The University of the State of New York

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

No. 19-112

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

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, 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, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining her son's pendency (stay put) placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student 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

According to the parent, the student received services through the Early Intervention Program, and at some point, a Committee on Preschool Special Education (CPSE) convened and developed an IEP or IEP(s) for the student's 2017-18 and 2018-19 school years, which included a recommendation for five hours per week of 1:1 special education itinerant teacher (SEIT) services, along with one 30-minute session of indirect SEIT services and two 30-minute sessions of

individual occupational therapy (OT) services per week (Due Process Compl. Notice at p. 3).[1] The parent indicated that the student attended a private preschool program at the parent's expense during the student's 2017-18 and 2018-19 school years (id.).

According to the parent, the district conducted an evaluation of the student for the purposes of creating the student's first school-age or "turning five" IEP for the 2019-20 school year (Due Process Compl. Notice at p. 4). The parent further described that, on January 31, 2019, the CSE convened and created an individualized education services program (IESP) for the student that recommended special education teacher support services (SETSS) five times weekly, along with two 30-minutes sessions per week of OT in a group and one 30-minute session per week of counseling services in a group (id. at p. 5). The parent also indicated that the CPSE convened on March 4, 2019 and created an IEP for the student that recommended 15 30-minute sessions of SEIT services per week in a group of two, one 30-minute session of indirect SEIT services, and two 30-minute sessions per week of individual OT (id.; see Tr. p. 8).

According to an email exchange offered into evidence by the district, during the 2018-19 school year (until June 21, 2019), the student received SEIT services from an agency at the rate of $92.00 an hour (Dist. Ex. 1; see Tr. p. 8).

A. Due Process Complaint Notice

In a due process complaint notice dated September 3, 2019, the parent requested an impartial hearing, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18, 2018-19 and 2019-20 school years (see Due Process Compl. Notice at pp. 1-2). As relevant here, the parent asserted the student's right to a pendency placement pursuant to "the most recent IEP prepared by the CPSE that was implemented for the Student and as modified by any subsequent agreement between the Parties" (id. at p. 11). The parent also alleged that the district had an "illegal policy" of refusing to implement pendency placements absent an order from an IHO even where the district did not dispute the nature of the stay put placement (id.). As such, the parent requested that, "[i]n the event that the [district] refuses to implement" the stay-put placement without an order from an IHO, that a pendency hearing be held immediately (id.). As relief, the parent also sought compensatory education for any failure in the district's obligation to implement pendency (id. at p. 12). In addition, the parent requested that "[a]ny services ordered should be delivered by providers of the Parents' choice for 'enhanced market rates'" (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on October 4, 2019 and concluded the pendency portion of the hearing that day (Tr. pp. 1-15). At the hearing, the district initially took the position that the student's CPSE IEP(s) could not form the basis for pendency since the parent was disputing those IEPs in her due process complaint notice; however, the IHO found that "the

[1] Due to the status of this matter as an interim appeal disputing a pendency determination, at the time of the parent's request for review there had been very little evidence received at the impartial hearing; accordingly, some of the factual background is derived from allegations in the due process complaint notice and representations made by the parties' representatives at the impartial hearing (see generally Tr. pp. 1-15; Dist. Ex. 1; Due Process Compl. Notice).

baseline for pendency . . . [wa]s the operational continuation of provision of SEIT services after the District provided the . . . turning five IESP" (see Tr. pp. 4-5, 9-10). The district also challenged the parent's "request for an enhanced rate" and the IHO indicated his agreement with the district's position, noting that the definition of SEIT services encompassed the idea of State-approval of a rate for such services and that, if the parent sought a different rate, the parent's request was in fact a request for something "in lieu of SEIT" (Tr. pp. 10-11). Accordingly, the IHO indicated he would "order the SEIT services at the SEIT rate" approved by the State (Tr. p. 11). The district's representative noted that "the aim [wa]s to ensure that [the student] stay[ed] with the same SEIT services that he ha[d] been receiving" (Tr. p. 11).

In an interim decision dated October 5, 2019, the IHO indicated that the parties agreed that the student's pendency placement lay in the March 2019 CPSE IEP (Interim IHO Decision at p. 3). The IHO noted that the district did, however, contest the enhanced rate sought by the parent for the SEIT provider (id.). The IHO reiterated his finding from the impartial hearing that the definition of SEIT services encompassed the State-approved rate for such services (id.). The IHO noted that the parent could seek services at a rate higher than those approved by the State, but that "those would be tutoring services and would require a demonstration of the propriety of the rate sought" (id.). The IHO, therefore, set the SEIT reimbursement rate at the "State approved rate for the provider who is providing the service" (id.).

IV. Appeal for State-Level Review

The parent appeals from the IHO's interim decision, asserting that the IHO erred in applying a rate limitation on the pendency SEIT services. The parent argues that the March 2019 IEP, upon which pendency was based, did not contain a cost limitation or requirement that the SEIT provider be State-approved and, as such, a limitation on the provider's rate cannot be deemed a component of the student's pendency. The parent also asserts that the IHO made findings about the nature of SEIT services, including the State rate-approval process, without record support therefor, and that the IHO failed to develop a record on the rate for the particular SEIT services at issue. The parent additionally alleges that the IHO erred in finding that the rate alone would change the character of the services to tutoring rather than SEIT services and asserts that "the cost of the service does not determine the character of the service."

The parent alleges that the student has been receiving 1:1 special education teacher services on a push-in basis at her school at the rate of $150.00 per hour from an agency arranged by the parent, Evalcare. The parent alleges that, to the extent the privately-obtained services are not deemed to be SEIT services per se, they should be deemed "substantially similar" thereto and "satisfy the stay-put mandate." The parent also asserts that the privately-obtained services represent the parent's exercise of self-help in response to the district's failure to implement the student's pendency placement and, therefore, the costs of such services should be ordered as a remedy. The parent also asserts that the IHO erred further by requiring the parent to establish the propriety of the rate of services obtained by the parent in the exercise of self-help and asserts that the district bears the burden of proof relative to pendency.

The parent requests that the district be required to fund 1:1 special education teacher services delivered by the provider selected by the parent at the rate of $150.00 per hour and that the district be ordered to implement the student's OT services.[2]

In an answer, the district responds to the parent's allegations and requests that the IHO's decision be upheld in its entirety. The district also makes affirmative representations that, as of December 4, 2019, the district issued a related service authorization (RSA) for the student's OT services retroactive to September 3, 2019, and that, as of December 19, 2019, the district directed its payments department to fund eight hours per week of SEIT services for the student at the rate of $150 per hour, upon the parent's submission of proper documentation, as pendency commencing as of the date of the filing of the due process complaint notice. Based on the steps taken by the district to implement the pendency services sought by the parent, the district argues that the parent's appeal is now moot and must be dismissed.

In a reply, the parent argues that the district's voluntary conduct does not render the appeal moot but that the district's agreement to fund the SEIT services at the rate requested by the parent resolves the issue regarding the IHO's imposition of a rate limitation on the pendency SEIT services.

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]).

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 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

[2] With the request for review, the parent submits additional evidence, including an affidavit (marked as SRO Exhibit B) from the agency that employs the two special education teachers who have been providing special education instruction to the student, starting on September 4, 2019 (SRO Ex. B). As the evidence is unnecessary in order to render a decision in this matter, the parent's request that it be considered is denied (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

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).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

Except for in circumstances not applicable here, the burden of proof is on the school district during an impartial hearing (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Mootness and Pendency

Turning first to the district's contention that the parent's appeal is now moot, it is well settled that a dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X., 2008 WL 4890440, at *12; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). However, in most instances, a claim for compensatory education will not be rendered moot (see Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 219 [N.D.N.Y. 1993] [demand for compensation to correct past wrongs remains as a live controversy even if parents are satisfied with student's current placement]; see also Toth, 720 Fed. App'x at 51).

In the context of a dispute over pendency, a matter is not moot so long as there is an active controversy regarding the identification of a student's stay-put placement and relief could result from a determination (see Termine v. William S. Hart Union High Sch. Dist., 219 F. Supp. 2d 1049, 1054 [C.D. Cal 2002] [finding that a dispute over identification of a student's stay-put placement was not rendered moot by an administrative determination on the final merits that awarded less than full tuition reimbursement]). Moreover, a "wrongful denial of stay put" could alter a student's entitlement to compensatory educational services (Olu-Cole v. E.L. Haynes Pub. Charter Sch., 930 F.3d 519, 530 [D.C. Cir. 2019]).

In the present matter, the parties do not dispute the actual program or services constituting the student's pendency placement; instead, the controversy is limited to whether or not the IHO erred in setting a cap on the rate to be paid for the SEIT services ordered as part of the student's pendency placement (see Interim IHO Decision at p. 3). In its answer, the district now explicitly agrees that, for purposes of pendency, the student's educational placement during the due process proceedings includes "SEIT services by Evalcare at $150" retroactive to the date of the due process complaint notice (Answer at pp. 3, 4). This represents an agreement between the parties regarding the student's educational placement during the due process proceedings, which supersedes the most recently implemented IEP as the student's then-current educational placement (see 20 U.S.C. § 1415[j] [providing that "unless the State or local educational agency and the parents otherwise

agree, the child shall remain in the then-current educational placement" [emphasis added]; Schutz, 290 F.3d at 483-84; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366).[3]

Notwithstanding the agreement between the parties concerning the identification of the student's educational placement, the case is not moot because there remains a dispute that is "real and live" related to the district's failure to implement pendency during these proceedings. The district points to its issuance of an RSA for OT services and its direction to its payment department to fund SEIT services at the rate sought by the parent as evidence that all of the relief sought by the parent has been satisfied (Answer at p. 4). However, there is no evidence in the hearing record and the district did not offer any documentation with its answer to evidence the district's representations that it had taken steps to "implement" the student's pendency services. Therefore, the district's allegation that it has issued an RSA for OT services or authorized payment for SEIT services is insufficient to render this matter moot (see Laster v Dist. of Columbia, 394 F. Supp. 2d 60, 67 [D.D.C. 2005] [finding that a district's "declaration" that it had "submitted the documentation required" for the student's enrollment at an out-of-district school did not sufficiently evidence that the district ceased violating the IDEA's stay put provisions or make the case moot]).

Moreover, even though the parties agree on the general program and services that make up the student's pendency placement, a district is the party tasked with implementing the pendency placement by delivering the instruction or services (T.M., 752 F.3d at 171-72). The parties may, under certain circumstances, agree that the district may satisfy its pendency obligation by issuing vouchers or paying providers identified and secured by the parent. Here, the parties are in agreement that the district will pay the private SEIT provider secured by the parent in order to satisfy the district's obligation to implement this portion of the student's pendency placement.[4] However, for the OT services, it is unclear whether or not the parent is in agreement with the district's offer of an RSA rather than its direct implementation of the services. To implement the pendency services, the district itself should schedule the OT services that the student is entitled to under pendency and inform the parent where and when the OT will be available; at that time, the parent's only responsibility would be to produce the student in order to receive the services. Instead of attempting to schedule the student's OT services, the district has represented that it has issued an RSA.

In a July 29, 2009 guidance document, the State Education Department (SED) clarified that a school district does not have the authority "to provide core instructional services through contracts with nonprofit and other entities" ("Clarifying Information related to Contracts for Instruction," Office of Special Educ. Mem. [July 2009], available at http://www.p12.nysed.gov/resources/contractsforinstruction/documents/contractsforinstruction2009.pdf). In response to several questions from the field, SED issued further guidance ("Q and A related to Contracts for

[3] Ordinarily the pendency changing event would only apply "on a going-forward basis" (New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [Mar. 17, 2010]) but in this instance the district has agreed that the change should be retroactive to the date of the due process complaint notice (Answer at p. 3).

[4] While the district represents that it authorized such payment, it does not appear that the private SEIT provider has received payment as of the date of the parent's reply (Parent Reply at p. 2).

Instruction" Office of Special Educ. Mem. [June 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/documents/contractsforinstruction2010covermemo.pdf).[5] As for related services, SED did provide that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control ("Questions and Answers Related to Contracts for Instruction," Office of Special Educ. [June 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html).[6]

The State guidance does not speak to the particular mechanism used by the district, i.e., an RSA, which under the circumstances of this case appears to function essentially as a voucher that permits the parent to locate the provider to deliver services to the student (see "Questions and Answers Related to Contracts for Instruction"). Implied in the issuance of the RSA is the shifting to the parent of the duty to locate and select an available provider and proceed with arranging the services, but the district does not provide any legal authority that explains how the district's duty to implement pendency by finding the providers can or should be forced upon the parent's shoulders (see Application of a Student with a Disability, Appeal No. 17-034).[7]

Even assuming that the district could use an RSA to secure a contract for the provision of the pendency OT services in this instance, the district's obligation to implement the OT services could not be deemed satisfied until such contract was executed and the services actually delivered.[8]

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[5] The questions and answers guidance draws a distinction between core instruction and instruction that represents a supplemental or additional resource, providing that a district may not contract with private entities for the former ("Questions and Answers Related to Contracts for Instruction," Office of Special Educ. [June 2010], available at http://www.p12.nysed.gov/resources/ contractsforinstruction/qa.html). Additionally, the guidance acknowledges that, in several specified instances, State law and/or regulation authorizes a school district to contract with other entities, including authorizing a district to enter into any contractual or other arrangement necessary to implement approved pre-kindergarten program plans ("Questions and Answers Related to Contracts for Instruction," citing Educ. Law § 3602-e).

[6] Under the IDEA itself "[t]he term 'related services' means transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education," which in this case is the instruction by the 1:1 SEIT/special education teacher (20 USC § 1401[26] [emphasis added]). By contrast, under State law, related services are included within the definition of special education (Educ. Law § 4401[2][k]). Where, as here, the district has failed to implement the required special education services including related services, as part of the student's stay-put services, reliance on an RSA that requires the parent to find a provider, absent the parent's agreement to take on that task, is a hollow remedy.

[7] The parent is required to cooperate with the provision of services and produce a child for services properly arranged for by the district.

[8] Although not explained by either party, the RSA procedure used in this case—a procedure which has become common practice within this school district and without regard to class status referenced herein—closely resembles the "Nickerson letter" procedure, which resulted from a stipulation and consent order in a federal class action suit, Jose P. v. Ambach, and provided that parents were permitted to enroll their children, at public expense, in appropriate State-approved nonpublic schools if they had requested special education services but had not received a placement recommendation within 60 days of referral for an evaluation (553 IDELR 298, 79-cv-270 [E.D.N.Y. Jan. 5, 1982]). The Jose P. class action arose because of the long wait lists in the district for students to receive special class, resource room, or day and residential nonpublic school placements as mandated in their IEPs (Jose P , 553 IDELR 298). To the extent that parents are faced with a "choice . . . between" locating and securing an appropriate placement consistent with CSE recommendations" and waiting indefinitely while

Here, the district only represents that it has issued the RSA (Answer at pp. 3, 4). There is no indication that the parent has been successful in obtaining OT services for the student by utilizing the RSA (see Reply at p. 2). Therefore, this matter may not be deemed moot.[9]

B. Compensatory Educational Services

There is no dispute among the parties that the district has not implemented the student's pendency placement beyond the district's representations in this answer that it recently issued an RSA and authorized payment of the SEIT services. As discussed above, these steps taken by the district are insufficient to satisfy its obligation to implement the pendency placement. As such, an order of compensatory education services is warranted.

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

To remedy the district's failure to implement the student's pendency, the district is ordered to provide the student with compensatory education based on the March 2019 CPSE IEP, as modified by the parties' agreement. Such compensatory education should take the form of funding of the SEIT services, which the district has apparently already authorized, and provision of make-

defendants fail to find one" (id.), the "Nickerson letter" procedure or, in this case, the use of an RSA, is certainly preferable and nothing in this decision should be deemed to discourage the use of RSAs when the alternative is for the students to remain without mandated services for extended periods of time. Nevertheless, pursuant to the "Nickerson letter" remedy, parents were notified that they could place their child in State-approved nonpublic school if one was available but that they did not have to and that the district would continue to work to provide public services (id.), implying that the district's obligation to implement public services did not terminate upon the issuance of the Nickerson letter. Likewise, the RSA procedure does not, and should not, be deemed to satisfy the district's obligation to implement pendency services such that it would render this matter moot.

[9] There is also merit to the parent's argument that an exception to the mootness doctrine applies. "Voluntary cessation does not moot a case or controversy unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'" (Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719 [2007]). The Second Circuit has observed that "[t]he voluntary cessation of allegedly illegal conduct usually will render a case moot if the defendant can demonstrate that (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." (Lillbask, 397 F.3d at 88, quoting Lamar Adver. of Penn, LLC v. Town of Orchard Park, 356 F.3d 365, 375 [2d Cir. 2004] [internal quotations omitted]). The Court also noted that where "the challenged conduct has only been proposed but never implemented because a stay-put order has maintained the status quo, it is the first factor that is critical to mootness analysis" (id.).

up OT services, both of which should be calculated on an hour-by-hour basis, with the computation of days to start as of September 3, 2019 and to continue through the date of this decision.

VII. Conclusion

Based on the above, and consistent with the parties' agreement, the student's pendency placement includes the district's provision of two 30-minute sessions of individual OT services per week and funding of eight hours per week of 1:1 SEIT services at the rate of $150.00 per hour. Further, the district has continuously failed to implement the student's pendency placement beginning on September 3, 2019 and the student is entitled to compensatory education services to remedy the district's failure.

In light of these determinations, I need not address the parties' remaining contentions.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that, consistent with the parties' agreement, the IHO's interim decision dated October 5, 2019 is modified by reversing that portion that set a cap on the rate for the SEIT services ordered as part of the student's pendency placement;

IT IS FURTHER ORDERED that, consistent with the parties' agreement, the district shall be required to provide the student with two 30-minute sessions of individual OT services per week and fund eight hours per week of 1:1 SEIT services by Evalcare at the rate of $150.00 per hour as part of the student's pendency placement until a final adjudication of the matter occurs; and

IT IS FURTHER ORDERED that to remedy the district's failure to implement the student's pendency placement during the proceedings thus far, the district shall provide hour-by-hour compensatory education consisting of the weekly services based on the March 2019 CPSE IEP, as modified by the parties' agreement, multiplied by the number of weeks during which the district has failed to implement the student's pendency placement beginning on September 3, 2019 through and including the date of this decision: delivery of two 30-minute sessions of individual OT services per week and funding of eight hours per week of 1:1 SEIT services by Evalcare at the rate of $150.00 per hour.

Dated: **Albany, New York**
February 26, 2020

CAROL H. HAUGE
STATE REVIEW OFFICER