The University of the State of New York

The State Education Department
State Review Officer
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No. 19-093

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

Appearances:
The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Elisa Hyman, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 the decision of an impartial hearing officer (IHO) which found that this matter would be resolved through an award of compensatory pendency services. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 parties' familiarity with the facts and procedural history of this matter and the IHO's decision is presumed and will not be recited in detail. Briefly, the student attended Quality Services for the Autism Community (QSAC) pursuant to an agreement between the parties (Parent Ex. A at p. 3; Dist. Ex. 14 at p. 1).[1] The student presents with delays in cognitive, academic,

[1] According to the July 1, 2016 due process complaint notice, the district agreed to place the student at QSAC with related services at an unspecified time (Parent Ex. A at p. 3). During the pendency hearing, the parent's attorney stated that the district agreed to place the student at QSAC and further indicated that the student's initial placement at QSAC occurred prior to 2012 (Tr. p. 7). QSAC is a nonpublic school that has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

behavioral, social-emotional, receptive and expressive language, pragmatic skills, and activities of daily living (ADL) skills (Dist. Ex. 1 at pp. 1-4). Additionally, the student has a significant hearing impairment and has bilateral cochlear implants (id. at p. 3). The student is primarily nonverbal and uses a communication device, a picture exchange communications system (PECS), sign language, and gestures to communicate (Dist. Exs. 1 at p. 3; 5 at p. 1).

By due process complaint notice dated July 1, 2016, the parent alleged, among other things, that the student had been denied a free appropriate public education (FAPE) for the 2016-17 school year and that the district had failed to implement an unappealed December 17, 2015 IHO decision for the remainder of the 2015-16 school year (Parent Ex. A p. 2; Tr. p. 5). The parent also alleged that the CSE failed to develop an IEP and failed to offer a placement for the 2016-17 school year, failed to recommend home-based services, and failed to provide documents and evaluations in the parent's native language (id. at pp. 2, 10, 11).

A hearing on pendency was held July 28, 2016 (Tr. pp. 1-13). At that time, the parent offered two exhibits into evidence, the July 1, 2016 due process complaint notice and the unappealed December 17, 2015 IHO decision upon which the student's pendency program and placement was based (Tr. pp. 4-5; Parent Exs. A; B). The parent's attorney indicated on the record that the district had not been able to fully or consistently implement the student's pendency services at QSAC due to a lack of available service providers (Tr. pp. 6-8). The district did not object to the student's pendency services as outlined in the unappealed December 17, 2015 IHO decision (Tr. p. 8). In a July 29, 2016 interim order on pendency, the IHO found that in accordance with the unappealed December 17, 2015 IHO decision, the student's pendency placement consisted of a 6:1+3 special class at QSAC with the related services of individual speech-language therapy five times per week for 30 minutes per session, individual occupational therapy (OT) two times per week for 30 minutes per session, individual physical therapy (PT) two times per week for 30 minutes per session, individual hearing education services five times per week for 30 minutes per session, assistive technology devices of an iPad with software and accessories and an FM unit, special transportation, 30 hours per week of home-based applied behavior analysis (ABA), and two hours of ABA supervision (IHO Ex. I at p. 4). The IHO also ordered that, in the event the district could not provide the student's pendency services, the parent would have the right to find private providers at district expense (id.). The IHO ordered that the student was entitled to pendency services as of the date of the July 1, 2016 due process complaint notice, essentially from the beginning of the 2016-17 school year, through the completion of this matter or as otherwise agreed to by the parties (id.).

Several prehearing and status conferences were held between September 21, 2016 and April 9, 2018, while the parties explored the possibility of settlement (Tr. pp. 14-219). During a March 24, 2017 appearance, the parent's attorney noted that the district had disclosed an IEP for the 2016-17 school year (Tr. p. 41). The parent's attorney indicated that she needed to amend the due process complaint notice to include challenges to the newly disclosed IEP (id.). The parent filed a second due process complaint notice on April 24, 2017, which was consolidated with the first hearing request in an interim IHO decision dated May 4, 2017 (Parent Ex. JJ; IHO Ex. IV at p. 3). The parties entered additional documentary evidence on June 26, 2018 (Tr. pp. 227-33). The parties next convened on September 14, 2018, at which time the district rested (Tr. p. 241) without conceding that it had denied the student a FAPE and without calling any witnesses (Tr. pp. 235-66). The parties discussed what issues were still pending and the parent's requested relief (Tr. pp. 241-45). The IHO indicated that he would issue an interim order directing the district to

review the student's receipt of services through pendency and calculate the number of hours of pendency services the student had not received (Tr. pp. 261-62). In an interim order dated September 18, 2018, the IHO directed the district to determine the number of hours of pendency services to which the student was entitled that the district had failed to deliver from July 1, 2016 through October 18, 2018 and further ordered the district to reimburse the parent for the cost of replacing the student's iPad with software and accessories (IHO Ex. II at p. 3). At a November 6, 2018 appearance, the parties discussed the district's pendency services calculation, including that the district had only calculated the number of pendency hours the student was owed through September 18, 2018 (Tr. pp. 267, 272-74). The parties convened for a final appearance on January 18, 2019 during which no witnesses were called (Tr. pp. 283-95) and the IHO indicated that the parties' closing briefs were due on March 11, 2019 (Tr. pp. 292-93). The hearing record indicates that additional extensions were granted from March 9, 2019 through August 30, 2019, so that the parties could continue to discuss settlement (IHO Ex. III at pp. 18-24).

In a decision dated August 19, 2019, the IHO ordered the district to calculate the number of hours of services required by pendency based on the unappealed December 17, 2015 IHO decision (IHO Decision at pp. 3-4; see IHO Ex. I). The IHO determined that the student was entitled to pendency services from July 1, 2016, the start of the 2016-17 extended school year, through the end of the 2018-19 school year (id. at p. 4). The IHO ordered the district to investigate the related services provided by QSAC to prevent duplication of services (id.). The IHO further ordered the district to fund or provide any pendency services "that have not been funded and/or provided through pendency for the period at issue" (id.). Next the IHO ordered that "necessary compensatory pendency services" shall be funded by the district at a market rate determined by the district's implementation unit and the parent (id.). Lastly, the IHO ordered that "[c]ompensatory home-based pendency services may be provided on a 52-week basis, including weekends and holidays" (id.).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO failed to determine whether the student was denied a FAPE for the 2016-17 school year based on substantive and procedural violations and the failure to implement the student's agreed-upon services in the absence of any other IEP, placement, or offer, failed to develop the record, failed to rule on all claims raised in the due process complaint notice, failed to determine whether the parent's remaining claims were moot, failed to rule on the parent's motion for summary judgment, improperly shifted the burden to the parent and given that the district did not present a case, the parent was entitled to a default ruling on all claims raised in the due process complaint notices, and that the IHO should have deemed all unaddressed and unrebutted allegations admitted and granted the parent's requested relief.[2] The parent contends

[2] In addition to asserting that the district committed procedural and substantive violations of the IDEA, its implementing regulations, and corresponding State laws and regulations, the parent also alleged in the due process complaint notice that the district committed systemic violations (i.e., adopting, applying, and implementing blanket policies), and violated Section 504 of the Rehabilitation Act of 1973 (section 504) and Section 1983 of the United States Code (section 1983) (see generally Parent Ex. A at p. 2). On appeal, the parent contends that the IHO failed to address the section 504 claims raised; however, an SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504, section 1983, or claims with respect to alleged systemic violations, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature

that the SRO should reverse the IHO's decision and find for the parent on all issues and claims not addressed by the IHO or, in the alternative, remand the matter to the IHO.

The parent also alleges that the district annually predetermines the student's IEPs and placements and annually fails to afford adequate language access. The parent further argues that claims related to translation and interpretation, denial of a FAPE, whether the district satisfied its burden relative to QSAC, and the specific relief requested by the parent are not moot. The parent also asserts that the student remains at QSAC due to "the continued application of the policies requiring annual litigation to maintain [the student's] services." The parent further contends that the IHO failed to determine whether QSAC was appropriate.

With regard to pendency services, the parent argues that the IHO's decision, which failed to find that FAPE was denied, has the potential to cause ambiguity relative to the student's program and placement. The parent asserts that the IHO failed to order pendency beyond June 30, 2019, leaving the student with an unexplained gap in services, and failed to determine whether push-in services at the school would be appropriate as compensatory education.

The parent next contends that the IHO ignored his request for compensatory pendency services and should have awarded 1,321.5 hours of 1:1 ABA, 126.5 hours of ABA supervision, 376 30-minute sessions or 188 hours of hearing education services, 202 30-minute sessions or 101 hours of OT, 202 30-minute sessions or 101 hours of PT, and 505 30-minute sessions or 252 hours of speech-language therapy for the period from July 1, 2016 through September 8, 2018. The parent argues that the district should be required to provide compensatory pendency services at QSAC, in the student's home, or in a center with transportation provided to and from the center.

For the period from September 8, 2018 through June 30, 2019,[3] the parent argues that the IHO should have awarded the following compensatory education (less any provided and/or funded pursuant to pendency): 1,200 hours of 1:1 ABA; 80 hours of ABA supervision; 505 30-minute sessions or 188 hours of hearing education services; 202 30-minute sessions or 101 hours of OT; 202 30-minute sessions or 101 hours of PT; and 505 30-minute sessions or 252 hours of speech-

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

[3] The end date of June 30, 2018 appears to be a typographical error in the parent's request for review. The correct date of June 30, 2019 is correctly referenced in the parent's closing memorandum (IHO Ex. V. at pp. 9-10).

language therapy. The parent again argues that the district should be required to provide compensatory pendency services at QSAC, in the student's home, or in a center with transportation provided to and from the center.

In an answer, the district responds with admissions and denials and argues that the parent's appeal should be dismissed. Specifically, the district asserts that the IHO reasonably declined to award all of the parent's requested relief. The district argues that the IHO could reasonably conclude that the student did not require additional compensatory educational services in order to make educational progress. The district alleges that the hearing record contained evidence of the student's progress during the 2016-17 school year and that the IHO's decision should not be disturbed. In the alternative, the district asserts that the matter should be remanded for further record development. Next the district "does not concede the veracity" of the parent's remaining arguments such as, the IHO's failure to address all of the parent's claims raised in the due process complaint notice, failure to adequately develop the record, failure to find a denial of a FAPE, and failure to find QSAC inappropriate. The district asserts that the IHO properly acted within the scope of his authority and that the hearing record did not support an award of additional compensatory educational services. Lastly, the district argues that the IHO's award of compensatory pendency services "implicitly confirms" a finding of a denial of a FAPE.

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]).

A FAPE 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]).[4]

[4] 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).

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).

VI. Discussion

A. Scope of Review

At the outset, I note that the district correctly asserts that the parent has not reiterated his claims related to the district's failure to implement the December 17, 2015 IHO's decision for the entirety of the 2015-16 school year, which, among other things, directed the provision of documents and evaluations in the parent's native language. The regulations governing practice before the Office of State Review require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Accordingly, I find the parent's claims related to the 2015-16 school year have been abandoned and will not be further discussed.

In its answer, the district argues that the IHO implicitly found a denial of a FAPE by ordering compensatory pendency services. The parent's requested relief will be addressed below, however, the district is reminded that the student is entitled to pendency services regardless of the merits of the parent's underlying allegations. To infer that the IHO made a finding of a denial of a FAPE on the basis of an award of compensatory pendency services strains credulity. Nevertheless, it appears that the district has essentially conceded a denial of a FAPE, given that it posited that the IHO had made such a finding and did not cross-appealed any such implicit or explicit finding of a denial of a FAPE (see Answer ¶¶ 7, 8, 11).[5]

The district also argues in its answer that the IHO could have determined that the student did not require additional compensatory educational services because the student made progress at QSAC. Notwithstanding that the district did not demonstrate the appropriateness of QSAC and I have determined that the district conceded a denial of a FAPE for the 2016-17 school year, the parent does not appear to be seeking compensatory educational services to remedy any alleged deficiencies with the student's placement at QSAC, rather the parent has repeatedly requested compensatory educational services to remedy the district's failure to implement the December 17, 2015 IHO decision and for the district's failure to implement pendency during this matter (Req. for Rev. at pp. 3, 4, 6-9; see Tr. pp. 36, 46, 67, 68-69, 70, 71, 72, 73, 97, 99, 112, 113, 117, 119, 120, 143, 187, 205, 245, 271, 276, 291).

In a section of the request for review asserting that certain claims were not moot, the parent alleges that the IHO refused to order a home-based extended observation of the student and instead

[5] The district did not present any testimonial evidence and offered 14 exhibits. The parent asserted in the July 1, 2016 due process complaint notice that the district failed to develop an IEP for the 2016-17 school year (Parent Ex. A at p. 2). The district produced a May 12, 2016 IEP at the hearing (Dist. Ex. 1). The parent's attorney asserted that the May 12, 2016 IEP was never provided to the parent (Tr. p. 101). By failing to call any witnesses, the district failed to demonstrate that the parent was timely provided a copy of the May 12, 2016 IEP in his native language.

ordered a neuropsychological evaluation over the parent's objection (Req. for Rev. at p. 5).[6] The IHO in this matter issued two interim orders on pendency, a consolidation order, and a final decision (see IHO Exs. I, II, IV; IHO Decision). None of the IHO's orders or the final decision include an order for a neuropsychological evaluation. Further, the IHO did not order any evaluations during a discussion of evaluations on the record (Tr. pp. 243-45).[7] The parent has not reiterated a request for an independent educational evaluation in any other section of the request for review, and the request for review does not include an enumerated list of requested relief. The hearing record does not support the parent's claim that the IHO ordered a neuropsychological evaluation and a statement that a claim was not moot is insufficient to plead a request for an independent educational evaluation (M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [the use of broad and conclusory statements or allegations within a pleading does not act to revive any and all procedural violations]). Accordingly, this issue will not be addressed any further.

Additionally, as the IHO declined to address the parent's request for compensatory educational services as a remedy for the district's failure to implement the December 17, 2015 IHO decision (Tr. pp. 71, 72), and the parent has not raised those claims on appeal, the parent's remaining claims relate to the district's failure to implement pendency during this matter and are discussed below.

B. Compensatory Pendency Services

Turning to the substance of the parties' dispute, the parent alleges that the IHO erred by ordering compensatory pendency services to cease on June 30, 2019 and by failing to direct the district to implement the student's home-based ABA services, ABA supervision and related services at QSAC (on a push-in basis), at a center or in the student's home.

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, the IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see

[6] The due process complaint notice included a request for the district to fund "an independent professional selected by the parents who is not constrained by blanket policies and who has an expertise in autism to evaluate [the student]" (Parent Ex. A at p. 13).

[7] During the hearing, it appeared that the parent intended to seek an unspecified independent educational evaluation (Tr. p. 243); however, in the post-hearing brief, the parent made no mention of, or request for, an independent educational evaluation (IHO Ex. V).

Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171).

Once a pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino, 959 F.3d at 532; Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; Letter to Hampden, 49 IDELR 197 [OSEP 2012]). If there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the

student's then-current educational placement (see Schutz, 290 F.3d at 483-84; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197).

The parent correctly asserts that the student is entitled to pendency services for the duration of the due process proceedings. In several discussions with the IHO, the parent's attorney detailed the district's history of failing to implement the student's program and failing to deliver on its pendency obligations to the student upon the filing of the due process complaint notice (Tr. pp. 6-7, 70, 209).

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

In his interim orders on pendency, the IHO directed that if the district was unable to fund the student's pendency program, the parent would be entitled to obtain private providers at the district's expense (IHO Exs. I at p. 4; II at p. 3). In his final decision, the IHO stated that "[t]o the extent necessary compensatory pendency services shall be funded at a market rate to be determined by the DOE Implementation Unit and the parent" (IHO Decision at p. 4).[8] The parent's attorney had stated during a discussion with the IHO that the parent did not want authorizations to obtain private providers (Tr. pp. 69-70, 259).

A district is tasked in the first instance with implementing the pendency placement by delivering the instruction or services (T.M., 752 F.3d at 171-72 [emphasis added]). According to discussions during the hearing, the district has not been able to provide all of the pendency services to which the student is entitled (Tr. pp. 273-74, 286-88). Further, the district has not refuted the parent's representations that there exists a dearth of providers within a reasonable traveling distance from QSAC and the student's home, or that the district has never been capable of "staffing" the student (Tr. pp. 6-7, 70, 119, 188-89, 209-10). Given the parent's prior experience with the district's failure to fulfill its obligation to implement the student's pendency services, it is understandable why the parent is not amenable to the issuance of requests for authorization (RSAs). Inasmuch as the hearing record demonstrates that the district has failed to deliver services to the student while this proceeding is pending, RSAs and promises of funding are tantamount to handing the parent a check and wishing the student the best of luck.

[8] The IHO did not include the language permitting the parent to obtain private providers in his final decision and omitted that the student's pendency program included 12-month services and a 6:1+3 special class placement (compare IHO Decision at pp. 3-4; with IHO Exs. I at p. 4; II at p. 3; Parent Ex. B at p. 8).

That is not to say, however, that the parties may not, under certain circumstances, agree that the district may satisfy its pendency obligation by issuing vouchers or paying providers identified and secured by the parent.

While the district is authorized to decide how (and where) a student's pendency services are to be provided as per the text and structure of the IDEA and given that the district is the party responsible for funding the pendency services (Ventura de Paulino, 959 F.3d at 533-35), the parties are directed to confer and determine the location in which these services can be provided to the student, so as to ensure the award does not impede the student's participation in his educational program going forward (see, e.g., M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017]).

To remedy the district's failure to implement the student's pendency, the IHO has already awarded the student services for the period from the filing of the due process complaint notice through the end of the 2018-19 school year, based on services consisting of individual speech-language therapy five times per week for 30 minutes per session, individual OT two times per week for 30 minutes per session, individual PT two times per week for 30 minutes per session, individual hearing education services five times per week for 30 minutes per session, assistive technology devices of an iPad and an FM unit, 30 hours per week of home-based ABA, and two hours per week of ABA supervision, less any services already provided to the student (IHO Decision at pp. 3-4). The parent, in requesting a specified amount of compensatory services, now appears to be objecting to the IHO's direction that the district compute the amount of pendency services that were missed; however, the parent had requested that the IHO direct the district to "go through from the date of the pendency order" and "calculate banks of the missing services" and that the IHO "order them to be provided at a regular market rate" (Tr. pp. 242-43). Accordingly, while I can understand the parties' difficulties in determining what the final compensatory pendency award in this matter consists of, the parent requested this award and there is insufficient information in the hearing record to depart from the manner in which this award was addressed by the IHO.

However, as discussed above, the IHO's award of compensatory pendency services is extended to cover the period of time from the end of the 2018-19 school year through the end of this proceeding, which includes the period of time that this matter has been pending here. The district is ordered to provide the student with compensatory education based on the unappealed December 17, 2015 IHO decision, which consists of a 6:1+3 special class at QSAC with the related services of individual speech-language therapy five times per week for 30 minutes per session, individual OT two times per week for 30 minutes per session, individual PT two times per week for 30 minutes per session, individual hearing education services five times per week for 30 minutes per session, assistive technology devices of an iPad with software and accessories, and an FM unit, special transportation, 30 hours per week of home-based ABA, and two hours of ABA supervision (Parent Ex. B at p. 8). The district shall determine the number of sessions to which the student is entitled and determine the number of sessions that have been provided pursuant to pendency. Such compensatory education should take the form of make-up sessions of those services the district has failed to provide, all of which should be calculated on an hour-by-hour basis, with the computation of days to start as of July 1, 2016 and to continue through the date of this decision.

To the extent the parent wants an order directing the district to deliver the compensatory pendency services at QSAC, the parent has not cited to any authority for the proposition that an SRO can order a private entity (e.g., QSAC or a center) to permit the implementation of any type of services by a district or third-party provider on its property. Additionally, this proceeding has been pending for in excess of four school years at this point (2016-17, 2017-18, 2018-19, 2019-20, and now the start of the 2020-21), and any award directing the district to deliver the student's compensatory pendency services at the student's school would necessarily begin to interfere with the student's current educational program as the CSE is the entity tasked with meeting every year at the very least to review information about the student's progress under current educational programming and periodically assess any changes in the student's continuing needs (see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

Finally, consistent with the above, the district is not permitted to consider the compensatory services awarded as a part of this proceeding in developing future IEPs for the student, as they are awarded to remedy a past violation, rather than to offer the student a FAPE going forward (see Boose v. Dist. of Columbia, 786 F.3d 1054, 1056 [D.C. Cir. 2015] [noting that an IEP is required to "provide some educational benefit going forward," while the purpose of compensatory education is to "undo[] damage done by prior violations"] [quotations omitted]).

VII. Conclusion

Based on the above, the student's pendency placement consists of 12-month services, a 6:1+3 special class with the related services of individual speech-language therapy five times per week for 30 minutes per session, individual OT two times per week for 30 minutes per session, individual PT two times per week for 30 minutes per session, individual hearing education services five times per week for 30 minutes per session, assistive technology devices of an iPad with software and accessories, and an FM unit, special transportation, 30 hours per week of home-based ABA, and two hours of ABA supervision. Further, the district has continuously failed to fully implement the student's pendency placement beginning on July 1, 2016 and the student is entitled to compensatory education services to remedy the district's failure.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 19, 2019 is modified by reversing that portion which terminated the student's right to pendency as of June 30, 2019;

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall be required to provide the student with 12-month services consisting of a 6:1+3 special class with the related services of individual speech-language therapy five times per week for 30 minutes per session, individual OT two times per week for 30 minutes per session, individual PT two times per week for 30 minutes per session, individual hearing education services five times per week for 30 minutes per session, assistive technology devices of an iPad with software and accessories, and an FM unit, special transportation, 30 hours per week of home-based ABA, and two hours of ABA

supervision as the student's pendency placement until a final adjudication of the underlying cause of action is realized; and

IT IS FURTHER ORDERED that, unless the parties shall otherwise agree, to remedy the district's failure to implement the student's pendency placement during the proceedings thus far, the district shall provide, using district employees, if necessary, hour-by-hour compensatory education consisting of the weekly services based on the unappealed December 17, 2015 IHO decision, multiplied by the number of weeks during which the district has failed to implement the student's pendency placement beginning on July 1, 2016 through the completion of this proceeding.

Dated: **Albany, New York**
September 14, 2020

STEVEN KROLAK
STATE REVIEW OFFICER