommodations or services (id. at pp. 10-11).

In August 2015, the parent privately obtained a neuropsychological and educational evaluation (August 2015 neuropsychological evaluation) of the student (see Parent Ex. P at p. 1). For the 2015-16 school year, the student began attending a first grade classroom at the charter school that consisted of approximately 24 to 30 students and one teacher (see Parent Exs. O at p. 1; S at p. 1).

By letter dated October 23, 2015, the parent wrote to the charter school and requested that a CSE meeting be reconvened to review and discuss the August 2015 neuropsychological evaluation report (sent with the letter), as well as a classroom observation report conducted on September 4, 2015 at the student's charter school (see Parent Ex. G; see generally Parent Exs. O-P). The parent requested an "IEP meeting . . . to make new recommendations regarding [the student's] IEP" because she believed the student required a "non-public school environment to address his very unique academic and medical profile" (Parent Ex. G). The parent also requested the issuance of a "Nickerson letter" because she had not received a "Final Notice" for the recommendations made in the May 2015 IEP for a "community school placement" or for a "[s]pecial [c]lass" (id.).[6] The parent noted that if the student's case was "not eligible" for the immediate issuance of a Nickerson letter, then she sought an "expedited IEP meeting" so the student's case could be deferred to the Central Based Support Team (CBST) for a "non-public

[5] The May 2015 IEP included some testing results from an April 2015 psychoeducational reevaluation of the student administered by a school psychologist at the charter school (compare Parent Ex. F at pp. 1-2, with Parent Ex. E at pp. 1, 11). Consistent with the April 2015 psychoeducational reevaluation report, the May 2015 IEP reflected the student's full-scale intelligence quotient (IQ) of 57, which indicated that the student performed within the "Extremely Low range of overall cognitive ability" (compare Parent Ex. F at p. 1, with Parent Ex. E at p. 3). The student's eligibility for special education programs and related services as a student with an intellectual disability for the 2015-16 school year is not in dispute (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

[6] A "Nickerson letter" is a remedy for a systemic denial of a FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, 79-cv-270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; see R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]).

school placement" (id.). The parent also noted that the student had not received "services in accordance with his current IEP since the beginning of the school year" (id.).[7]

A. Due Process Complaint Notice

In a due process complaint notice dated October 30, 2015, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) during the 2015-16 school year because the student did not receive "special education programming," related services, and a "placement" for the 2015-16 school year (Parent Ex. H at pp. 1-2).[8] In addition, the parent asserted that the district failed to provide the student with "special class services" during the 2014-15 school year in violation of both the IDEA and State regulations (id. at p. 2). As relief, the parent requested that the student be "compensated fully for any and all services/programming not received" during the 2014-15 and 2015-16 school years, in addition to the issuance of a Nickerson letter "and/or [the] student's attendance" at a State-approved nonpublic school (id.).

B. Events Post-Dating the Due Process Complaint Notice

In a letter to the parent dated November 3, 2015, the district acknowledged it had not "offered a site that c[ould] provide the special education services recommended" in the student's IEP (Parent Ex. J at p. 1). The district indicated that although it would continue its efforts to provide a "placement site" as soon as possible, the parent nevertheless had the "legal right" to place the student in a State-approved "private day school" in order for the student to receive the "special education program and services" pursuant to the IEP (id.).[9] According to the letter, if the parent enrolled the student in an "appropriate approved private day school" by November 25, 2015, the student was entitled to remain at that school for the "rest of the school year" regardless of whether the district offered a "placement" prior to that date (id.). The parent also retained the right to place the student in an "appropriate approved private day school" after November 25, 2015 "until the [district] offer[ed] a placement" (id.). If, however, the district offered the student a placement after November 25, 2015 but before the parent placed the student in an "approved private day school," the letter would "expire" (id.).

In a school location letter dated November 5, 2015, the district identified the particular public school site to which it assigned the student to attend to implement the special education program and related services recommended in the May 2015 IEP (see Parent Ex. L at p. 1).

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[7] The parent testified that when she provided the charter school with a copy of the August 2015 neuropsychological evaluation report, she "asked them to contact the [district] about his placement" (Tr. pp. 342-43). However, the hearing record lacks any evidence showing that the charter school contacted the district pursuant to the parent's request or that the district otherwise knew that the student was not receiving "services" pursuant to the May 2015 IEP—as set forth in the parent's October 23, 2015 letter to the charter school—prior to receipt of the October 30, 2015 due process complaint notice (see generally Tr. pp. 1-392; Parent Exs. A-X; IHO Exs. I-V).

[8] In a letter of the same date, October 30, 2015, the district sought the parent's consent for a "requested reevaluation or mandated three-year-reevaluation" of the student (Parent Ex. I at p. 1).

[9] The November 3, 2015 letter constituted a Nickerson letter (see Parent Ex. J at pp. 1-2, 4-6).

By letter dated November 6, 2015, the parent wrote to the CSE to acknowledge receipt of the district's October 30, 2015 letter seeking her "written consent . . . to proceed with the special education evaluation" of the student (Parent Ex. M). The parent informed the district that she had "already forwarded a copy of [the student's] most recent neuropsychological" evaluation report, as well as a classroom observation report, and she did not, therefore, "give permission for any further educational or psychological testing" of the student (id.; see Parent Ex. I at p. 1 [declining consent for the district's reevaluation of the student]). In the November 6, 2015 letter, the parent did, however, provide permission for the district to conduct a classroom observation of the student (see Parent Ex. M). The district completed the classroom observation on November 12, 2015 (see Parent Ex. S at p. 1).

By letter dated November 15, 2015, the parent wrote to a CSE chairperson acknowledging receipt of the school location letter and prior written notice sent by the district (see Parent Ex. N at p. 1; see also Parent Ex. L at pp. 1-2).[10] The parent indicated that, having visited the same assigned public school site "in the past," the parent did not believe it was an "appropriate setting" for the student; the parent did, however, indicate a willingness to visit the assigned public school site "again if at all possible" and if the parent's "work schedules allow[ed]" (Parent Ex. N at p. 1). The parent further indicated that she was willing to defer the student's case to the CBST—as "discussed" at the May 2015 CSE meeting—and given the newly submitted evaluative information and request to reconvene a CSE meeting, the parent noted that it was "most appropriate at this time [to] await the results of the team's review of the new documentation" and the reconvened CSE meeting "before any additional placement decisions [were] explored" (id.). Next, the parent requested that the district extend the expiration date of the Nickerson letter "beyond the current November 25, 2015 date" (id.). The parent explained that since the district should have issued the Nickerson letter to the parent "on or about August 15, 2015" in accordance with the district's standard operating procedures manual, she should receive an extension of the current expiration date equivalent to the "number of days from August 15th" until her receipt of the Nickerson letter on November 12, 2015 "in order to identify an appropriate school setting" (id.). Finally, the parent noted that she had not yet received a date for the "Resolution Session" related to the currently pending impartial hearing (id. at p. 2).

C. Impartial Hearing Officer Decision

On December 9, 2015, the parties proceeded to an impartial hearing, which concluded on March 30, 2016 after five days of proceedings (see Tr. pp. 1-392).[11, 12] In a decision dated April

[10] The prior written notice was dated May 29, 2015 (see Parent Ex. L at p. 2).

[11] On or about December 9, 2015, the district issued a second Nickerson letter to the parent (see Parent Ex. W at pp. 4-5; see also Tr. pp. 44-46).

[12] On January 11, 2016, the IHO issued an interim decision, which, upon the agreement of the parties, ordered the district to evaluate the student in the following areas: speech-language, OT, and PT (see Jan. 11, 2016 Interim IHO Decision at p. 2). The IHO also issued two interim decisions pertaining to the student's pendency placement (see Jan. 11, 2015 Interim IHO Decision at pp. 3-4; Jan. 24, 2015 Interim IHO Decision at pp. 2-5). It appears that the IHO mistakenly dated both of the interim pendency decisions as "2015" instead of "2016" (see Jan. 11, 2015 Interim IHO Decision at p. 4; Jan. 24, 2015 Interim IHO Decision at p. 5). For clarity, both interim pendency decisions will continue to be referred to in this appeal according to the uncorrected, likely mistaken date appearing on the IHO's interim decisions ("2015"), rather than guessing about a corrected date ("2016").

15, 2016, the IHO determined that the district conceded that it failed to offer the student a FAPE for both the 2014-15 and 2015-16 school years because the district did not deliver special education services to the student at the charter school in conformity with the IEPs (see IHO Decision at pp. 3, 10). In fashioning the relief, the IHO initially noted the "difference of opinion" about the student's needs and the "type of program needed [for the student] going forward" (id. at pp. 3-4, 6-7).[13] The IHO considered and discussed the neuropsychologist's testimony and opinion that the student required "daily speech intervention, or at a minimum, three to four times per week" and that the student would "'benefit from a nonpublic school educational setting that . . . specialize[d] in working with students with his particular profile or disability'" (id. at p. 6). The IHO found that, according to the neuropsychologist's testimony, the student also required a "class smaller than" 12 students, as well as the services of a paraprofessional and a 12-month school year program (id. at pp. 6-7). To compensate the student for the "deprivation of services for a long period of time," the IHO noted the neuropsychologist's testimony that the student "should receive after school services in addition to the specialized program addressing his needs" (id. at p. 6). The IHO also noted the neuropsychologist's opinion that the "additional services" should focus on the student's "speech and language, motor skills and socialization skills" (id. at pp. 6-7).

Next, the IHO discussed and considered the district's position with respect to the relief in this matter (see IHO Decision at p. 7). First, the IHO recognized the district's view that in light of the student's recent evaluations, a CSE should reconvene to review the evaluative information and recommend an appropriate program "going forward" (id.). Without assessing the appropriateness of the IEP developed at the most recent CSE meeting, the IHO noted that the district school psychologist who attended that CSE meeting testified at the impartial hearing and explained that although the CSE reviewed the August 2015 neuropsychological evaluation report, the CSE "did not agree with an 8:1 class, as advocated by [the neuropsychologist]," and instead, the CSE recommended a 12:1+1 special class placement for the student (id. at pp. 7-8). Considering the August 2015 neuropsychological evaluation report, the IHO agreed that the district's most recent recommendation "utilizing a public school setting featuring a small class, with many supports, before going more restrictive with a nonpublic school recommendation, may be an approach that might well work" for the student (id. at p. 7). The IHO also indicated that the CSE's most recent recommendation appeared to be a "least restrictive and reasonable approach" to address the student's needs "without being as restrictive, perhaps needlessly overrestrictive as a nonpublic school class with only eight students might be" (id.). Moreover, given the parent's unsuccessful attempts to locate a "nonpublic school to her satisfaction" with the three Nickerson letters already issued to the parent, the IHO concluded that it "seem[ed] reasonable to allow a team to review the findings [of the student's most recent evaluations and] make a recommendation to address" the student's needs, which the parent could then "either challenge" or "try out the program" (id. at p. 8). In addition, the IHO found that the hearing record included no "legal basis to order [the student's placement in a] nonpublic school at this time" (id.). The IHO further noted, however, that this conclusion did not preclude the district from recommending a nonpublic school program in the future, as long as it addressed the student's needs (id.).

Therefore, as relief, the IHO relied upon the neuropsychologist's testimony, which indicated the student's greatest areas of need centered on his "speech and language and motor skills

[13] The IHO also indicated that the student's "continued placement at the charter school" was not addressing his educational needs (IHO Decision at p. 6).

and socialization" (IHO Decision at pp. 8-9). To "make the [student] whole," the IHO ordered the district to do the following: convene a CSE meeting to review recent testing and other evaluative information to recommend a "primary special education program and related services" for the student that must include a 12-month school year program, the services of a paraprofessional, and that must be provided to the student at a location other than the charter school; provide the student with two hours per week of speech-language therapy outside of the regular school program for one calendar year beginning two weeks from receipt of the IHO's order; and provide the student with two hours per week of OT services outside of the regular school program for one calendar year beginning two weeks from receipt of the IHO's order (id. at pp. 8-10).[14] Additionally, the IHO noted that although the student was deprived of "services with regard to [the] provision of academics," the IHO was not "convinced that it [was] necessary to provide additional academic services at th[at] time, to supplement a program that w[ould] be addressing [the student's] academic needs, from a special education perspective" (id. at p. 9).

IV. Appeal for State-Level Review

The parent appeals and asserts that the district failed to implement the student's pendency services—16 hours per week of 1:1 special education teacher services—as set forth in the IHO's second interim decision, dated "January 24, [2016]."[15] As a result, the parent seeks an order directing the district to provide the parent with an "authorization" to obtain "'make-up'" services the student did not receive under pendency. In addition, the parent alleges that the IHO erred in failing to award any compensatory educational services for the district's failure to provide the student with ICT services during the 2014-15 and 2015-16 school years. As relief, the parent seeks an order directing the district to provide the student with an "[a]uthorization" to use during the "next two years or a period of 108 weeks from issuance" to obtain "over 800 hours of special education services" the student did not receive during the 2014-15 and 2015-16 school years.[16, 17]

In an answer, the district responds to the parent's allegations and generally argues that, contrary to the parent's contention that the district failed to implement the IHO's second interim decision on pendency, the student received special education teacher support services (SETSS)

[14] The IHO indicated that the parent had the right to challenge the "new IEP developed" at the CSE meeting convened pursuant to this order (IHO Decision at p. 9).

[15] As noted previously, the IHO's second interim decision on pendency actually bears the date "January 24, 2015" (Jan. 24, 2015 Interim IHO Decision at p. 5).

[16] Since neither party appealed or otherwise challenged the IHO's orders directing the district to reconvene a CSE meeting to review recently obtained evaluations of the student; to develop a new IEP that included recommendations for a 12-month school year program, the services of a paraprofessional, a "primary special education program and related services," and to find a "location other than the charter school;" and to provide the student with two hours per week of speech-language therapy for one calendar year and two hours per week of OT services for one calendar year, the IHO's determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[17] Since neither party appealed or otherwise challenged the IHO's interim decision directing the district to conduct evaluations of the student in the areas of speech-language, OT, and PT, the IHO's determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

during the 2015-16 school year. The district submits additional documentary evidence for consideration on appeal in support of its argument. In addition, the district acknowledges that while the district conceded that it failed to offer the student a FAPE for both the 2014-15 and 2015-16 school years at the impartial hearing, the district attempted to remedy these violations by issuing a Nickerson letter to the parent, which, ultimately, could not be fulfilled. Finally, the district acknowledges that "an award of compensatory education beyond what the IHO ordered for compensatory related services . . . is appropriate and likely necessary," and settlement negotiations did not resolve this matter.

V. Discussion

A. Preliminary Matters—Additional Evidence

As indicated above, the district submits additional documentary evidence for consideration on appeal with its answer (see Answer Exs. 1-3). Generally, documentary evidence not presented at an impartial hearing may be 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. 15-033; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013]).

However, upon review of the evidence in the hearing record and the district's additional documentary evidence submitted with its answer, the undersigned determined that it was necessary to seek further additional evidence from the district pursuant to 8 NYCRR 279.10(b). This was due, in part, to the district's position asserted in its answer related to the pendency services provided to the student. Notably, the parent asserted in her appeal that the district failed to implement the student's pendency placement. In an attempt to address this allegation, the district generally argued that the student received SETSS during the 2015-16 school year and submitted one document with its answer, dated May 12, 2016, which vaguely quantified the pendency services as "daily ELA and Math SETSS instruction totaling 16 hours per week," with no indication when the services commenced or the extent to which they were consistently provided to the student (Answer Ex. 3 at p. 1).[18] The parent was afforded an opportunity to respond to any evidence proffered by the district.

Pursuant to this SRO's request, the district thereafter submitted an affidavit attested to by the current principal of the student's charter school (principal), together with the charter school's calendar, the student's attendance report, and the student's report cards as accompanying exhibits in support of the district's argument that the student received 16 hours per week of 1:1 SETSS focusing on ELA and mathematics as pendency services consistent with the IHO's second interim decision (see generally Supp. Ex. 1). The parent objects to the consideration of the principal's

[18] Accordingly, the district was directed, pursuant to 8 NYCRR 279.10(b), to serve upon the parent and file with the Office of State Review a copy of any and all progress reports, attendance records, or other such documentary evidence establishing the total amount of 1:1 special education services provided to the student consistent with the IHO's interim order on pendency. It appears that to date, the student was entitled to receive several hundred hours of pendency services—16 hours per week of 1:1 SETSS focusing on ELA and mathematics since the filing of the due process complaint notice on November 2, 2015 and continuing through the date of this decision unless the parent appeals (see Jan. 24, 2015 Interim IHO Decision at pp. 4-5).

affidavit, in part, because the parent contends that the information in the principal's affidavit was available at the time of the impartial hearing, the charter school or the principal had the opportunity to present such information at the impartial hearing but failed to do so, and it is not now necessary to render a decision in this matter.

Notwithstanding the parent's objection that the information in the principal's affidavit may have been available at the time of the impartial hearing, while SROs have considered the factor of whether the additional evidence was available or could have been offered at the time of the impartial hearing, this factor is not necessarily dispositive in every case (Application of a Student with a Disability, Appeal No. 08-030). This factor serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination, and to prevent the party submitting the additional evidence from "sandbagging" that is, withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). That factor is of less weight in this instance, where neither party submitted evidence concerning the implementation of the IHO's second interim decision on pendency, the IHO did not address or remediate any alleged failure to implement the order, and the additional documentary evidence is now necessary in order to render a decision on this issue as appealed by the parent. Furthermore, as noted herein, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]). Therefore, while the information presented in the principal's affidavit may have been available at the time of the impartial hearing, the need to render a decision on this issue and the preference for doing so based upon reliable information outweighs the concerns noted above and as argued by the parent; thus, the principal's affidavit and accompanying exhibits will be considered.[19, 20]

Next, this SRO also determined that it was necessary to seek additional documentary evidence from the district due, in part, to its position asserted in the answer related to the equitable relief requested by the parent. Here, the district acknowledges in its answer that an award of compensatory education is "appropriate and likely necessary." Yet despite bearing the burden of

[19] With respect to the additional documentary evidence submitted with the district's answer, while exhibit "1" was not available at the time of the impartial hearing, it is not now necessary to consider in order to render a decision; thus, exhibit number "1" will not be considered. With regard to exhibit number "2," this document—dated February 2, 2016—was available at the time of the impartial hearing; however, it, too, is not now necessary to consider in order to render a decision in this matter and will not be considered.

[20] To the extent that the parent also contends that the district "'illegally'" provided SETSS to the student and further, that the SETSS provided to the student "were in a group setting and the Pendency Order called for 1:1" SETSS, these arguments appear to relate more directly to whether the student received the pendency services consistent with the IHO's second interim order as opposed to whether the SRO should accept the principal's affidavit and accompanying exhibits as additional documentary evidence. As such, this argument will be discussed more fully below.

production and persuasion under New York law and conceding that it failed to offer the student a FAPE for the 2014-15 and 2015-16 school years, the district did not identify a clear position one way or the other in its answer that would inform a decision maker as to its position about how to best remediate the situation that it admittedly created (i.e., the total amount of compensatory educational services by type with frequency, duration, and location recommendations), and instead, referencing no evidence, vaguely asserted at the impartial hearing that 840 hours of compensatory education, while an accurate calculation of the missed services, may not be an appropriate remedy (IHO Ex. V; see Parent Ex. X at p. 1).[21]

Moreover, the record of proceedings in this case shows that, at the outset of the due process litigation, the parties essentially stipulated that the district denied the student a FAPE (Tr. pp. 42-44). This left, as the primary issue to be resolved through impartial hearing, what compensatory education remedy, if any, was available and appropriate to remediate the denial of a FAPE. Accordingly, irrespective of any efforts to settle the matter, the district was required under the due process procedures set forth in New York State law, to address its burdens in the due process hearing context by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that most reasonably and efficiently could place the student in the position that he would have been but for the denial of a FAPE (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 457 [2d Cir. 2015], cert. denied, 136 S. Ct. 2022 [2016], quoting Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [noting that the "'ultimate award [of compensatory education] 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'"]). The hearing process in this case was essentially an inquest as to the appropriate relief. However, the district appeared to have concluded its participation, for all intents and purposes, with its concession of liability and statutory violation—that it denied the student a FAPE. Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district—unlike states which align the burden of production and persuasion consistent with Schaffer v. Weast, 546 U.S. 49, 58-62 (2005)—it is not an SRO's responsibility to craft the district's position regarding the primary issue in the case: the appropriate compensatory education remedy.[22]

On this issue, and as discussed more fully below, the district now concedes that the student is entitled to receive 840 hours of SETSS as compensatory educational services to remedy the district's failure to offer the student a FAPE for the 2014-15 and 2015-16 school years.

[21] With respect to the parent's argument that the IHO erred in finding that the student was not entitled to compensatory educational services, the administrative hearing record revealed that the district's representative at the impartial hearing agreed with the parent's calculation of the total amount of educational services (840 hours) the student did not receive during the school years at issue in this matter (see Parent Ex. X at p. 1; IHO Ex. V).

[22] In large part, the undersigned communicated these concerns and the state of the hearing record to both parties after the pleadings were submitted. Stated differently, in most jurisdictions outside of New York in which there is voluminous compensatory education litigation, it is up to the parent to establish both the FAPE violation and adequacy of the requested remedy in both the administrative and judicial contexts.

VI. Relief

A. Pendency Services

The parent argues that as a result of the district's failure to implement the pendency services—16 hours per week of 1:1 special education teacher services—as set forth in the IHO's second interim decision, the student should receive an authorization to obtain the missed services. In response, the district contends that upon receipt of the IHO's second interim decision on pendency on January 28, 2016, the charter school scheduled the student to receive 1:1 SETSS on a daily basis beginning in the second week of February 2016. The district alleges that, to date, the student received approximately 208 hours of SETSS between February 8, 2016 and the conclusion of the 2015-16 school year at the charter school on June 8, 2016, consistent with the IHO's order.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Student X, 2008 WL 4890440, at *20; Bd. of Educ. 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. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]), 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 v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then-current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2002]). The United States Department of Education has opined that a student's then-current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then-current placement (Evans, 921 F. Supp. 1184, 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001], aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

Once a proceeding commences, a student's pendency placement can be changed in one of two ways pursuant to the IDEA: 1) by agreement between the parties themselves, or 2) by a state-level administrative (i.e., SRO) decision that agrees with the student's parents that a change in placement was appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Bd. of Educ. v. Schutz, 290 F.3d 476, 484-85 [2d Cir. 2002]; A.W. v Bd. of Educ., 2015 WL 3397936, at *6 [N.D.N.Y. May 26, 2015]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Murphy, 86 F. Supp. 2d at 366). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings," S.S., 2010 WL 983719, at *1 [emphasis in the original]). And upon a pendency changing event, such changes apply "only on a going-forward basis" (S.S., 2010 WL 983719, at *1). This serves the core purpose of pendency: "to provide stability and consistency in the education of a student with a disability;" moreover, it would contradict this provision to require a district to change a student's pendency services in the middle of an impartial hearing (Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 696 [S.D.N.Y. 2006]; see Evans, 921 F. Supp. at 1187, quoting Ambach, 612 F. Supp. at 233; see also Doe v. E. Lyme, 790 F.3d at 452).

In this case, the IHO issued the first interim decision on pendency, dated January 11, 2015, which found—pursuant to the parties' agreement—that the special education program and related services recommended in the student's May 2015 IEP constituted the student's pendency placement (see Jan. 11, 2015 Interim IHO Decision at pp. 3-4; see also Tr. pp. 27-31; Parent Ex. F at pp. 7, 11). When the parties returned to the impartial hearing on January 22, 2016, the parent asserted that the IHO's interim order on pendency, issued on "January 11, 2016," had "yet to be implemented" (Tr. pp. 102, 121-25; see Jan. 11, 2015 Interim IHO Decision at pp. 3-4). Having discussed the district's inability to implement the 12:1+1 special class placement as part of the student's pendency services—and recognizing, by mutual agreement, that relocating the student from the charter school to a district public school for the sole purpose of receiving a 12:1+1 special class placement in order to implement a pendency placement was not in the student's best interest—the parties subsequently agreed that the student would receive 16 hours per week of 1:1 special education services focusing on ELA and mathematics as pendency services, effective as of the date of filing of the due process complaint notice, November 2, 2015 (see Jan. 24, 2015 Interim IHO Decision at pp. 2-5; see also Tr. pp. 145-61, 172-76).[23]

Before turning to the merits of the parent's argument, initially it must be noted that the IHO erred in describing the award of 16 hours per week of 1:1 special education services focusing on ELA and mathematics as pendency services as retroactive to the date of filing of the due process complaint notice, November 2, 2015 (see Jan. 24, 2015 Interim IHO Decision at pp. 2-5). While a pendency changing event occurred in this matter—that is, the parties' agreement to change the student's pendency services subsequent to learning about the inability to implement the pendency services (12:1+1 special class) ordered in the IHO's first interim decision on pendency—such changes to the student's pendency services apply "only on a going-forward basis" (S.S., 2010 WL 983719, at *1). Therefore, rather than retroactively effectuating the newly agreed upon pendency services back to the date of the filing of the due process complaint notice, the IHO should have

[23] Since neither party appealed or otherwise challenged the IHO's interim decisions pertaining to pendency, dated "January 11, 2015" and "January 24, 2015," the IHO's determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z., 2013 WL 1314992, at *6-*7, *10).

explained the need to craft a remedy for the failure to implement the first interim decision on pendency, dated January 11, 2015 (see S.S., 2010 WL 983719, at *1). However, the error, in this particular instance was more technical in nature because the 1:1 SETSS is nevertheless an equitable solution to remediate the district's failure to provide the student with pendency services. Accordingly, upon review of the evidence in the hearing record, there is no reason to disturb the IHO's ultimate award regarding the pendency issue.[24] As such, the district shall be directed to calculate and provide the student with 16 hours per week of 1:1 SETSS focusing on ELA and mathematics for a period equivalent to that between November 2, 2015 through January 28, 2016 (when the charter school received the IHO's second interim order on pendency) as relief for the failure to implement the IHO's first interim order on pendency.[25]

With respect to the implementation of the pendency services, the parent argues that the SETSS services allegedly provided to the student "were not the services prescribed on his IEP, nor those indicated as per the order." The parent then quotes language included in the IHO's first interim decision on pendency, dated January 11, 2015, which ordered the district to provide the student with a 12:1+1 special class placement and related services as a pendency placement. The parent contends that in order to provide the student with SETSS, the district required her signature on an amendment to change the services in the student's IEP, and thus, the district "'illegallly'" provided SETSS to the student. This argument, however, misconstrues the decision to amend the services recommended in a student's IEP without a CSE meeting with the decision, in this case, wherein the parent agreed to change the student's pendency services during the impartial hearing from a 12:1+1 special class placement to 16 hours per week of 1:1 SETSS focusing on ELA and mathematics. Furthermore, the parent's argument is inconsistent with her own contentions on appeal, to wit: the district failed to implement the student's pendency services—16 hours per week of 1:1 special education teacher services—as set forth in the IHO's second interim decision, dated "January 24, 2016" (Pet. at p. 3).

Next, contrary to the parent's allegation, the evidence in the hearing record does not support the parent's contention that the SETSS provided to the student "were in a group setting and the Pendency Order called for 1:1 SETSS," as ordered in the IHO's second interim decision on pendency. According to the principal's affidavit, the charter school scheduled the student to receive 16 hours per week of 1:1 SETSS focusing on ELA and mathematics, which totaled approximately 208 hours of SETSS received by the student between February 8, 2016 and June 8, 2016 (see Supp. Ex. at pp. 2, 4). The principal's affidavit does not reflect scheduling the student to receive SETSS in a group setting; rather, the evidence reveals that in addition to the 1:1 SETSS, the charter school also provided the student with an additional "reading support group" during the final two weeks of the school year (Supp. Ex. at p. 4). Based upon the foregoing, the weight of

[24] At least one U.S. District Court found, however, that a parent "through her acquiescence, somehow forfeited her right to compel performance" of an IEP when the parent requested that a student remain at a charter school by invoking her right to pendency (stay-put) "despite knowing that [the student's] IEP could not be implemented there" (James v. Dist. of Columbia, 2016 WL 3461185, at *4, *7 [D.D.C. June 21, 2016])..

[25] The district failed to submit any evidence that the 16 hours per week of 1:1 SETSS provided to the student at the charter school incorporated any calculation of hours for the period of time the student was entitled to pendency services from November 2, 2015 through January 28, 2016 (see Supp. Ex. 1 at pp. 1-5).

the evidence does not support the parent's assertion that the student received SETSS in a group setting.

Finally, the district's additional documentary evidence fails to support a finding that the student continued to receive pendency services consistent with the IHO's second interim order since June 8, 2016 (see generally Supp. Ex. 1). By virtue of the instant proceedings and the requirements to continue pendency in accordance with the IDEA during an appeal, the district remains obligated to continue to provide the student's pendency services through the conclusion of any administrative and/or judicial proceedings (see 20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]). Consequently, the district shall be directed to calculate and provide the student with 16 hours per week of 1:1 SETSS focusing on ELA and mathematics for a period equivalent to that between June 8, 2016 through the conclusion of this proceeding and any further appeals, if any (see Doe v. E. Lyme, 790 F.3d at 452 [noting that the goal of pendency is "to maintain the educational status quo while the parties' dispute is being resolved"]).

B. Compensatory Educational Services

The parent argues that the student is entitled to receive compensatory educational services for the district's failure to provide ICT services to the student for the 2014-15 school year, as well as the 2015-16 school year. More specifically, the parent contends that the district failed to provide the student with the services of a special education teacher during both the 2014-15 school year as well as the 2015-16 school year pursuant to the recommendations in respective IEPs.

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 may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Compensatory education may also 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]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [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]"]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of 21]; see generally R.C. v. Bd. of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional 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. 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]; see, e.g., Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding

additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE).

As noted above, the district acknowledged in its answer that the student was entitled to "an award of compensatory education beyond what the IHO ordered for compensatory related services . . . [was] appropriate and likely necessary." In the additional documentary evidence and letter submitted at the request of the SRO, the district now further agrees with the parent that the student is entitled to, and should receive, 840 hours of SETSS as an award of compensatory educational services in this case. Therefore, given the district's stipulation on this issue, it is not now necessary to independently determine whether the student was entitled to an award.

Prior to the district's concession, I informed the parties that I would consider the possibility that a summary disposition of this proceeding akin to a default judgment would have been required due to the fact that the parent presented evidence of a compensatory education remedy and the district had not so much as taken a position on the issue of remedy in its answer, other than to concede that some type of further compensatory remedy would be appropriate. Authority specific to the issue of a parent's request for a default judgment due to a school district's failure to comply with provisions requiring a response to due process complaint notices tends to lean against entry of a default judgment in the absence of a substantive violation, and that the remedy is a due process hearing (G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 F. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]). However, a substantive violation is conceded by the district in this case, and an impartial hearing, which provided a full and fair opportunity to be heard, has been afforded to the district already, rendering such authority inapposite.

Several courts have endorsed the consideration of various factors when making a determination that a party has defaulted, including:

> [T]he amount of money potentially involved; whether material issues of fact or issues of substantial public importance are at issue; whether the default is largely technical; whether plaintiff has been substantially prejudiced by the delay involved; and whether the grounds for default are clearly established or are in doubt. Furthermore, the court may consider how harsh an effect a default judgment might have; or whether the default was caused by a good-faith mistake or by excusable or inexcusable neglect on the part of the defendant.

(Briarpatch Ltd., L.P. v. Geisler Roberdeau, Inc., 513 F. Supp. 2d 1, 3 [S.D.N.Y. 2007], quoting Badian v. Brandaid Communications Corp., 2004 WL 1933573, at *2 [S.D.N.Y. Aug. 30, 2004]; see also Belcourt Pub. Sch. Dist. v. Davis, 786 F.3d 653, 661 [8th Cir. 2015]; Wing v. E. River Chinese Rest, 884 F.Supp. 663, 669 [E.D.N.Y. 1995]).

The parties' agreement on the appropriate remedy in this case has rendered application of the standards above, or similar standards, unnecessary. However, from time to time I see parties and IHO's struggle to develop adequate hearing records with regard to complex compensatory

education remedies—admittedly a daunting task—but I have nevertheless perceived an increase in the number of due process hearing cases in which there are deficiencies in the development of a hearing record that contains the essential information needed to design meaningful, fair compensatory education solutions that are likely to be useful to the student. At that juncture, New York's burden statute regarding due process hearings is then implicated.[26] Accordingly, should such scenarios occur in the future, I have identified some possible standards for parties to consider as a starting point when the process for developing a hearing record has failed to yield a meaningful solution that is well-rooted in the factual evidence.

C. Delivery of Services

One final note: given the remaining hours of pendency services owed to the student and the 840 hours of 1:1 SETSS focusing on the areas of ELA and mathematics awarded as compensatory educational services to the student, the parties must work collaboratively to most efficiently and effectively deliver such services to the student in a manner that allows him to receive the full benefits of these services. To be clear, while the purpose of any award of compensatory educational services is not to maximize the student's potential or to guarantee that the student achieves a particular grade-level in his areas of need, it would, for certain, be a pyrrhic victory if the delivery of these services only served to overwhelm the student or the pace at which the student is capable of making progress. Moreover, it would also ring hollow if the student received these compensatory educational services while he continued to remain enrolled at his current charter school given the district's and the charter school's abysmal failure to deliver the special education programs and related services the student was entitled to receive as recommended in his IEPs. To assist in this effort, the district shall be ordered, upon calculating the pendency services owed to the student consistent with this decision, to provide the full complement of 16 hours per week of 1:1 SETSS owed to the student before implementing the compensatory educational services awarded in this matter: 840 hours of SETSS. In addition, the district may not substitute either the pendency services or the compensatory educational services for a SETSS recommendation in a subsequently developed IEP for the student, but the district shall indicate in subsequently developed IEPs how the pendency services, and then the compensatory educational services, will be delivered to the student. When implementing the compensatory educational services award, the district is further directed to provide the student with no more than 10 hours per week of SETSS within a school setting until the student has received the 840 hours of total services.

VII. Conclusion

Having determined that the district conceded that it failed to offer the student a FAPE for the 2014-15 and 2015-16 school years, and given the district's concession on appeal that the student is entitled to an award of 840 hours of SETSS as compensatory educational services to remedy these violations, the IHO's decision denying, in part, the parent's request for compensatory educational services must be reversed in part.

[26] Although I have allocated the evidentiary burden to the district, parents nevertheless have a responsibility to identify the remedy they seek, an obligation that the parent met in this case.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the district shall provide the student additional pendency services as calculated and consistent with the directives in this decision; and,

IT IS FURTHER ORDERED that the IHO's decision, dated April 15, 2016, is modified by reversing so much as declined to award additional academic compensatory education services; and

IT IS FURTHER ORDERED that the district shall, after fully providing the pendency services owed to the student, thereafter provide the student with 840 hours of SETSS consistent with the directives in this decision.

Dated: **Albany, New York**
July 15, 2016

JUSTYN P. BATES
STATE REVIEW OFFICER