The University of the State of New York

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

No. 19-059

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:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, 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 parent) appeals from a decision of an impartial hearing officer (IHO) which denied the parent's request for an order directing respondent (the district) to provide pendency and 12-month services for her son for the 2019-20 school year. 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

The impartial hearing in this matter was very brief and no evidence regarding the student—either testimonial or documentary—was accepted by the IHO (see Tr. pp. 1-30). As a result, I directed the submission of additional evidence to supplement the existing hearing record which consists solely of a brief discussion before the IHO. The additional evidence is referenced in this decision as Supplemental Exhibits 1-14, a portion of which is relied upon to provide a brief educational history of the student. The process regarding its submission during this appeal is described further below.

With information in hand, it can be discerned that at the time of the current dispute the student was in fourth grade and attending a non-public school (Supp. Ex. 6 at p. 1).[1, 2] According to the parent, the student has been diagnosed with a chromosome disorder 47, XXY (also known as Klinefelter syndrome) and, as noted by the student's doctor, has a history of speech and motor delays, anxiety, attention difficulties, behavioral problems including tantrums, and difficulty socializing appropriately with other children (Req. for Rev. at p. 5).

Although the hearing record does not provide information prior to a January 17, 2017 Individual Education Services Plan (IESP) (2016-17 school year) it is evident that as of that date, the student was recommended to receive special education teacher support services (SETSS) and related services of speech-language therapy, occupational therapy (OT), physical therapy (PT) and counseling with the addition of a full time, one-to-one paraprofessional, by way of subsequent IESPs beginning May 19, 2017 going forward (Supp. Ex. Packet IESP 1 at p. 7; IESP 2 at pp. 7-8; IESP 3 at pp. 7-8; IESP 4 at pp. 7-8; IESP 5 at pp. 6-7; IESP 6 at p. 6).[3]

The present levels of performance in the student's most recent IESP, dated April 5, 2019, indicated that the student struggled with reading fluency and comprehension, mathematical problem solving and staying on topic when writing (Supp. Ex. 6 at p. 1). With respect to the student's speech and language development, the IESP indicated that the student's overall attending and ability to focus were poor, he had difficulty recalling the content of the stories he read and was unable to write about "his story" (id.). The IESP noted that the student was immature, cried in response to negative comments and was beginning to exhibit facial grimaces and hair twirling (id.). In addition, the student demonstrated poor social skills when greeted by others in the therapy environment and often did not make appropriate eye contact (id.) According to the IESP, the student was eager to please adults and was fearful of failure (id at pp. 1-2). At times the student struggled with redirection from adults, as well as self-doubt, and demonstrated negative feelings about himself (id. at p. 2). With regard to the student's sensory processing and motor development, the IESP included goals targeting the student's ability to self-regulate; improve tactile and vestibular processing; and improve ocular motor skills, postural control and reflex integration, and hand strength (id. at pp. 4-5). The IESP indicated that the student had a paraprofessional to keep him focused on work but noted that, even with such support, the student struggled to remain on task (id. at p. 1).

To address the student's needs, the April 2019 CSE recommended direct group SETSS five periods per week, individual OT for one 60-minute session per week, individual physical therapy

[1] Although the hearing record contains limited information regarding the student's educational history, it is evident from the supplemental information received, that the student attended the same non-public school from second grade through fourth grade (Supp. Exs. 1-6).

[2] Upon receipt of the requested additional information which included the student's IESPs for the 2017-18, 2018-19, and 2019-20 school years, the district's cover letter indicated that the IESP for the 2017-18 school year was revised three times prior to the January 18, 2018 IESP (Supp. Ex. Packet at p. 1).

[3] The one-to-one paraprofessional was recommended on or about May 19, 2017 until the January 11, 2018 IESP, when it was not included, but was again recommended in the April 5, 2019 IESP modified to a full-time group service rather than an individual service (Supp. Exs. 2 at p. 8; 3 at p. 8; 4 at p. 8; 5 at p. 7; 6 at p. 6).

for two 30-minute sessions per week, individual speech-language therapy for two sessions per week for 60 minutes a session, and group counseling one session per week for 45 minutes (Supp. Ex. 6 at p. 6). The CSE also recommended that all related services and SETSS be provided in a separate location (id.). The April 2019 CSE also recommended that the student be afforded a full-time group paraprofessional for health reasons (Klinefelter syndrome) (id.). Lastly, the April 2019 CSE put forth three speech-language goals, four SETSS goals, and eight OT goals to address the student's needs (id. at pp. 3-6).

A. Due Process Complaint Notice

In a due process complaint notice dated May 13, 2019, the parent requested that a "summer session" be added to the student's programming in the form of SETSS, speech-language therapy, and OT (IHO Ex. I).[4] The parent asserted that the student required 12-month services to avoid "regression in the maintenance of his goals" and to avoid forgetting "the strategies he has learned" (id. at p. 1, 3). In the due process complaint notice the parent explicitly sought pendency through the issuance of related service authorization vouchers (RSAs) to allow the student to continue to receive services from providers in the student's neighborhood (id. at p. 5). The specific pendency services requested were for "Speech and Language Therapy: Two times per week, for sixty minutes, provided individually in a separate location"; "Special Education Teacher Support: Five times per week, for one hour, provided individually in separate location"; and, "Occupational Therapy: One time per week, 60 minutes, provided individually in a separate location" (id.).

B. Impartial Hearing

The parties proceeded to an impartial hearing on June 20, 2019 and concluded both the pendency portion and the hearing on the merits of the parent's due process complaint that day (see Tr. pp. 1-30). At the impartial hearing, the parent represented herself and declined the IHO's offer for time to obtain an attorney, stating that she preferred to proceed on her own because she does this "every year" (Tr. pp. 4-5). The parent brought the student to the impartial hearing because she had no one else she trusted to care for the child, but it appears that an arrangement was made for the student to exit the hearing room (Tr. p. 6). The IHO then addressed the parent's request for pendency and asked the parent to make a "pendency application" (Tr. p. 6). During the colloquy with the IHO, the parent responded that she was requesting a "summer session," consistent with her written request for pendency services in the due process complaint notice, and went on to state the reasons she believed the student required 12-month services to avoid regression and noted the written provider recommendations she brought to the hearing to support the need for those services (Tr. pp. 6-7; see IHO Ex. I at p. 5). Apparently under the impression that the parent was conflating the services requested as pendency with those the parent was seeking on the merits of the final determination after a hearing—stating at one point, "I understand your request on the merits"—the IHO explained his understanding of the legal bases for pendency and asked the parent to specify which basis she believed applied (Tr. pp. 7-10).

[4] The IHO did not assign an exhibit identifier to the May 13, 2019 due process complaint notice, or formally enter the document into the hearing record. I will refer to this document, that is a part of the record on appeal, as "IHO Ex. I".

The colloquy continued during which the parent repeated her reasoning as to why the student needed the services, and expressed disagreement with the resolution meeting process and noted that the district denied the services every year, forcing her to initiate a due process hearing and prove that the student needed the 12-month services, stating "[s]ame thing every year. I have to fight, and fortunately . . . I have the doctor's note" (Tr. pp. 8-9). The IHO asked the district representative if there was any agreement from the district as to the student's pendency to which the representative responded that she was unaware of an agreement (Tr. pp. 9-10). Although unclear , the parent and the district representative thereafter appeared to discuss the fact that the parent successfully obtained 12-month services after an impartial hearing concerning the previous school year (Tr. pp. 10-12).

In response to a second inquiry from the IHO as to possible district agreement with the parent's assertion of 12-month services under pendency, the district representative stated that she would research the question of whether the "hearing officer's order last year for the summer services was a pendency order or a findings of fact and decision" (Tr. pp. 11-12). Returning to the impartial hearing after the district "had approximately 15 minutes to do research on the issue of pendency" the IHO again asked if the district was "agreeing to any order of pendency in this case", to which the district replied "we're not able to at this time, but I will continue to look into it" (Tr. p. 13).

The IHO next addressed the merits of the case and informed the district that it had the statutory burden to present its case first, and had the "burden of production and persuasion in these matters," and asked the district representative if she intended to call any witnesses or present any documentary evidence (Tr. p. 13). The district responded, "[n]ot at this time. No" (id.). The IHO then stated on the record that a denial of FAPE had been established, and that, "[t]he only thing that needs to be proven [sic] what are the student's needs and whether or not the relief sought is appropriate to address those needs and provide an educational benefit" (Tr. p. 13-14). By way of response, the district's representative stated that, "[w]e'd just like to say that the case was scheduled yesterday, so we haven't had sufficient time to be able to produce documents. And also we hadn't received documents from the parent either" (Tr. p. 14). The IHO confirmed that the district did not intend to submit any documents (Tr. p. 14).

The IHO then asked the parent for an opening statement (Tr. p. 15). The parent expressed that she wanted an order providing the services that the student's providers recommended for the summer and suggested that the student's doctor could be called by telephone "right now" (Tr. p. 15-16). She stated that she submitted all the necessary paperwork on time, "in May," and cooperated with the district despite the stress of having to battle over the student's 12-month services every year (id.). She asserted that she had repeatedly tried to communicate with district personnel by mail, email and telephone and had not received responses "since last week" (id.). Lastly, she stated in her opening that she was not overreaching and only seeking the speech, SETSS and OT services that the student needed to achieve his goals (id.).

The IHO asked if there were any "stipulations the parties wish to place on the record" (Tr. p. 16). The district responded in the negative, and the parent said, "I will like you to look at the letters from the doctor and all the providers" (Tr. p. 17). The IHO noted that the district's position was that it had not received any documents, and the district representative said, "[r]ight. We need time to look at the documents" (id.). Whereupon the IHO noted the "discovery rule," and told the

parent that she had to "turn over documents at least five business days before the hearing so that the other side has an opportunity to review them, and that makes the hearing fair" (Tr. pp. 17-18). Further, the IHO stated that the district did not have to accept the parent's proposed documents because they had not received them prior to the hearing and that there were no documents the IHO was "going to be able to receive at this time" (id.). Becoming upset, the parent countered that the recommendations for 12-month services the parent obtained from the student's providers were the same proof the parent had used in previous hearings, and that the district had ample evidence of the student's needs in his educational record and from recent evaluations (Tr. pp. 18-19).

Whereupon the IHO stated, "we're going to move next to the calling of witnesses" (Tr. p. 19). The district offered no witnesses and rested (Tr. pp. 19-20). The parent also offered no witnesses, and restated her contention that she had provided the necessary paperwork and that the district had the "psychology paperwork" demonstrating the student's needs (Tr. p. 20). The IHO asked the district for any closing statement, whereupon the district's representative stated, "I'm just responding. I know you're a very concerned parent. I understand you said you submitted documents for me (indiscernible). It's a different issue. We needed the time to prepare for the hearing. And it was just when things got scheduled. So but I understand what the parent's saying" (Tr. p. 21). Further, the district representative stated that, "[a]nd if we had additional time, we might have a different response, like documents (indiscernible), witnesses" (Tr. p. 21).

The IHO suggested that if the parties "jointly request additional time to resolve the matter" he would grant it to them, and brief discussion occurred on other topics, but ultimately the parent declined the offer for additional time because she wanted a decision from the IHO and that "[e]very single time, like I said, any delay affects my child" (Tr. pp. 21-29).

C. Impartial Hearing Officer Decision

In a decision dated July 1, 2019 the IHO denied the parent's request for an order on pendency, finding "no evidence in the record supporting the issuance of an order" (IHO Decision at pp. 3-6, 10). The IHO also denied the parent's requested relief on the merits, stating that the district offered no witnesses or evidence, that the parent offered evidence that was not properly marked and was not in compliance with the rule requiring disclosure of all evaluations and other documents to be submitted as evidence at an impartial hearing not less than five business days before the hearing and was therefore not a part of the hearing record (id. at pp. 6-7, 10). The IHO also found that the parent had declined the opportunity to obtain counsel or obtain an extension of the compliance timeline to negotiate with district (id. at pp. 3, 7). Lastly, the IHO noted that the parties were provided with a "letter to litigants" by email before the hearing explaining the relevant rules and protocol for the conduct of the hearing (id. at p. 7).

Although the IHO denied the parent's request for a pendency order and denied her request for a remedy on the merits, he nonetheless ordered the district to conduct a re-evaluation of the student and re-convene a CSE to produce a new IEP for the student's 2019-20 school year (IHO Decision at p. 10).

IV. Appeal for State-Level Review

The parent appeals. Initially, the parent attaches additional evidence to her amended request for review, offering four documents from the student's providers recommending 12-month services for the student.[5] Next, the parent asserts that the IHO failed to promptly convene the hearing, and that she had sent an email to "my coordinator from the [district]" requesting that the IHO recuse himself, whereupon he scheduled the impartial hearing for the following day, indicating personal misuse of the system and animus against the parent. With respect to pendency, the parent asserts that the student had 12-month services during the 2017-18 school year, and that the first quarter of the 2018-19 school year had "gone well." The parent next asserts that the IHO erred in failing to review the student's case because he did not read the letters she presented at the impartial hearing from the student's providers, and that the district "has copies of the letters [she] brought and handed directly to [the IHO] the day of my meeting." Substantively, the parent also asserts that the IHO erred in denying the student a "summer session" because she offered sufficient proof of regression and the student struggles with attention and focus on school work. She further asserts that the district failed to respond to her timely request for summer services, and that the student is "fidgety and sometimes antsy" and requires therapy all summer. Lastly, for relief the parent requests an order for the district to provide summer services for the student as speech-language therapy, OT and SETSS as well as make-up services for the time the student did not receive services in the summer.

In an answer, the district argues that the additional evidence offered by the parent should be rejected because it was available at the time of the impartial hearing and the IHO properly refused to admit it into the hearing record. Next, the district asserts that to the extent that the parent argues that the IHO should have recused himself or mishandled the hearing, the SRO should deny the parent's assertion, because the parent was offered additional time and an opportunity for timeline extension but declined the offer. The district next asserts that the parent failed to appeal from the IHO's denial of a pendency order. The district also contends that the SRO should dismiss the parent's claim that the hearing was untimely because the IHO conducted the hearing and issued a decision within the timeline set forth in State regulation.

On the question of whether the IHO erred in denying the student a "summer session" as the parent contends, the district explicitly does not appeal the IHO's finding of a denial of FAPE, but argues that the IHO's refusal to accept the parent's evidence should be upheld, and that the IHO's finding that insufficient evidence was proffered should be upheld. The district contends that an IHO's decision must be based upon the record, and that after the district conceded that it had failed to offer a FAPE, it was "incumbent " upon parent to show the appropriateness of the unilaterally selected services, and the IHO correctly rejected the offered evidence because of the "five-day" rule. Lastly, the district requests that in the event the SRO finds any issues with the way the IHO conduced the hearing, the matter should be remanded to the IHO for a "full hearing on the requested relief."

[5] The parent initially filed a request for review with the Office of State Review, but that document was not served upon the district. I note that at least two written explanations from the undersigned regarding the Part 279 State-level review procedures and three attempts by the parent at personal service upon the district were required before the parent successfully served an amended request for review upon the district.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).AFAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245.

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379;

Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132.

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

VI. Discussion

A. Preliminary Matters

As noted above, in order to have any evidentiary basis at all to support a determination, I conducted a preliminary review and informed the parties that additional evidence may be necessary to render a determination in this proceeding.[7] Thus, in a letter to both parties dated August 1, 2019, the undersigned, pursuant to 8 NYCRR 279.10(b), directed the district to submit additional documentary evidence consisting of any copies of IEPs or individualized education services programs (IESPs) developed for the student with respect to the 2017-18, 2018-19 and 2019-20 school years, as well as any due process complaint notices, and interim or final IHO decisions made with respect to the specified school years. The parties were offered an opportunity to be heard no later than August 7, 2019 regarding whether either party supported or opposed the consideration of such evidence by the undersigned. Neither party opposed the consideration of the additional documentary evidence. Lastly, the undersigned directed the district to file a written statement as to whether the district complied, or intended to comply with the IHO's order directing the district to conduct a re-evaluation of the student and re-convene a CSE to produce a new IEP for the student's 2019-20 school year.

In response, the district submitted copies of the following documents: Six IESPs dating between November 17, 2017 and April 5, 2019 (Supp. Exs. 1-6); four due process complaint notices dated between July 3, 2017 and June 12, 2018 (Supp. Exs. 7-10); two orders consolidating impartial hearing case no. 173643 with case no. 173641 (Supp. Exs. 11, 14); one interim order on pendency in case no. 173641 (Supp. Ex. 12); and, one findings of fact and decision in case no. 173641 (Supp. Ex. 13).

The district's letter accompanying the documentary evidence, dated August 7, 2019, stated that the district had not, and did not intend to comply with the order in the IHO's July 1, 2019 decision in this matter compelling the district to conduct a re-evaluation of the student and re-convene a CSE to produce a new IEP for the student's 2019-20 school year. Although neither the parent nor the district appealed the IHO's order to reevaluate the student and develop a new IEP, the district indicated that the reason for inaction was because the matter "is on appeal."

B. Conduct of Impartial hearing and the Parent's Additional Evidence

The parent also attaches four documents to her request for review as additional evidence for consideration on appeal (see generally Req. for Rev. at pp. 5-12). The district objects to the consideration of all four documents proffered by the parent, alleging that the additional evidence

[7] 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]; see, e.g., E.T. v. Bureau of Special Educ. Appeals, 2016 WL 1048863, at *12-*13 [D. Mass. Mar. 11, 2016] [considering additional evidence regarding a purported settlement agreement not accepted by the IHO]; Application of a Student with a Disability, Appeal No. 18-147; 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]).

should not be considered because it was available at the time of the impartial hearing and was properly excluded by the IHO (see Answer ¶¶ 13, 17).

Upon review, I note that the documents offered by the parent consist of a letter dated May 31, 2019 addressed "To Whom It May Concern" from the student's SETSS provider, a letter dated May 30, 2019 addressed "To Whom It May Concern" from a physician, a "Request for Summer coverage" dated May 30, 2019 from the student's speech-language therapy provider, and a regression statement and justification for extended school year recommendation on district letterhead dated June 3, 2019 from the student's OT provider, all of which recommend 12-month services for the student (Req. for Rev. at pp. 7-14). All of the documents were created after the April 2019 CSE meeting and it would be impermissible to use them to evaluate the adequacy of the IESP developed by the April 2019 CSE, but the documents all pre-date the June 20, 2019 impartial hearing date by more than five days. In this case, the parent's due process complaint notice adequately pled the nature of the problem, namely that the programming developed by the CSE lacked summer services and that he would regress without them. As noted above, the IHO determined that the district failed to produce evidence to the contrary, which finding is unappealed (IHO Decision at p. 6; see Tr. pp. 13-14). The only remaining issue was to craft appropriate equitable relief. I will accept these documents as additional evidence for the limited purpose of developing a remedy for the student, because they are necessary to render a decision and, as further described below, they were offered at the time of the impartial hearing but improperly excluded from evidence by the IHO.

1. Five Day Exclusionary Rule

The only reasons offered by the IHO for not accepting the documentation submitted by the parent was that the documents were not properly labeled and the parent did not disclose it to the district five days before the impartial hearing. The IDEA provides parents involved in a complaint the "opportunity for an impartial due process hearing" (20 U.S.C. § 1415[f]). State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). However, any party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). Further, State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). An IHO has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]).

However, courts do not enforce absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to

Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

In this case, the IHO did not permit anything other than rigid adherence to the 5-day disclosure rule, which was a problematic approach under the circumstances of this case. The transcript of the proceeding shows that the IHO informed the parties of the June 20, 2019 hearing date only one day before that date, rendering the parties' ability to satisfy the 5-day disclosure rule questionable (Tr. pp. 14, 21). Moreover, it is not clear from the hearing record that the district representative was asserting that the parent's proffered evidence should be rejected as violative of the five-day rule for disclosure, rather than merely stating in explanation that the one-day turnaround in scheduling of the hearing date had prevented her from examining the parents documents and obtaining evidence and witnesses for the hearing(Tr. pp. 17, 21). Lastly, the parent's assertions that she had provided the "paperwork" to the district in a timely manner were unrefuted, as even the district's representative candidly stated that, "I understand you said you submitted documents for me (indiscernible). It's a different issue" (see Tr. p. 21). Moreover, the IHO found on the one hand that the district did not present a case at all and thereby failed to meet both its burden of production and persuasion with respect to whether the student required 12-month services during summer 2019, but on the other hand, the IHO failed to take into account the need to complete the hearing record in some meaningful way by having any evidence at all to support a decision (see 8 NYCRR 200.5 [j][3[vii]). In light of the above, I find that the IHO's reliance on the 5-day disclosure rule to exclude the parent's evidence in this instance was an abuse of discretion because the proffered evidence was relevant to the relief requested by the parent and there was merely an acknowledgement by the district representative that she had not reviewed the parent's evidence rather than a clear assertion that the evidence should be excluded due to a violation of the 5-day rule. The additional evidence in this proceeding also strongly supports the parent's statements that a similar dispute with similar evidence continues to occur each school year, and in these circumstances, I accord little weight to the risk of undue surprise that the 5-day rule is designed to alleviate. The application of the rule by the IHO in these circumstances prevented the creation of a minimally adequate record upon which to base a decision.[8]

C. IHO Bias and Conduct of the Impartial Hearing

The parent alleges that the IHO demonstrated bias against her by waiting until the last possible day to schedule a hearing in the matter, and then scheduling the hearing for the next day after the parent requested that the IHO recuse himself.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be

[8] Although hardly an ideal approach, the IHO could have attempted to remediate the total absence of information in the record in a similar way as was accomplished in this appeal, that is, directed the district to produce minimal information with respect to pendency and compensatory relief on the merits and, after the hearing recessed on June 20, 2019, provided the parties an opportunity to be heard on whether such information should be considered by the IHO before rendering a final decision.

heard, and shall not, by words or conduct, manifest bias or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

Here, although I have found that the IHO should have taken into account the scheduling of the impartial hearing and abused his discretion in his evidentiary rulings, the error did not create an appearance of partiality in favor of the district nor was there evidence of actual bias on behalf of the IHO. The IHO conducted himself even-handedly with both parties, took the time to ensure that the parent had the opportunity to seek counsel and allowed both sides the opportunity to call witnesses (Tr. pp. 3-5; 19-20). There was no evidence that the IHO had any animus toward the parent. The IHO's evidentiary mistake with respect to the 5 day rule, while very unfortunate, does not provide a basis for finding that the IHO was biased (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]). Because I have accepted the parent's offered documentation as additional evidence, and addressed the IHO's failure to identify a pendency program for the student, among other findings as set forth below, the IHO's error has been sufficiently remediated.

D. Pendency Placement

The IHO rejected the parent's pendency argument in favor of summer services due to a lack of available information with respect to pendency. Although the district asserts that the parent has failed to appeal from the IHO's denial of the parent's request for a pendency program in this matter, I disagree and find that the parent has adequately pursued her pendency argument in this matter. The parent's request for review is less than a page long. The parent has alleged on appeal that the IHO erred in failing to grant summer services and the student received 12-month services after an impartial hearing on the merits with respect to the 2018-19 school year, which is a basis upon which to identify the correct pendency program for the student in this matter (see Tr. pp. 4-10; IHO Ex. 1 at p. 5; Req. for Rev. at p. 3 at ¶¶ 3, 4). While perhaps inartfully drawn, the pro se parent's request in this regard is sufficiently clear to survive the district's abandonment argument.

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 T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

An educational agency's obligation to maintain stay-put placement is triggered when an administrative due process proceeding is initiated (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 445, 452 [2d Cir. 2015]). 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; see E. Lyme, 790 F.3d at 452; Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). In addition, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]). 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).

At the impartial hearing, although the IHO discussed the parent's request for a pendency order, he erred in failing to come to a conclusion with respect to what the student's pendency program consisted of, because 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, 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, and 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.

During the impartial hearing, the parent asserted that the student's pendency services should have consisted of a "summer session" consisting of speech-language therapy, SETSS and OT of specified amounts delivered via RSA (see Tr. pp. 4-13; IHO Ex. I at p. 5). During the hearing, the parent and the district representative discussed the fact that the parent had obtained 12-month services for the student the previous year after initiating an impartial hearing and getting a decision in her favor from an IHO (see Tr. pp. 9-12). It can be gleaned from the hearing transcript that the district's representative attempted to locate a copy of the previous IHO decision, but was unable to do so during the brief 15-minute effort expended in this research, and therefore she could not "agree" with the parent that the asserted pendency services were correct (Tr. pp. 10-13). As noted above, it is the district's obligation to maintain the student's then-current educational placement during the pendency of the proceedings (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]). The student's pendency placement is automatic unless the student's parent and the board of education otherwise agree to an alternative arrangement. Thus, the district's failure to agree to pendency does not negate its non-discretionary obligation to effectuate the student's pendency placement, and the district's inability to access the student's records to verify the parent's request for pendency services runs against the district, not the parent, especially when the district bears the burden of production and persuasion on this issue as well. It was incumbent upon the IHO to develop a hearing record with evidence that would allow him to determine a pendency placement based upon evidence, rather than fail to render a pendency decision at all due to a lack of any evidence.

Moreover, the additional evidence requested by the undersigned to complete the record includes an IHO interim decision dated July 11, 2018 directing pendency for summer 2018 (see Supp. Ex. 12). As set forth above and as acknowledged by the IHO during the impartial hearing, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]). This may or may not be the IHO order that the parent and the district were recalling during the impartial hearing (see Tr. pp. 9-13). That determination notes that the student received 12-month services during the 2017-18 school year, and orders the district to provide SETSS and speech-language therapy via RSA during the months of July and August for the 2018-19 school

year (Supp. Ex. 12 at p. 2).[9] Most importantly, the IHO in the prior proceeding, case 173641,[10] went on to the render a final decision on August 8, 2018 which ordered that

> 1. The Student shall receive speech and language, 2x60, one-to-one.
>
> 2. The Student shall receive occupational therapy, l x60, one-to-one.
>
> 3. The Student shall receive physical therapy, 2x30, one-to-one.
>
> 4. The Student shall receive SETSS, 5 sessions x60 minute.
>
> 5. The Student shall receive health paraprofessional to be used within the classroom fulltirne.
>
> 6. RSAs shall issue for all services above for the 2018/19 school year.

(Supp. Ex. 13 at p. 2). The August 8, 2018 final decision does not explain the basis of the final determination, but the parent's due process complaint notice in that proceeding seeks similar relief – summer services in the form of SETSS and speech-language therapy- that was sought in this proceeding (Supp. Ex. 8 at p. 2).

The evidence above sufficiently supports that the student's pendency services in the current proceeding during the six-week summer session in July and August consists of weekly services of five hours of SETSS, two 60-minute sessions of speech-language therapy, and one 60-minute session of OT. The parent explicitly did not seek physical therapy or a health paraprofessional as pendency in her due process complaint notice or during the impartial hearing, and, consequently I decline to order relief that the parent is not seeking (see IHO Ex. I at p. 5). I will turn next to the issue of appropriate relief due to the missed services.

E. Remedy and Compensatory Services

The parent requests an order directing the district to provide the student with speech-language therapy, OT and SETSS 12-month services for the 2019-20 school year as well as "make-up summer session" services for the time the student did not receive those services. As of the date of this decision, it appears that the summer session has all but elapsed and there is no evidence that the student received any services pursuant to his pendency placement or that an attempt to provide them is underway.

The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a

[9] I note that the interim order did not provide for the OT that was included in the parent's pendency order request in this matter (Supp. Ex. 12; see IHO Ex. I at p. 5).

[10] There was a consolidation of the matter with a second proceeding, not directly relevant to the issue of 12-month services.

compensatory remedy (E. Lyme, 790 F.3d at 456 [full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

As noted above the district has not appealed the denial of a FAPE to the student as determined by the IHO and the failure to identify or provide the student's pendency services are independent violations of the IDEA and state law. The district also misallocates the burden of production and persuasion in this case, stating that "as the [district] conceded FAPE, it was incumbent upon the Parent to show the appropriateness of the unilateral selection of services" (Answer ¶ 14). There is no evidence whatsoever a unilateral placement of the student in this case, and the State legislature assigned the burden to the district, not the parent.[11] The evidence is sufficient to order relief.[12] Consequently, I will order the district to provide speech-language therapy, OT, and SETSS as compensatory education services in an amount equal to the six-weeks of 12-month services the student was entitled to under pendency in this matter.

F. Compliance with Unappealed IHO Orders

Lastly, as noted above, the district has stated that it had not, and did not intend to comply with the unappealed aspects of the IHO's July 1, 2019 decision in this matter compelling the district to conduct a re-evaluation of the student and re-convene a CSE to produce a new IEP for the student's 2019-20 school year while an appeal is pending. The district is reminded that, but for its obligations to deliver the student's pendency placement, there is no stay of the unappealed aspects of an IHO's order due to administrative or judicial review. To hold otherwise would allow undisputed matters regarding the appropriate education of disabled children to languish, and that is a luxury they cannot afford. Accordingly, I will direct the district to immediately comply with the unappealed aspects of the July 1, 2019 IHO decision in this matter.

Furthermore, upon the reevaluation of the student directed by the IHO, I will specifically require the CSE in this matter to, among those assessments, evaluate the student's need for 12-

[11]Under the IDEA, the burden in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]), however that burden has been altered by the legislature in New York to provide that "[t]he board of education or trustees of the school district or the state agency responsible for providing education to students with disabilities shall have the burden of proof, including the burden of persuasion and burden of production, in any such impartial hearing, except that a parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement" (Educ. Law § 4404[1][c]).

[12] If the burden of production were allocated to the parent in accordance with Schaffer as the party seeking relief, I would still have requested additional evidence; however, I would have placed the burden of producing it on the parent rather than the district.

month services and, after the CSE has reconvened, provide the parent with prior written notice in her native language specifically indicating whether the student requires 12-month services to prevent substantial regression on the form prescribed by the Commissioner of Education and specifically indicating whether the CSE recommends or refuses to recommend 12-month services on the an IEP for the student together with an explanation of the basis for the CSE's recommendation therein, as well as describing the evaluative information relied upon in reaching the determination regarding 12-month services (8 NYCRR 200.5[a]; see 34 CFR 300.503[b]). [13] The CSE is also required to consider the documentation submitted by the parent as additional evidence in this proceeding, as it did not have the opportunity to do so at the time of the last CSE meeting.

The district is also reminded that State guidance has indicated that Education Law § 3602-c does not require school districts to provide dual enrollment services to students with disabilities during the summer, unlike a district's obligation during the course of the regular school year, within an IESP (see "Chapter 378 of the Laws of 2007 – Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3206-c," VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/documents/chapter-378-laws-2007-guidance-on-nonpublic-placements.pdf). However, State guidance also directs that for such dually enrolled (that is parentally placed) nonpublic school students who qualify for 12-month services (also known as extended school year services [ESY]) there is a need for an IESP for the regular school year and an IEP for 12-month services programming, resulting in a 10-month IESP and a 6-week IEP ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at pp. 39-40, Office of Special Ed. [Apr. 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). Accordingly, if, after the reevaluation of the student, the CSE finds the student eligible for 12-month services and the parent continues to parentally place the student in a nonpublic school and seek dual enrollment services, the district must produce an IESP for the 10 month school year and an IEP for the 12-month services.

VII. Conclusion

For the reasons set forth above, the student was entitled to pendency for 12-month services of the student's 2019-20 educational programing and I have further found that the student is entitled to compensatory education as relief for the district's failure to implement the student's pendency programming. As further equitable relief, the district must definitively address the student's need for 12-month services going forward and provide a clear explanation of its reasoning to the parent

[13] Generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," VESID Mem. [2014], available at http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (id. [emphasis in original]).

for its determination(s) after conducting the required reevaluation. I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated July 1, 2019 is modified by reversing that portion of the decision that denied the parent's request for a determination of the student's pendency placement; and

IT IS FURTHER ORDERED that the student's pendency placement for the 12-month services portion of the school year consists of five hours of SETSS per week, two 60-minute sessions of speech-language therapy per week, and one 60-minute session of OT per week for the course of six weeks during the months of July and August; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall provide the student with compensatory education consisting of 30 hours of SETSS provided individually in a separate location, 12 hours of speech-language therapy provided individually in a separate location, and six hours of OT provided individually in a separate location via the issuance of RSAs provided to the parent; and

IT IS FURTHER ORDERED that the district shall complete a reevaluation of the student within 60 school days from the date of this decision, which reevaluation shall include an assessment of whether the student requires 12-month services to avoid substantial regression, and

IT IS FURTHER ORDERED that the CSE shall reconvene within 90 school days at a time and location convenient to the parent during which the provision of 12-month services shall be considered for inclusion in an IEP for the student, and

IT IS FURTHER ORDERED that within 10 days following the CSE meeting described above, a prior written notice in the parent's native language shall be issued to the parent consistent with the body of this decision.

Dated: **Albany, New York**
August 23, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER