The University of the State of New York

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

No. 19-130

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 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, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from that portion of the interim decision of an impartial hearing officer (IHO) determining the student's pendency placement that limited the rate to be paid for the special education itinerant (SEIT) services ordered as part of the pendency placement. 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[a]). 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

Given the limited scope of this appeal, a recitation of the student's educational history is unnecessary. By due process complaint notice dated September 3, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18, 2018-19 school years (when the student was in preschool) as well as for the 2019-20 school year when he became eligible for special education and related services under a school-aged IEP based upon various procedural and substantive violations (see Parent Ex. A at pp. 1-10). As relevant here, the parent—within the section of the due process complaint notice captioned as

"Pendency"—alleged that the district had an "illegal policy where it refuse[d] to implement payments for last agreed-upon/pendency placements and service after a hearing [was] filed without an order from an [IHO], even where there [was] no legitimate and/or substantive dispute about the nature of the pendency placement and services" (id. at p. 11). In addition, the parent indicated that the district's "illegal policies on pendency" forced parents to "retain counsel and incur legal fees by retaining counsel and filing for an impartial hearing" (id.). The parent also indicated if the district "refuse[d] to implement [the student's] pendency/last agreed-upon placement and insist[ed] upon the issuance of an interlocutory decision from an [IHO] before doing so, [the parent] respectfully request[ed] an immediate pendency hearing" (id. [emphasis in original]).

With respect to the relief requested and as relevant to this appeal, the parent sought an order: finding the student's "pendency to consist of the services set forth on the most recent IEP from the [Committee on Preschool Special Education (CPSE)] that was implemented for the [s]tudent"; directing that the district "shall fund/provide compensatory education for the denial of FAPE and any deprivation of pendency, . . . "; and directing the district to "reimburse the [p]arent[] for and/or fund the private school tuition as equitable and/or compensatory relief, along with the pendency services" (Parent Ex. A at pp. 11-12). In addition, the parent indicated that "[a]ny services ordered should be delivered by providers of the [p]arent's choice for 'enhanced market rates' that [were] necessary to ensure that the [s]tudent work[ed] with appropriate providers and consistent with the rates paid by the [district's] IHO Implementation Unit to the provider(s) pursuant to hearing orders with[in] the past year" (id. at p. 12).

On November 4, 2019, the parties proceeded to the impartial hearing, and on that date, presented their respective positions with regard to the student's pendency (stay-put) placement during the administrative proceedings (see Tr. pp. 1-29). The IHO began the proceeding by marking and entering documents from the parties into the hearing record as evidence (see Tr. p. 3). The district proffered one document: an email purporting to reflect the rate paid for SEIT services during the 2018-19 school year (see Tr. pp. 4-6).[1] The parent's attorney objected to its submission on the grounds of relevancy, stating specifically that the "rate for related services under pendency [was] not relevant" and that the document, itself, appeared to reflect a "contracted rate [for SEIT or Special Education Teacher Support Services (SETSS)] that [was] no longer valid" for the current school year (Tr. p. 4). The parent's attorney also asked that the IHO's pendency order "only reflect the related services that [were] not being contested by the [district], and that any issue as to the rate per hour of any related service be[] handled by implementation" (Tr. p. 5).

The IHO expressed similar reservations about the admissibility of the district's document and then allowed the parties to address her concerns (see Tr. pp. 5-9). In response, the district representative contended that the SEIT services requested by the parent were "not a related

[1] Parties often use the acronym "SEIT" to refer to "special education itinerant services" which under State law means "an approved program provided by a certified special education teacher on an itinerant basis in accordance with the regulations of the commissioner, at a site determined by the board, including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in paragraph a of subdivision eight of this section. If the board determines that documented medical or special needs of the preschool child indicate that the child should not be transported to another site, the child shall be entitled to receive special education itinerant services in the preschool child's home" (Educ Law § 4410[1][k]; see 8 NYCRR 200.16[i][3][ii]).

service"—as opposed to occupational therapy (OT) or counseling services—but rather, were "considered more programmatic" (Tr. p. 6). The district representative explained the district's position that SEIT services, as "defined, created, and exist[ing] in preschool only," did not, therefore, "exist outside of preschool but-for pendency orders or impartial hearing orders" (Tr. p. 6). She further explained that in order to "continue this service of SEIT would mean to continue what create[d] it, which [was] that contract" between the State Education Department (SED) and the "SEIT agencies" (Tr. p. 6). As such, the district asserted that document proffered as evidence in this case reflected the SEIT rate paid during the 2018-19 school year, which, according to the district representative, should remain in place as the rate paid to continue to obtain the SEIT services requested under pendency (see Tr. pp. 6-7). In addition, the district representative stated that the rate reflected in the document accurately reported the "rate for this specific provider for this specific child" during the 2018-19 school year, as well as when those services began and ended (Tr. p. 8).

Addressing the IHO's concern that the district's document was not a "sworn statement," the district representative admitted it was not (Tr. p. 8). The district representative also addressed the IHO's concern that the document was not "probative," noting the district's concern however about leaving the implementation of such orders solely up to "implementation" without "guidance from the IHO's order"—meaning, "if an order [was] silent about rate"—and, as a result, sought an order from the IHO that said "something, such as at a reasonable [rate] or at the SEIT rate to provide guidance" (Tr. p. 8).

The IHO then asked to clarify whether she was "being called upon, in the application for a pendency order, to rule on the rate that's being paid" (Tr. p. 9). The parent's attorney indicated that the parents sought an order that reflected "only the services being requested as of the last agreed upon IEP" because, at that time, the student was "having an issue with [receiving] services" and the parent had a "provider . . . able to provide services tomorrow and ha[d] been providing services with the understanding that they would get paid under pendency" (Tr. pp. 9-10). The parent's attorney added that, based upon her own understanding, the district did not have "providers willing" to accept the rate reflected in the district's proffered document (Tr. p. 10). Therefore, if the IHO "rule[d] that any SEIT services would be limited to the rate contracted" then the student would be "prevent[ed] or significantly delayed" in receiving services (Tr. p. 10).

Next, the IHO stated her understanding of the district's position, indicating that the district sought a pendency order that "sa[id] something like the SEIT rate or a reasonable rate because that would facilitate implementation" (Tr. p. 10). The district representative agreed with the IHO's understanding, and consequently, the IHO stated that while she would hear the parties' arguments about what specific language, if any, should be included within the pendency order, the district's proffered document was not necessary on that point and she declined to enter the document into the hearing record as evidence, but marked it for identification only (see Tr. pp. 10-11).

At that time, the IHO then asked the parent to make her application for pendency and for the district's response (Tr. p. 12). The parties agreed that the special education program recommended by the CPSE in the student's March 2019 IEP formed the basis of the student's pendency placement (see Tr. pp. 12-13; Parent Ex. B at pp. 15-16). The IHO and the parties then

continued to discuss the language of the pendency order for the remainder of the impartial hearing (see Tr. pp. 13-26).[2]

In an interim order dated November 16, 2019, the IHO directed the district to provide the following as the student's pendency placement: "five hours per week of SEIT services at the 2019-2020 contractual SEIT rate; three 30-minute sessions per week of 1:1 [OT], two 30-minute sessions per week of 1:1 counseling, one 30-minute session per week of 2:1 counseling, and a full-time 1:1 behavioral support paraprofessional" (Corrected Interim IHO Decision [emphasis added]).[3] In addition, the IHO ordered the district to provide the pendency services on a 12-month school year basis and, noting further, that the services were effective from the "filing date" of the due process complaint notice (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by arbitrarily limiting the rate paid for the SEIT services ordered as part of the student's pendency placement.[4] In support of this contention, the parent argues that the March 2019 IEP, upon which pendency was based, did not contain a cost limitation and, as such, a limitation on the provider's rate cannot be a deemed component of the student's pendency.

In addition, the parent alleges that the student has been receiving 1:1 special education teacher services on a push-in basis at the rate of $150.00 per hour from an agency called Evalcare arranged by the parent. The parent alleges that, to the extent the privately-obtained services are

[2] During this discussion on the record, the IHO noted that she did not "have a hearing record to make a finding on a specific rate" for the SEIT services and "in the absence of the parties agreeing to the specific rate," the IHO could not make a finding specific to that rate (Tr. pp. 13-14). The IHO also stated that, to her, "pendency [was] . . . a program . . . a service" and "not a dollar amount" (Tr. p. 14).

[3] The IHO issued two interim orders on pendency, both dated November 16, 2019 but separately denominated as the "Interim Order on Pendency" and the "Corrected Interim Order on Pendency" so as to reflect in the second revised order the language added referencing a 12-month school year pendency program. Citations in this decision refer solely to the IHO's decision titled as the "Corrected Interim Order on Pendency."

[4] With the request for review, the parent submits additional evidence, which includes an affidavit (marked as SRO Exhibit B) by an employee of the agency that employs the special education teacher who has been providing "1:1 Special Education Teacher Support Services [SETSS]" to the student beginning on September 9, 2019 (Req. for Rev. SRO Ex. B at p. 1). The affiant was not the same individual identified as providing the SETSS to the student during the 2019-20 school year (id.). The district objects to the consideration of the parent's additional evidence, arguing that the issue is now moot (see Answer ¶ 1). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 19-112; 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]). As the information contained in the parent's additional information was available—but not offered—at the time of the impartial hearing, and unnecessary, at this juncture, to render a decision in this matter, I will exercise my discretion and deny the parent's request to consider the additional evidence.

not deemed to be SEIT services per se, they should be deemed "substantially similar" thereto and "satisfy the stay-put mandate." According to the parent, Evalcare does not have a "contract" with the district which undermines the IHO's decision to capping services at a contractual rate. 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 that, therefore, the costs of such services should be ordered as a remedy. The parent requests that the district be required to fund 1:1 special education teacher services delivered by Evalcare at the rate of $150.00 per hour. In addition, the parent seeks an order directing the district to implement the student's pendency services (on a 12-month school year basis), consisting of five hours per week of SEIT services, three 30-minute sessions per week of individual OT, one 30-minute session per week of counseling in a small group, two 30-minute sessions per week of individual counseling, and a 1:1 behavior support paraprofessional services.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. More specifically, the district contends that this matter is now moot because the district issued related services authorizations (RSAs) on January 3 and January 8, 2020 for the parent to obtain the OT, counseling, and the 1:1 behavioral paraprofessional ordered by the IHO as part of the student's pendency placement. In addition, the district affirmatively asserts that the RSAs "authorized payment from September 3, 2019, until the conclusion of the case." The district also affirmatively asserts that on January 3, 2020, the payments department had been "directed . . . to fund five hours of SEIT services per week as pendency until the final resolution of the matter." 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.[5]

In a reply, the parent argues that, although the district voluntarily agreed to "process payments to pendency providers," the district's voluntary conduct does not render the appeal moot. The parent acknowledges, however, 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 and "eliminates the need for a decision to be made concerning the reasonableness of the requested provider's rate."

The parent further asserts that the matter cannot be deemed moot unless or until either an SRO or a court reverses the IHO's decision, or the district "agrees to vacate the order" and continues "to pay the provider at issue." Moreover, the parent alleges that, "[w]ithout an order or enforceable agreement, the provider and parent have no guarantee of payment if the [district] does not pay or excessively delays payment." As a result, the parent argues that she needs the "protection of an enforceable agreement or order or proof that the services have already been paid." For relief, the parent requests that the SRO reverse the IHO's decision "with respect to the aspects of the relief

[5] With the answer, the district submits an email dated January 3, 2020 as additional evidence (marked as SRO Exhibit A), which reflects that "pendency for the 5 hours of SEIT ha[d] been authorized" and would be paid via the [Bureau of Non-Public School Payables] which was referenced as a payments department (Answer SRO Ex. A). There is no indication in the hearing record if this bureau, which appears to have some funding responsibility, is part of, similar to, or completely distinct from the IHO implementation unit referenced during the impartial hearing that appeared to also have some funding responsibility (Tr. p. 8, 13, 21).

that the IHO did not grant and issue an enforceable order to direct the funding of the requested pendency 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 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 to "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 Req. for Rev; Corrected Interim IHO Decision). As described above, the district—in its answer—asserts that the parent's appeal is moot because it has taken measures to implement the pendency services by issuing RSAs to obtain the pendency OT, counseling, and 1:1 behavioral support paraprofessional services, and by agreeing to fund the five hours per week of pendency SEIT services (see Answer ¶¶ 9-12).

Recently, an SRO presiding over an appeal of an IHO's interim order on pendency, which closely mirrors the facts and arguments presented in this appeal, found that the district's assertions in its answer constituted "an agreement between the parties regarding the student's educational placement during the due process proceedings, which supersede[d] the most recently implemented IEP as the student's then-current educational placement (Application of a Student with a Disability, Appeal No. 19-112, citing 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). In that appeal, the district explicitly agreed in its answer that "for purposes of pendency, the student's educational placement during the due process proceedings include[d] 'SEIT services by Evalcare at $150'" retroactive to the date of the due process complaint notice (Application of a Student with a Disability, Appeal No. 19-112).

In contrast, the district in the instant appeal asserts in its answer only that it directed payment of the five hours per week of pendency SEIT services and there is no indication that such payments were retroactive to the date of the due process complaint notice (September 3, 2019), it does not specify that Evalcare is the agency selected by the district to provide the pendency SEIT (or 1:1 special education teacher services) services, and it does not specify a rate that the district agreed to pay for, or fund, the pendency SEIT services (compare Answer ¶¶ 9-12, with Application of a Student with a Disability, Appeal No. 19-112). Consequently, because the district's assertions in its answer in this case are not sufficiently specific, the district's assertions will not be similarly deemed to be an agreement between the parties to alter the student's educational placement during the due process proceedings and the district's assertion that these facts render the parent's appeal moot must be dismissed.

Moreover, 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 affirmatively asserts that the RSA issued for the 1:1 behavioral paraprofessional on January 8, 2020 authorized payment retroactive to September 3, 2019, the date of the due process complaint notice (see Answer at p. 3 n.1). The district does not, however, make the same affirmative assertions with respect to the RSAs issued to obtain the student's pendency OT or counseling services, or for that matter, with respect to the funding authorized for the student's pendency SEIT services (compare Answer at p. 3 n.1, with Answer at p. 4). These facts also preclude a finding of mootness.

The parent, at the time the due process complaint notice was being drafted, anticipated that the district would engage in a practice of failing to deliver on its pendency obligations to the student upon the filing of the due process complaint notice. With respect to the student in this case,[6] that is essentially what has occurred and the matter quickly became ripe. The case is also not moot at this juncture because there remains a dispute that is "real and live" related to the district's failure to implement pendency during these proceedings. Regardless of whether parties agree on the general program and services that make up a student's pendency placement, 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]). Here, the hearing record is devoid of evidence that the district delivering the instruction or services to the student (see generally Tr. pp. 1-29; Parent Exs. A-B).[7] On appeal, the district instead points to its issuance of RSAs for OT, counseling, and paraprofessional services and its direction to its payment department to fund SEIT services as evidence of fulfilling its obligation to implement the student's pendency services and, therefore, providing all of the relief sought by the parent (see Answer ¶¶ 9-12). But when the allegation is that the district is failing to deliver services to the student while a proceeding is pending, RSAs and promises of funding (capped or otherwise) is more akin to handing the parent a check and wishing the student the best of luck. In other words to show that it satisfied its undisputed pendency obligation to the student, the district does not offer any documentation with its answer to evidence the district's representations that it has arranged for specific pendency providers, scheduling pendency services, or service records showing that the student is receiving the required stay-put services (id.).

Therefore, the district's allegations that it has issued RSAs for OT, counseling, and paraprofessional services or authorized payment for SEIT services is insufficient to make 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

[6] Some of the parent's allegations are systemic in nature, and to the extent they are systemic claims, the administrative due process system is not designed to address matters of that magnitude.

[7] Indeed, at the impartial hearing, even though the parties agreed that the March 2019 IEP formed the basis for the student's pendency placement, it does not appear that the parties or the IHO even considered the district's obligation to implement the services as a necessary part of the analysis prior to answering the questions as to the parent's attempts at self-help and/or the parent's request for relief related to self-help measures (see Tr. pp. 1-29; Parent Exs. A-B).

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]).

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.[8] The parent—in the request for review—asserts that the district has failed to implement the pendency services ordered by the IHO, and specifically refers to the failure to implement the pendency counseling services. As relief, the parent requests that the district be ordered to implement the pendency services. Notably, however, the parent's request for review predates the district's issuance of RSAs to obtain the OT, counseling, and 1:1 paraprofessional services, as well as the district's internal directive to fund the five hours per week of SEIT services (compare Req. for Rev. at p. 6, with Answer ¶¶ 9-10). The parent, in her reply, did not address the RSAs issued by the district, thus, it is unclear whether or not the parent is in agreement with the district's issuance of RSAs rather than the IHO's directive that the district must "provide" the services (see generally Reply). To implement the pendency services, the district should undertake to schedule the services as envisioned under the pendency IEP (March 2019) and, in essence, inform the parent where and when the services would be available, and at that time the parent would have the responsibility to produce the student in order to receive the services. Instead of attempting to schedule the student's pendency services, the district has represented that it has issued RSAs and directed funding of the SEIT services.

In a July 29, 2009 guidance document, the 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 [R]elated 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 Instruction" Office of Special Educ. Mem. [June 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/documents/contractsforinstruction2010covermemo.pdf).[9] 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

[8] Some parents may be willing to resolve disputes with the district using this mechanism, especially if they have reason to believe that they will easily locate a provider and quickly and efficiently ensure the delivery of services to their child, but there were assertions in this matter that finding providers that would accept district rates was part of the problem (Tr. pp. 19-20).

[9] 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 entitles 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).

Answers Related to Contracts for Instruction," Office of Special Educ. [June 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html).[10]

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 this duty to participate in the implementation of the 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).[11]

Even assuming that the district could use RSAs to secure a contract for the provision of the pendency OT, counseling, and paraprofessional services in this instance, the district's obligation to implement these services could not be deemed satisfied until such contract was achieved and the services delivered.[12] Here, the district only represents that it has issued RSAs (see Answer ¶¶ 9-10). There is no indication that the parent has been successful using the RSAs (see generally Reply). Therefore, this matter may not be deemed moot.[13]

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[10] 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]). Under State law, the related services alone fall within the definition of special education (Educ. Law § 4401[2][k]). When the district has already 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 go find a provider, absent the parent's agreement to take on that task, is a hollow remedy.

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

[12] 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 defendants fail to find one" (id.), the "Nickerson letter" procedure or 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 a 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.

[13] There is also merit to the parent's argument that an exception to the mootness doctrine applies. "Voluntary

B. Compensatory Educational Services

With regard to the provision of services, I agree with the parent that the IHO's rate cap was problematic in this case. On the one hand, there is was no evidence of "market rates" that the parent sought and on the other hand, the district cannot fail in is obligation to deliver services to the student at the same time impose limits on what it needs to pay to make the student whole. The IHO also expressed reticence at one point in delving into the issue of rate setting for services that the district clearly owes the student (Tr. p. 18). There is no dispute among the parties that the district has not actually delivered the student's pendency services as called for in the stay-put IEP beyond the district's representations in this answer that it recently issued RSAs 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 student's services identified in the March 2019 IEP. 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 IEP created by the CPSE. Such compensatory education should take the form of make-up sessions of the SEIT services the equivalent thereof which would be 1:1 instruction by a certified special education teacher, as well as the provision of make-up OT, counseling, and paraprofessional services, all 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. I will still leave open the possibility that the district and the parent may agree to satisfy some of the compensatory pendency services with the private services obtained by the parent.

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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. Sch. 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.).

VII. Conclusion

Based on the above, the student's pendency placement includes the district's provision of five hours per week of SEIT services, three 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual counseling, one 30-minute session per week of counseling in a small group, and a full-time 1:1 behavioral support paraprofessional. 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.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's corrected interim decision dated November 16, 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, unless the parties otherwise agree, the district shall be required to provide the student with five hours per week of individual SEIT services (which may be satisfied by using certified special education teacher), three 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual counseling, one 30-minute session per week of counseling in a small group, and a full-time 1:1 behavioral support paraprofessional 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 March 2019 IEP created by the CPSE, 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.

Dated: **Albany, New York**
March 4, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER