The University of the State of New York

The State Education Department
State Review Officer
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No. 20-123

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 petitioners, by Erin O'Connor, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which did not award all of the relief requested by the parents. The appeal must be dismissed.

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 nature of the appeal, the parties' familiarity with the student's educational facts and the detailed procedural history of the case is presumed and will not be recited here. Briefly, at the time of the impartial hearing in the present matter, the student was eligible for special education as a student with autism and attended an educational setting in a district public school (see Parent Ex. A at p. 1).[1]

[1] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 2002.1[zz][1]).

By a due process complaint notice dated June 30, 2018 (June 2018 due process complaint notice), the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (see Parent Ex. A at pp. 1-2). In support of this allegation, the parents asserted, in part, that although the district had "offered funding for a private school placement," the district had failed to offer a "program . . . as of the start of the school year" (id. at p. 2). As background, the parents indicated that, as a result of a previous impartial hearing initiated by a due process complaint notice dated June 30, 2017, the district was ordered—in a final decision dated December 27, 2017 (December 2017 IHO decision)—to provide the student with the following: compensatory educational services consisting of a bank of 350 hours of special education teacher support services (SETSS)/applied behavior analysis (ABA) services to be accessed at the parents' discretion and at a rate not to exceed $125.00 per hour, for violations related to the 2015-16, 2016-17, and 2017-18 school years; to reconvene a CSE to add assistive technology, a 12-month school year program, and a 1:1 paraprofessional to the student's IEP, and to defer the student to the Central Based Support Team (CBST) for a State-approved nonpublic school referral (to include a "full day, 12-month ABA program"); and if the CSE could not locate a "proper placement within 30 days of its receipt of the [student's] file, the [district] shall prospectively fund a private placement selected by the parent" (id. at p. 13).[2] According to the December 2017 IHO decision, the parents were required to "act expeditiously in locating such a placement" (id.). In addition, the parents indicated that the December 2017 IHO decision ordered that, "[i]n the interim, but in no event to extend beyond [the] 2017-2018 [school year]," the [student] shall continue to attend [a district public school] with all of his related services in place, a full time 1:1 para[professional]; and his ABA provider who shall provide ABA five hours a day, five days in school and ten hours a week at home at a rate not to exce[ed] $125.00; 1 hour per month of [Board Certified Behavior Analyst (BCBA)] supervision at a [rate] not to exceed [a] reasonable market rate; and 2 hours per month of Parent Training at a market rate at home" (id.).[3] In addition, the district was ordered to fund independent educational evaluations (IEEs) of the student (neuropsychological, speech-language, and occupational therapy), and for the district to provide the parents, upon request, with a "written translation" of any document sent by the district that was "difficult for the parent[s] to read" (id.).

The parents alleged that, as of the date of the due process complaint notice (June 30, 2018), the district had "not offered a private school and the [p]arents ha[d] not located one," as ordered in the December 2017 IHO decision (Parent Ex. A at p. 13). In addition, the parents noted that they had " partially appealed the December 2017 IHO decision, but the district had not done so

[2] The parents also indicated that the same IHO had issued an "uncontested" pendency order, and that pursuant to that order, the student "continued to attend" a 12:1+1 special class at [a district public school] (Parent Ex. A at p. 13). In addition, the district was ordered to provide the student with the following as part of the pendency placement: a full-time paraprofessional, four 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of counseling in a small group, two 60-minute sessions per month of parent counseling and training in a group, and transportation (id.). The pendency order described in the due process complaint notice was not entered into the hearing record as evidence in the instant proceedings (see generally Tr. pp. 1-152; Parent Exs. A-E; H-R; T-V; X; Dist. Exs. 3-31; IHO Exs. I-III).

[3] The district public school the student was ordered to continue to attend while the parties attempted to locate a nonpublic school in the interim was the same district public school the student had been continuously attending since kindergarten during 2016-17 school year (compare Parent Ex. A, with Parent Ex. B).

(id.). According to the parents, however, the district implemented the interim services ordered in the December 2017 IHO decision, "funding the following in addition to the pendency services": five hours per day of ABA in school; 10 hours of home-based, 1:1 instruction per week; one hour per month of BCBA supervision; and two hours per month of parent training and counseling services (id. at p. 14).

Next, the parents indicated a CSE convened in "spring" 2018 (Parent Ex. A at p. 14). The parents listed the CSE's recommendations, noting parenthetically that specific recommendations terminated on or about June 28, 2018 (i.e., both the in-school and home-based ABA services, BCBA supervision, and the 12:1+1 special class placement in a community school, pending a nonpublic school) (id.). The parents further noted that the CSE recommended a 12:1+1 special class placement in a State-approved nonpublic school (id.). Thereafter, the parents alleged both procedural and substantive violations related to the CSE meeting held in spring 2018, which included a list of approximately 46 separate violations (id. at pp. 14-18).[4]

Turning to relief, the parents sought an interim order on pendency (listing those services alleged to be the student's pendency placement), and a determination that the district was required to fund said pendency placement effective at the start of the 2018-19 school year on July 1, 2018 (Parent Ex. A at pp. 19-20). In addition, the parents requested implementation of the student's pendency placement at a community school comparable to the district public school the student had been continuously attending (as it was not open for summer); and further, if the district could not locate a comparable district public school, then the district should be required to fund the services ordered by the IHO at the student's home (id. at p. 20). Next, the parents requested an interim order directing the district to fund the following IEEs "as may be necessary to inform the

[4] The parents also alleged that the district committed systemic violations (i.e., applying blanket policies and practices for students with autism and regarding the provision of a FAPE), violations of section 504 of the Rehabilitation Act of 1973 (section 504), engaged in discrimination against the student under the Americans with Disabilities Act (ADA), and violated 42 U.S.C. § 1983 (section 1983) (see Parent Ex. A at pp. 1, 17-18). However, regardless of whether the IHO addressed any of these allegations, an SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504, section 1983, ADA claims, 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 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, even if the IHO had addressed these claims, an SRO would have no jurisdiction to review any portion of a parents' claims regarding section 504, section 1983, ADA claims, or systemic violations or policy claims, and such claims will not be further addressed.

hearing record and to remedy the [district's] failure to appropriately evaluate" the student: a neuropsychological evaluation, a speech-language evaluation, an OT evaluation (with a sensory profile/component), a PT evaluation, a functional behavioral assessment (FBA), a behavioral intervention plan (BIP), and an assistive technology evaluation (id.).

In addition to the foregoing, the parents requested an order directing the district to develop an IEP for the student that included "recommendations of the professional who ha[d] recently worked with and evaluated" the student (Parent Ex. A at p. 20). According to the parents, that IEP included, "at a minimum," home-based and school-based ABA, BCBA supervision, home-based or "after-school" speech-language therapy, "[p]ush -in 1:1 ABA (for a minimum of 25 hours per week)" in a 12:1+1 special class located within a "community school," related services (OT, PT, and speech-language therapy), special transportation (air-conditioned mini-bus, limited travel time, and a 1:1 paraprofessional), a BIP developed from an FBA, a 12-month school year program (with services over breaks and vacations), assistive technology devices and training, and home-based parent counseling and training services provided by a BCBA (id.).

Next, the parents requested "as an alternative form of equitable relief, including compensatory education, at the [p]arents' option," that the district be ordered to provide "prospective funding for a private program, school services and/or a collection of school and services that [were] identified following the submission of the [due process complaint notice (but which [were] not currently known) to facilitate an appropriate program and remedy for the failures" alleged (Parent Ex. A at pp. 20-21). In addition, the parents requested compensatory educational services for the student "to make up for a lack of FAPE and a violation of pendency" (id. at p. 21). According to the parents, this relief included a "bank of 1:1 ABA services"; assistive technology devices and training for the student, the parents, and the student's teachers or providers; speech-language therapy; and parent counseling and training services (id.). As final points, the parents requested "'enhanced rates'" for "after-school" or "home-based" services, to fund transportation costs incurred to access the requested relief, and to provide interpreter services and translation of documents for the parents (id.).

A. Impartial Hearing and Intervening Events

On July 31, 2018, the parties proceeded to an impartial hearing, and on this date, set forth their respective positions concerning the student's pendency placement (see Tr. pp. 1-39; see generally Parent Exs. A-B). After some discussion and explanation of the prior impartial hearing, as well as the contents of the December 2017 IHO decision emanating from that proceeding, the parties eventually agreed that as the student actually received the program and services set forth in paragraph "number 5" on page "22" of the December 2017 IHO decision, those services constituted pendency on a 10-month school year basis (Tr. pp. 4-21, 25; Parent Ex. B at pp. 22-23). The parents' attorney stated that, with respect to summer 2018, the district agreed "to the home services" (Tr. p. 22). In addition, the parties agreed that the prior pendency order issued in the previous impartial hearing set forth the related services the student should have received during the 2017-18 school year, which was otherwise reflected on page "8" of the December 2017 IHO decision (see Tr. pp. 23-26; Parent Ex. B at p. 8).

During the pendency placement discussion, the parents' attorney stated on the record that she would be filing a "new due process complaint notice" related to the 2018-19 school year (Tr.

p. 7). According to the parents' attorney, this was necessary because the district had recently "offered [a State-approved nonpublic school]"]," and this offer "was holding up the settlement" of an appeal the parents initiated pertaining to selected portions of the December 2017 IHO decision (Tr. pp. 6-7). She further stated that the parents, however, rejected the State-approved nonpublic school offered by the district because accepting it would result in the loss of "all their services that we won [about] a month ago, and that [did not] seem reasonable" (Tr. p. 7). The district's attorney confirmed that an "IEP meeting" had been held, "which deferred the [student's] case to [the] CBST," and that the services set forth in paragraph "5" "continued while they were looking for a placement" (Tr. p. 26). The district's representative agreed to allow the parents to file an amended due process complaint notice, so long as it was "before the substance of [the] hearing" (id.).

Next, the IHO described what the parties had agreed to as the student's pendency placement, with the parents' attorney noting that they were "okay with the home program" for summer 2018 (Tr. pp. 26-30, 32-33). In addition, the IHO indicated that he interpreted the December 2017 IHO decision to provide for a pendency placement on a 12-month school year basis, and neither party objected (Tr. pp. 32-34).

In a (corrected) interim decision on pendency dated August 22, 2018, the IHO found that the following constituted the student's pendency placement based upon the "program and services ordered" in the December 2017 IHO decision: a 12:1+1 special class placement in a community school, four 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, one 30-minute session per week of counseling services in a small group, two sessions per month of parent counseling and training services, and the services of a full-time paraprofessional on a 12-month school year basis (Interim IHO Decision at pp. 2-4). In addition, the IHO ordered the district to fund five hours per day for five days per week of school-based ABA and 10 hours per week of home-based ABA "at an enhanced rate sufficient for the parent[s] to obtain the services as determined by the [district] in consult with parents' counsel" (id. at p. 3). Finally, the IHO ordered the district to provide the pendency placement effective of the date of the due process complaint notice, July 2, 2018, and until the "matter [was] completed or the parties otherwise agree[d]" (id. at p. 4).[5]

As alluded to at the first impartial hearing date, the parents filed a second due process complaint notice, dated October 8, 2018 (October 2018 due process complaint notice), alleging additional violations in support of a finding that the district failed to offer the student a FAPE for the 2018-19 school year (see Tr. p. 7; Parent Ex. C at pp. 1-2). According to the October 2018 due process complaint notice, the newly asserted allegations arose "based on the disclosures received five days prior to the hearing," which indicated that the district intended to "defend a placement [offer] for a [S]tate-approved non-public school" made after the parents filed the June 2018 due process complaint notice (Parent Ex. C at p. 2). As noted in the June 2018 due process complaint

[5] The IHO also noted that funding of the pendency placement "shall be provided upon proper proof of the provision of services and attendance by the student," including but not limited to "attendance or enrollment documents, and transportation logs" (Interim IHO Decision at p. 4). The IHO also ordered that all questions pertaining to reimbursement or payment should be directed to the "Impartial Hearing Order Implementation Unit" and included a telephone number (id.). In a footnote, the IHO noted that any pendency placement services required by the order, but not provided, "may be subject to a compensatory award to be determined at the continuation of this matter or as otherwise resolved by the parties" (id. at p. 4 n.1).

notice, the parents indicated that the previous December 2017 IHO decision ordered the district, in part, to refer the student's case to the CBST to locate a State-approved nonpublic school and, while attempting to locate such, to implement a program outlined in that decision within a community school until the conclusion of the 2017-18 school year (compare Parent Ex. C at p. 3, with Parent Ex. A at p. 13). The parents alleged, however, that the district failed to offer any nonpublic school prior to the start of the 2018-19 school year and failed to "offer any placement for summer, as the [district] was unable to implement [the student's] stay-put placement" (Parent Ex. C at p. 4).

Next, the parents indicated that they took part in an interview at the State-approved nonpublic school on July 5, 2018, and "toured the school," but ultimately decided "they were unwilling to give up all of the additional services that [the student] had just won" (Parent Ex. C at p. 4). According to the October 2018 due process complaint notice, the State-approved nonpublic school contacted the parents on July 10, 2018 to inform them that the student "would [be] accept[ed]" (id.). The parents contacted the CSE on or about July 17, 2018 to reject the State-approved nonpublic school, and they were advised to "send a written rejection letter" (id.). The parents alleged that the next day, on July 18, 2018, they received a telephone call and were informed that the district "had to change the IEP to reflect [the State-approved nonpublic school]"—and during that same telephone call, the parents indicated that they had already advised another district individual "that they were not accepting the program at th[at] time" (id. at p. 5). The parents also indicated that they sent an email as a follow-up to that conversation and continued to exchange email correspondence for a short time thereafter with district staff (id.).[6]

Next, the parents alleged that the district had not "issued any new notices or IEPs relative to [the State-approved nonpublic school]," but that, as part of disclosures made on or about October 3, 2018 related to the pending impartial hearing, the district included a CSE meeting notice, dated July 18, 2018, that the parents "never received" and moreover, that the parents had no idea that the district held a meeting on July 18, 2018 (Parent Ex. C at p. 6). Additionally, the parents alleged that the district failed to provide them with "any subsequent IEP" or otherwise advise them that the CSE "had recommended [the State-approved nonpublic school]" (id.). According to the October 2018 due process complaint notice, the parents first learned of this recommendation through the district's impartial hearing disclosures (id.). The parents also alleged that the district's disclosures included a letter from the State-approved nonpublic school, accepting the student—but that the acceptance letter required that the district modify the related services for OT, speech-language therapy, and parent counseling and training and "remove counseling and ABA services" from the student's IEP (id. at p. 7). Thus, the parents alleged that if the student attended the State-approved nonpublic school, they "would have had to agree to a significant reduction in services" (id.). Moreover, the parents asserted that the none of the State-approved nonpublic schools provided 1:1 instruction or after-school services, and would not allow the student to have access to nondisabled peers, in violation of the least restrictive environment (LRE) (id.).

As relief, the parents requested a finding that the district failed to offer the student a FAPE for the 2018-19 school year, that the district violated the student's LRE, and that the district be

[6] Based upon the evidence in the hearing record, the parents rejected the State-approved nonpublic school in an email to district staff dated July 24, 2018 (see Parent Ex. V at pp. 4-5).

ordered to develop an IEP with the same components requested in the June 2018 due process complaint notice (compare Parent Ex. C at pp. 8-9, with Parent Ex. A at p. 20).

On October 11, 2018, the parties and the IHO resumed the impartial hearing (see Tr. p. 39). At that impartial hearing date, the parties agreed that the June 2018 and October 2018 due process complaint notices should be consolidated (see Tr. pp. 41-42). When the IHO asked the district's representative about the status of the case, she responded that the district intended to "defend the CBST recommendation" and deferral, but noted the complicated nature of the "situation because a lot of it ha[d] to do with the previous order that was issued, which deferred the case to [the] CBST" (Tr. pp. 42-43). The district's representative explained that although the recommendation was a "little bit late," the recommendation for the State-approved nonpublic school "would have been for the start of September [2018]" (Tr. p. 43). She further clarified that the district's position was that the State-approved nonpublic school—with no additional services—offered the student a FAPE (see Tr. p. 45; see also Tr. pp. 43-45 [explaining that because the parents were not aware of any CSE meeting to "memorialize [the State-approved nonpublic school" or any "follow-up letter," the parents' attorney believed the matter to be "very straight forward," and that they would secure pendency services and "we would move on"]).[7] However, the district's representative also expressed confusion with respect to whether the parents were "still seeking the continuation of the five hours a day" if the student attended the State-approved nonpublic school (Tr. pp. 45-46). She also stated that if the parents were not seeking the five hours, that there might be some more room for negotiating a settlement (Tr. p. 46).

According to the parents' attorney, the removal of these additional services—later referring specifically to the "home program and the related services"—in order for the student to attend the State-approved nonpublic school primarily contributed to the parents' rejection of the offer (Tr. pp. 44-46; see Tr. pp. 46-47 [explaining that, "just like all the other [S]tate approved [nonpublic schools]," this particular State-approved nonpublic school was not allowed to accept students if it could not "provide the services from the IEP"]). She noted, however, that the parents' current rejection of the school did not foreclose the possibility of "consider[ing] a change to the school" in the future (Tr. p. 45). Moreover, she acknowledged that she and the district's representative had not had a "chance to talk" about further negotiations or settlement; however, she also acknowledged that they could speak to each other—"just so [they] c[ould] clarify the issue, if [there was] room to discuss settlement"—or "maybe a January placement" could be discussed (Tr. pp. 47-50).

In light of the foregoing, the parties and the IHO scheduled the next impartial hearing date for December 4, 2018, and confirmed that it would be for an actual hearing, and "not a status" conference (see Tr. pp. 50-51). In an order dated October 11, 2018, the IHO consolidated the

[7] The parents' attorney also indicated, at that point, that the parents "wanted reimbursement for some minor co-pays" but did not further elaborate (Tr. pp. 43-44). In addition, she noted that although two of the student's then-current providers had quit because they had not been paid by the district for approximately six months, it would not be an issue in the current matter "because it ha[d] to do with enforcement of last year's decision," which was already on appeal (Tr. p. 48). Nevertheless, she noted that the student was "not receiving all of his pendency" because the providers had quit (id.).

parents' June 2018 and October 2018 due process complaint notices (see generally IHO Order on Consol.).

When the impartial hearing resumed on December 4, 2018, the IHO entered the parties' evidence into the hearing record, and scheduled the next impartial hearing date for February 13, 2019, when the district anticipated presenting its case (see Tr. pp. 54-58, 77; Parent Exs. A-E; H-R; T-V; X; Dist. Exs. 3-31).[8]

On February 13, 2019, the impartial hearing continued (see Tr. p. 81). In an opening statement, the district representative explained that the student's "most recent IEP dated April of 2018" included a recommendation for a nonpublic school "pursuant to a finding of fact and decision with speech, counseling, OT, a one-to-one paraprofessional, parent counseling and training in assistive technology to begin no later the start of the 12-month [2018-19] school year" (Tr. p. 84). She also noted that since a finding of fact and decision had already been issued related to the 2015-16, 2016-17, and 2017-18 school years, the student's "January 2018 and April 2018 IEPs which set forth the programs for the remainder of the [2017-18] school year and the [2018-19] school year [were] at issue in the hearing" (Tr. p. 85). According to the district representative, the previous IHO found that the student had not made "sufficient progress in a community school setting and ordered a deferral to CBST and in the interim, five hours per day of ABA and specifically stated that the services should not continue past the [2017-18] school year" (id.).

Next, the district representative stated that, similar to the prior impartial hearing proceedings, the district continued to believe that the student was not appropriately placed in a community school, and instead, required a more restrictive setting (see Tr. p. 85). However, at that time, the student was attending second grade in a 12:1+1 special class at a district community school with 25 hours per week of school-based ABA and 10 hours per week of home-based ABA, consistent with the pendency order until a "nonpublic school could be located" (see Tr. pp. 84-85).[9] In addition, the district representative explained that although the district offered a State-approved nonpublic school a "few weeks late"—meaning, not offered before July 1, 2018, the start of the 2018-19 school year—that fact, alone, did not entitle the student to relief for the entire 12-month school year, as the student would have started attending the school in September 2018 (Tr. pp. 85-86). She also noted that the parents had rejected the State-approved nonpublic school offered (see Tr. p. 87). The parents' attorney reserved her right to make an opening statement at the beginning of their case (Tr. p. 87).

[8] At the December 4, 2018 hearing date, the parents' attorney indicated that a stipulation of settlement had been executed with respect to the parents' appeal of the December 2017 IHO decision (see Tr. pp. 74-75). The parties contemplated entering a copy of the stipulation into the hearing record as evidence, but upon further discussion, agreed to allow the district representative the opportunity to first discuss it with "legal" to assess their position (Tr. p. 75). At that time, both the parents' attorney and the district representative believed that the stipulation of settlement would not affect the issue concerning the State-approved nonpublic school; however, the district representative believed it could affect the parents' request for "IEEs," and thus, wanted to solicit additional advice on that point (Tr. pp. 75-76).

[9] The district representative briefly mentioned the testimonial evidence anticipated by a district school psychologist who attended the "2018 IEP meetings," as well as from the student's classroom teacher for the past two years (Tr. pp. 85-86).

Before presenting its witnesses, the district representative asked about the "new IEP meeting" mentioned by the parents' attorney in an off-the-record conversation, as well as "her understanding that [the district] agreed to the services that [the parents were] seeking" (Tr. p. 88). The parents' attorney confirmed that, as she understood it, the district "put all the services on pendency that [were] on the IEP" and wanted to look at the IEP if the district representative had access to it and to "ascertain the implications of that [IEP] for this hearing" (Tr. p. 88). The district representative indicated that she had not looked at the "new IEP yet because [it was] not an issue in this complaint," but agreed that if it listed "all of the services that [the parents' attorney was] seeking, [she was] not sure [it was] worth it to proceed with the substantive hearing about a nonpublic school placement that may be a moot issue at th[at] point" (Tr. pp. 88-89). The parents' attorney agreed that the new IEP should be reviewed at that time because, although there were "other issues in the hearing," she could not "know if the whole thing w[ould] be moot" without clarification (Tr. p. 90).

At that point, the parties and the IHO obtained the new IEP, which the IHO noted, upon review, was "to be implemented on February 14th, 2019" (Tr. p. 90). According to the IHO, he agreed to grant the parties additional time to review the IEP and to meet again on March 14, 2019—at which time he would "make whatever decision have to be made at that time" (Tr. pp. 90-91). However, the IHO noted that "if everything look[ed] as it seem[ed] right now, this case w[ould] be completed unless [there was] some pendency miss[ing] that [he] [did not] know about" (Tr. p. 91). He further stated that, if "[e]verything was provided as we believed it was through pendency, then [he] w[ould] simply order that this [new] recommendation continue for the duration of the [2018-19] school year and that should complete the matter" (id.).[10]

Resuming the impartial hearing on March 14, 2019 (Tr. p. 94), the parents' attorney briefly recounted the parents' position throughout the proceedings, and then noted the development of a "new IEP" during those proceedings on or about January 29, 2019 (Tr. pp. 96-97). According to the parents' attorney, the district "actually put some of the contested services on the new IEP"—and "changed the recommendation for the school year in the middle of the school year" (Tr. p. 98). She also acknowledged that the services on the new IEP were "now relatively consistent with the pendency order" in the current matter, including recommendations for a 12:1+1 special class, 10 hours per week of home-based ABA and 25 hours per week of school-based ABA, BCBA supervision, parent counseling and training, related services (counseling and speech-language therapy), a paraprofessional, assistive technology, and transportation (id.).

Notwithstanding that the new IEP included many, if not all, of the recommendations consistent with the pendency placement, the parents' attorney advised that she intended to file a new due process complaint notice related to the new IEP (Tr. pp. 98-99). The parents' attorney noted, however, that the new due process complaint notice was "not so much [about] the services—all of the services, but there [were] issues with the IEP and [there had] been implementation issue[s] with the services since [the parents] had filed" (Tr. p. 99). At that time, the parents'

[10] The hearing record did not include a copy of the "new IEP" obtained and discussed at the February 2019 impartial hearing (see generally Tr. pp. 1-152; Parent Exs. A-E; H-R; T-V; X; Dist. Exs. 3-31; IHO Exs. I-III).

attorney anticipated filing the new due process complaint notice within the "next eight to ten days" and thereafter to decide whether to consolidate the matters (id.).

The parents attorney continued, however, and noted an off-the-record conversation about "some of the original issues that were pled in the due process complaint because [it] was filed before [the parties] settled the other case" (Tr. pp. 99-100). As a result, the parents' attorney indicated that "some of the issues in the due process complaint notice that [the parents] raised were moot," stating that "some of the evaluations" requested had been ordered and were "now final"—therefore, the parents did not now "necessarily need all of them" (Tr. p. 100). The parents' attorney was willing, at that time, to review the evaluations and to withdraw those the parents were no longer seeking (id.). According to the parents' attorney, all of the following requested evaluations had been "resolved": the neuropsychological evaluation, a speech-language evaluation, an OT evaluation, and an FBA (Tr. p. 101). She believed, however, that there remained an outstanding PT evaluation and an assistive technology evaluation, and agreed that the evaluations could be completed "at the end of the case," as opposed to on an "interim basis" (Tr. p. 102). The parents' attorney later clarified that an assistive technology evaluation had been conducted, but that the district did not provide the parents with a copy of the report and the evaluation had not been conducted in the student's home (see Tr. pp. 104-05). According to the district representative, the assistive technology evaluation had been "part of" the previous impartial hearing (Tr. p. 105).

With regard to the development of the new IEP, the district representative had conferred with the district in order to clarify whether the new IEP had been created "just to be in compliance with the pendency order" (Tr. pp. 106-07). Based upon those conversations, the district representative stated that the district "added the services back into the IEP to continue through the end of this school year because they believed given the student['s] needs, it [would not] be in the best interest of the [student] to up route (sic) him in the middle of the year" (id.). The district's opinion, however, remained consistent that a State-approved nonpublic school was appropriate for the student—and was reflected in the new IEP by making the ABA recommendations effective through the end of the 2018-19 school year and "for a deferral to CBST to commence in July" (Tr. p. 107).

In light of the discussions held, the IHO opined that the case was "going to probably disappear without too much being heard" (Tr. pp. 107-08). He specifically noted that "[i]if the [p]arent[s] made a request for a program that the [p]arent[s] received through pendency, and the [d]istrict's agreeing to continue it for the duration of the school year, there should be very little left of this case, unless [he was] missing something completely" (Tr. p. 108).

In response, the parents' attorney stated that "one of the issues ha[d] to do with the fact that [the district was] not . . . really allowing an inclusion program to be developed," or "modification of the curriculum and a modification of the program"; in addition, she noted that the parents had asked for the district to consider the student for alternate assessment due to the "pressure on the staff" for a student who was "very far behind" (Tr. p. 108). She also noted that there was a "FAPE violation for years prior" and "a lot of pressure . . . to meet the standards which [were] just obviously not realistic" (Tr. pp. 108-09). At that point, the IHO indicated that perhaps the student was "in the wrong place" (Tr. p. 109). According to the parents' attorney, the student should not be removed to a "fully segregated setting" just because the district made "no effort to make a proper inclusion program" (id.). Although, "maybe at the end of the year, [that was] what w[ould] happen,

but there should be a reasonable opportunity" for the student (id.). Given the amount of services available, the parents' attorney stated her belief that the district should be able to "develop and implement a proper inclusion program" for the student (id.).

While understanding their position, the IHO noted that before getting into any law that supported the parents' position, he wanted "to hear form the school if [there was] any allegation that [the district was] not implementing something" and he wanted to hear from witnesses "what their concerns [were]" (Tr. pp. 109-10). In furtherance of that direction, the parents' attorney indicated that she wanted the district to produce copies of the student's related services' attendance logs, and the IHO indicated that any related services not already provided must be "compensated for" (Tr. pp. 110-12). The parents' attorney agreed (see Tr. p. 111).

The parties returned to the impartial hearing on May 6, 2019 (see Tr. p. 116). As reported by the district representative, the parties were working to identify and to calculate "some missed services for the student for this year for his related services" (Tr. p. 119). She noted that documents had been turned over to the parents' attorney and the parties were "just trying to get this squared away by the end of the year" (Tr. p. 119). When asked her thoughts, the parents' attorney indicated that although she had "some issues with the recitation of facts," to save time, she agreed "with the conclusion" that the district representative had provided her with related services records, that she had "calculated the numbers," and she was just awaiting confirmation of those calculations from the district representative (Tr. pp. 119-20). In light of the foregoing, the IHO scheduled the next impartial hearing date for June 5, 2019, with the hope that the parties would "have reached a much closer understanding of what [was] needed, and [the parties] c[ould] resolve this case" (Tr. p. 120).

On June 5, 2019, the impartial hearing resumed (see Tr. p. 123).[11] When asked about the status, the district representative stated that, based upon her understanding, "the only thing [that was] remaining pertaining to the [2018-19] school year [was] some missed related services," and the parties could proceed to "discuss the number and figure out how to proceed from there" (Tr. p. 125). The parents' attorney agreed with this representation (see Tr. p. 125).

After discussing the related services not provided to the student under pendency, the parties agreed with the following as compensatory educational services: 67 30-minute sessions of speech-language therapy and 72 30-minute sessions of OT (see Tr. pp. 125-33). The parties agreed that no compensatory educational services were required with respect to the student's counseling services (see Tr. p. 131). The parents' attorney agreed that that agreement could be put "on the record" and asked for transportation costs prospectively in case the compensatory related services could not be provided at the student's home (Tr. pp. 132-33). The parents' attorney also noted, however, that the parents would not agree to accept related services authorizations (RSAs) for "compensatory education" (Tr. p. 134). In addition, the parents' attorney agreed to allow the district 30 days from the receipt of the IHO's order to implement the compensatory educational services (see Tr. pp. 136-42).

[11] Although the parents' attorney noted in February 2019 her intention to file a new due process complaint notice related to the new IEP developed in or around January 2019, the hearing record contained no evidence that the parents or the parents' attorney did so (see generally Tr. pp. 1-152; Parent Exs. A-E; H-R; T-V; X; Dist. Exs. 3-31; IHO Exs. I-III).

After assisting the IHO with language for provider rates and implementation of the compensatory educational services, the district representative confirmed with the IHO that he would be issuing a "finding of fact and decision," as opposed to a "statement of agreement and order" (Tr. p. 142). According to the IHO, he would find that the "parties reviewed the record and came to similar conclusions," and he would find "those conclusions [were] appropriate" (id.). He then asked if "[t]hat really end[ed] this case"—and the district representative agreed (Tr. pp. 142-43).

At that time, the parents' attorney indicated her preference to submit a "very brief closing just to summarize, unless [the IHO was] going to already find that there was no FAPE and award compensatory education based on the facts" (Tr. p. 143). In response, the IHO indicated, that under the circumstances, the "case ended with pendency" (id.). The parents' attorney disagreed, explaining that the district proposed to "change the program," the parents' objected, and then "in the middle of the hearing [the district] changed the program back" and decided not to defend "that IEP because that [was not] part of the hearing"—adding that the parents were "not necessarily in agreement with the IEP itself" and "need[ed] a finding of note" (Tr. pp. 143-44). The parents' attorney stated her uncertainty regarding whether the district "conceded" or were just "not defending the program anymore," but regardless, she believed the parents were "entitled to a finding of no FAPE" because "[o]therwise, the pendency will be changed" (Tr. p. 144).

The district's representative asserted that the district had not conceded FAPE and was prepared to defend the "deferral to CBST the whole time" (Tr. p. 144). She further explained that "essentially what happened was at the January 2019 IEP meeting, the team decided it would be inappropriate to move the [student] midyear, so they created an IEP that granted, . . . , the majority of the services from the pendency order for the remainder of the [2018-19] school year and then for a new deferral to happen in [the 2019-20 school year]" (id.).

In response, the parents' attorney claimed that the district did not, however, present evidence or call witnesses; therefore, the parents were "entitled to summary judgment" on the claims raised and the relief requested (Tr. p. 144).

The IHO disagreed with the parents' attorney's description of the how the events unfolded during the impartial hearing, but noted that it did not matter (see Tr. p. 144). The parents' attorney indicated that the district representative "should call witnesses and we should move forward" to decide (Tr. p. 145). The IHO immediately questioned why that should happen, as there was no longer anything to be decided since "[b]oth sides wanted, at some point in time, for pendency services to be continued for this limited school year and whatever was missing from pendency to be funded"—and according to the IHO, that was "basically what happened" (Tr. p. 145).

The parents' attorney disagreed with the IHO's representations, and stated that she was "asking that [the IHO] find that there was no FAPE based on the fact that [the district] did not have an IEP in placement at the beginning of the school year, which [the district representative] admitted" and because the district did not "have a placement for July 1st" (Tr. p. 145). The district representative clarified that the district "had a placement three weeks later," which the parents' attorney characterized as a "de facto violation" and a "serious procedural violation" and that the district did not defend the "program" (Tr. pp. 145-46). When the IHO asked why the district did not "have something" or whether the district did so in a timely manner, the parents' attorney stated

that it was because the district could not "find a placement" (Tr. p. 146). The district representative agreed, noting that there was a "delay in finding a placement for the student," but the student "had a placement as of July" and the district was "ready to agree that the student was entitled to some comp[ensatory] ed[ucation] for those three weeks" (id.). She further stated, however, the district's position that, "as of September, the student should have attended [the State-approved nonpublic school]" (id.). The parents' attorney continued to argue that the district "terminated the entire home program and all the services that were awarded" and that if the IHO looked "at the IEP, it [said she was] entitled to a finding of no FAPE" (id.).

At that point, the IHO stated that it was "just too messy [of] a record" and the parents could "appeal for that"—but he did not think he was "going to do it" (Tr. pp. 146-47). The IHO also stated that he would "look at it or read it," and he could not "discuss something like that now" (Tr. p. 147). He granted the parents' attorney's request to "brief this issue" and to "submit anything [she would] like," noting further that the record was "closed" (id.). The IHO also noted that he would review everything before making a decision and that he would allow the parties to select dates to provide closing briefs to him (see Tr. pp. 147-48). According to the parents' attorney, she thought the "case should be closed before the end of the [school] year" so the IHO could avoid having the case returned to him (Tr. p. 148). The IHO responded to the parents' attorney, stating that she "could have made this simpler if [she] wanted to," but she "made it more complicated, and [he would] have to live with that" (Tr. pp. 148-49). The parents' attorney told the IHO that she did not think that that was accurate or that her desire to "prevail" made the case "more complicated" (Tr. p. 149). The IHO explained that he did not "understand [her] position," and that the case was "far more involved than what [he] thought it was" (id.).

The IHO and the parties returned, then, to selecting a date to submit closing briefs; the parents' attorney suggested July 12, 2019, and the IHO and the district representative agreed to that date (see Tr. pp. 149-50). At that time, the impartial hearing concluded (see Tr. p. 151).[12, 13]

[12] Following the conclusion of the impartial hearing on June 5, 2019, the IHO granted approximately 13 extensions to the compliance date, in addition to the 10 extensions to the compliance date already granted during the impartial hearing. In reviewing the extensions granted by the IHO after the conclusion of the impartial hearing, the IHO identified both parties as the requesting party for approximately four extension requests; however, the IHO did not identify anyone as the requesting party for the remaining seven extension requests.

[13] Both parties submitted closing briefs to the IHO, and both briefs were dated July 12, 2019 (IHO Exs. II at pp. 1, 3; III at pp. 1, 9). In pertinent part, the parents alleged that the district failed to offer the student a FAPE for the 2018-19 school year because the district failed to "recommend a placement before the start of the 2018-19 school year" and only offered the State-approved nonpublic school "in the second week of July" (IHO Ex. III at p. 1). While arguing that this violation, alone, was sufficient to deny the student a FAPE, the parents also argued that the district failed to offer the student a FAPE due its "refusal to recommend ABA on [the student's] IEP, either in school or after-school, despite the fact that the parents had just prevailed in an extensive hearing finding that [the student] required ABA in school (on a full-time basis) and at home" (id. at pp. 1-2). The parents also pointed out that, in order for the State-approved nonpublic school "to meet the student's related services mandates," they would have to "agree to . . . reductions and modifications of the related services" (id. at p. 2). As relief, the parents requested that the IHO find that the district failed to offer the student a FAPE for the 2018-19 school year, order the district to continue to fund the student's pendency placement "until such time as all or part of the services [were] changed by agreement or operation of law," and order the district to "develop an IEP in accordance with the corrected pendency order and place ABA and related services in their entirety on this IEP"

B. Impartial Hearing Officer Decision

In a decision dated June 9, 2020, the IHO reviewed the parties' respective positions in the case (see IHO Decision at pp. 3-4, 7). The IHO noted that the district arranged for the student's attendance at a State-approved nonpublic school "shortly after" the 2018-19 school year began, and contended that the recommendation for the State-approved nonpublic school was appropriate (id. at p. 3). However, the parents rejected the State-approved nonpublic school and "continued with the pendency program" (id.). According to the IHO, the district recommended a State-approved nonpublic school again in January 2019, "but decided not to change the student's placement midyear" and instead, "agreed to continue pendency for the duration of the 2018[-]19 school year, which constitute[d] an appropriate remedy in this matter" (id., citing IHO Ex. II). Next, the IHO noted that the district had agreed, upon a review of the hearing record, that the student did not receive all of the related services ordered pursuant to the pendency placement and that "[t]his amount [was] also part of an appropriate remedy in this matter" (IHO Decision at p. 3, citing to IHO Ex. I).

Turning to the parents' position, the IHO noted their contention that the district failed to offer the student a FAPE for the 2018-19 school year by "virtue of failing to have a school placement location in place at the start of the 2018[-]19 [extended school year]" (IHO Decision at p. 4). According to the IHO, the parents sought to continue the student's pendency placement in a 12:1+1 special class at a district community school with home-based and school-based ABA, related services, and assistive technology, "among other relief" (id.). In addition, the IHO noted that the parents sought to have the student's pendency placement put in the student's IEP (id., citing IHO Ex. III).

Next, the IHO turned to compensatory educational services as part of the "Finding of Fact and Decision" section of the decision (IHO Decision at p. 4). Here, the IHO noted that the parties conducted an independent review of the hearing record, which "resulted in a consensus" that the student was owed the following as compensatory educational services for any missed services not provided pursuant to the pendency placement: 67 30-minute sessions of speech-language therapy and 72 30-minute sessions of OT (id.). In addition, the IHO indicated that he had granted the parents' request for the student to receive the compensatory educational services in "one-hour sessions, at an enhanced rate sufficient for services to be obtained" if the district failed to make such arrangements (id.). The IHO also noted the parents' request for the district to timely deliver the compensatory educational services (within 30 days of the decision), and if the district should

(id. at p. 8). Alternatively, the parents requested an order directing the district—if it deferred the student's case to the CBST "for the in-school portion of the above"—to require that the "program should provide 1:1 ABA services in school and after-school, be close to the parent[s'] home, as well as afford opportunities for interactions with typical peers" (id. at p. 9). Additionally, the parents requested that the district "calculate any hours missed under the corrected pendency order in ABA and related services and create compensatory banks in each area" (id.). Finally, in a footnote, the parents indicated that "[a]ll of the arguments and grounds alleged for the failure to provide a FAPE in the [due process complaint notice] (Ex. 1) [were] being asserted as grounds for the [p]arents to prevail at this hearing" and moreover, that the "[a]rguments and facts alleged in the [due process complaint notice] but not referenced in this [c]losing brief [were] not being waived or abandoned" (id. at p. 1 n.1). To be clear, the due process complaint notice identified therein as "Ex. 1" referred solely to the due process complaint notice dated June 30, 2018, as specifically indicated in the parents' closing brief (id. at p. 1).

fail to comply, then the parents—within 10 days thereafter—"shall receive authorization" to obtain the services at an enhanced rate (with transportation) (id.).

In light of the foregoing, the IHO concluded that he had "no reason to disturb the parties' findings with respect to an appropriate compensatory remedy in this matter" (IHO Decision at p. 4).

Next, the IHO turned to the issue of FAPE for the 2018-19 school year (see IHO Decision at pp. 4-5). Here, the IHO—"under the facts and circumstances of this case"—"decline[d] to address FAPE" (id. at p. 5). While noting that the district did not concede that it failed to offer the student a FAPE and that the district "continued to contend that the [State-approved nonpublic school], which accepted [the student], was appropriate," the IHO further noted that the district appeared to agree that the student was entitled to a "small amount of compensatory services" for the "few days in July before the placement accepted" the student (id.). In addition, the IHO agreed with the district that at least some evidence in the hearing record demonstrated that the student's social/emotional needs "were such that the community school placement was inappropriate and a [State-approved] placement was appropriate" (id., citing Dist. Exs. 10; 21). However, the IHO also agreed with the district's position that the "failure to have an IEP for a little over a week at the beginning of a school year fail[ed] to constitute a material violation of the IDEA" (IHO Decision at p. 5). According to the IHO, in order to make a determination as to the appropriateness of a "school district IEP recommendation," he was required to "render a decision on substantive grounds"; relatedly, an IHO could only find that a procedural violation resulted in a failure to offer the student a FAPE if the procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding a FAPE, or caused a deprivation of educational benefits (id., citing 20 U.S.C. § 1415[f][2][E]). Given these standards, the IHO concluded that "missing a little more than a week of school at the start of the school year fail[ed] to satisfy this standard, particularly where compensatory services were offered" (IHO Decision at p. 5).

Next, the IHO indicated that the impartial hearing did not include any witness testimony, and, based upon his own understanding, the "parties wished for pendency services to continue for the remainder of the 2018[-]19 school year" even though the district continued to assert that the State-approved nonpublic school was appropriate for the student (IHO Decision at p. 5). In addition, the IHO "decline[d] to find that the [district] 'defaulted'" and that, "to the extent that the parents received all of the relief requested in this matter through pendency, the case [was] moot" (id. at pp. 5-6). The IHO also noted that "any exception to mootness would lie in the [d]istrict's claim, not the parent[s']"—especially where, as here, the parents sought "pendency as an appropriate remedy" (id. at p. 6).

In summary, the IHO ordered the "above described pendency program and services" in the August 2018 (corrected) interim decision "for the entirety of the 2018[-]19 school year with the addition of 33.5, 1 hour sessions of speech and 36 1 hour sessions of OT" as relief (IHO Decision at p. 6). The IHO also ordered the district to provide the compensatory educational services to the student at an "enhanced market rate sufficient for services to be obtained in the event that the [district] fail[ed] to arrange" for the services, within 30 days of the date of the decision (id.). The IHO further ordered that the district shall provide the parents with authorizations to privately obtain the compensatory educational services within 10 days "from the end of the 30-day period"

if the district otherwise failed to provide the services (id.). Next, the IHO ordered the district's "Implementation Unit" to determine the "enhanced market rate for related services . . . in consultation with the parent[s'] counsel," and to the extent required, the student would access "public transportation or as otherwise agreed by the parties" (id.). As a final point, the IHO ordered that any funding for the compensatory educational services would be "provided upon proper proof of the provision of services and attendance by the student" through documents such as "attendance or enrollment documents, and transportation logs" (id. at pp. 6-7).

IV. Appeal for State-Level Review

The parents appeal. Initially, the parents affirmatively assert that they do not contest the compensatory educational services awarded by the IHO with respect to the "violations of the student's stay-put placement." However, the parents contend that they are entitled to additional relief, arguing that the IHO declined to issue a ruling with respect to whether the district offered the student a FAPE for the 2018-19 school year, "as well as other issues and may have effectively terminated critical aspects of the student's program." As a result, the parents request that the SRO reverse the IHO's decision, find that the district failed to offer the student a FAPE for the 2018-19 school year, award additional compensatory educational services, and "clarify [the student's] last-agreed upon services."

As grounds for overturning the IHO's decision, the parents allege that the IHO erred by failing to deem factual allegations in the due process complaint notice admitted as well as "credible and unrebutted documentary evidence," apply legal precedent and provisions of the IDEA and State law, and hold the district to its burden of proof regarding the provision of a FAPE for the 2018-19 school year (including summer 2018) (see Req. for Rev. ¶¶ 1-6; ¶ 17 [alleging the district failed to establish the substantive appropriateness of the IEP]). The parents also argue that the IHO erred in finding that the absence of a program for one week during summer 2018—as one procedural violation raised among a multitude of others not decided by the IHO—did not rise to the level of a denial of a FAPE (id. ¶ 7; see Req. for Rev. ¶¶ 14-16 [asserting that the IHO failed to make determinations with respect to the parents' allegations of predetermination, the failure to conduct a reevaluation of the student before changing his "placement," and the cumulative procedural violations]). Additionally, the parents contend that the IHO failed to find that the student required "1:1 ABA and various related services" in order to receive a FAPE, and the district's failure to recommend the same on the student's IEP—as well as the State-approved nonpublic school's inability to provide them—resulted in a failure to offer the student a FAPE (Req. for Rev. ¶ 13). The parents contend that the district opened the door to issues postdating the due process complaint notice, noting that the district "abandoned" a placement offer identified at the impartial hearing after the district had conducted another IEP meeting (id. ¶ 20). The parents further contend that the district did not put that specific IEP into evidence, yet "planned to defend its placement" at the State-approved nonpublic school offered to the student "three weeks into July" (id.). As a result, the district opened the door to any issues related to this IEP and placement offer and the parents seek a finding that the district denied the student a FAPE on this basis (id.). In addition, the parents contend that the IHO improperly made sua sponte and ultra vires rulings, or otherwise made rulings based on incorrect facts (id. ¶¶ 21-22).

Next, although the parents note that the IHO declined to address FAPE, the IHO erred in finding that a community school placement was not appropriate for the student and that a State-

approved nonpublic school was appropriate (see Req. for Rev. ¶ 8). According to the parents, the IHO failed to consider whether the district violated LRE requirements and erred by finding the matter moot because the parents received all the requested relief through pendency, especially given the lengthy delay in issuing the IHO's decision (id. ¶ 9). The parents also contend that the IHO did not provide the parents with notice of his intention to possibly dismiss the parents' case as moot, and improperly found the case moot (id. ¶¶ 10-11). Moreover, the parents argue that the IHO's failure to address FAPE "may have changed [the student's] stay-put," noting that if the pendency placement ends, the parents cannot afford to pay the providers for services (id. ¶ 10).

With regard to relief, the parents assert that the IHO failed to consider their evidence in support of an "appropriate equitable and compensatory remedy for the failure to provide a FAPE," and specifically, the parents' request for an "order directing the [district] to create an IEP with all of the recommended services, or order the [district] to provide prospective funding for [a] private program, school and services" (Req. for Rev. ¶ 12, citing IHO Ex. III at p. 8). The parents seek an award of relief as set forth in their closing brief submitted to the IHO (Req. for Rev. ¶ 12). In addition, the parents allege that the IHO failed to "[e]nsure" that the district fully funded the student's pendency placement from the last impartial hearing date, ignoring the relief requested in the closing brief and in the due process complaint notice, and resulting in the parents having to pay out-of-pocket for some of the speech-language therapy services ordered as part of pendency (Req. for Rev. ¶ 18, citing Parent Exs. A; G; IHO Ex. III). The parents seek an order directing the district to fund the compensatory educational services for "any pendency services ordered but not provided during this time period at issue" (Req. for Rev. ¶ 18).

Next, the parents seek an award of compensatory educational services for the district's failure to implement pendency (see Req. for Rev. ¶ 19). The parents allege an entitlement to additional relief in this appeal due to a change in the student's "circumstances" that occurred during the "time between the close of evidence and the date of the [IHO's] decision" (id.). According to the parents, the "parties agreed to change the school-day portion of the student's stay-put in the middle" of the 2019-20 school year (January 2020, when the student was "offered a seat" at another State-approved nonpublic school), but continued to "dispute . . . whether the home-based ABA should be terminated" (id.). The parents assert that although the student attended the newly offered State-approved nonpublic school for a short time prior to the school's closure due to the COVID-19 pandemic, the student did not receive "all of the pendency services to which he was entitled during the 2019-2020 school year . . . due to the gap in the issuance of the decision" (id.). The parents contend that they have no evidence regarding the missed pendency services, and seek an order directing the district to calculate the services owed and award the same as a bank of services (id.).

In an answer, the district responds to the parents' allegations and affirmatively asserts that the parents' request to recalculate the compensatory educational services owed to the student under pendency due to the "one-year delay in issuance" of the IHO's decision must be granted (Answer at p. 1 & ¶ 1). Otherwise, the district generally argues to dismiss the remainder of the parents' appeal with prejudice, asserting that the district never conceded FAPE, it was prepared to defend the deferral to the CBST, the matter is moot, and if a FAPE finding is required, then the matter should be remanded for further administrative proceedings (see generally Answer).

In a reply, the parents responded to the district's arguments. The parents argue that, contrary to the district's assertion, the matter is not moot because the parents sought to have the services that had been placed in the January 2019 IEP ordered by the IHO—and now the SRO—and found to be the student's last agreed-upon program. The parents claim this is necessary because the district does not have a "mechanism to provide or fund private ABA, [parent counseling and training] and ABA supervision outside of a pendency and/or final order through the Impartial Hearing Implementation Unit even if the services [were] placed on an IEP." In addition, the parents contend that the matter is not moot because the district, in an IEP developed on or about October 13, 2019, "proposed to terminate the mandate for a full-day ABA program as of January 2020." Thus, the student's entitlement to five hours of ABA during the school day is not moot and is capable of repetition and yet evading review. Finally, the parents assert that compensatory educational services should not be limited to related services but should encompass any and all pendency services that were not provided and that the district waived the right to defend FAPE.

V. Discussion—FAPE 2018-19 School Year

Here, except for the aspects of the parents' appeal that seek limited relief, discussed below, the parents' request for a finding that the district denied the student a FAPE amounts to a request for a declaratory judgment. Upon review, the IHO's reticence in reaching the merits of a FAPE was understandable in light of several interacting and complicating factors, and at this juncture, there is no basis upon which to disturb the IHO's conclusion.

First, to the extent the parties' dispute surrounded the implementation of the December 2017 IHO decision from a prior administrative proceeding, it is well settled that an IHO does not have the authority to enforce or stand in review of another IHO's decision (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]). The IHO from the prior matter ordered prospective relief in the form of requiring the CSE to locate a State-approved nonpublic school for the student, in addition to ordering the CSE to add specific recommendations to the student's IEP (see Parent Ex. B at p. 22). Based upon the evidence, the district complied with the IHO's directives by developing the January 2018 IEP, and later modified the same in the March 2018 IEP (see id.). A review of the March 2018 IEP reveals that it included the following recommendations consistent with—and as ordered in—the December 2017 IHO decision: a 12-month school year program (compare Dist. Ex. 21 at pp. 10-11, with Parent Ex. B at p. 22), assistive technology (compare Dist. Ex. 21 at p. 11, with Parent Ex. B at p. 22), and full-time, 1:1 paraprofessional services (compare Dist. Ex. 21 at p. 11, with Parent Ex. B at p. 22). In addition, the IEP reflected that the CSE deferred the student's case to the CBST to locate a State-approved nonpublic school that was "'designed to meet the [student's] needs [and] which shall preferably include a full day, 12 month ABA program'" (compare Dist. Ex. 21 at pp. 13, 15, with Parent Ex. B at p. 22).[14] Consequently, in this case, the evidence in the hearing record demonstrates that

[14] A review of the March 2018 IEP reflects that the student was attending first grade in a 12:1+1 special class at a district community school, and he was receiving one 30-minute session of individual counseling services, three 30-minute sessions of individual OT, four 30-minute sessions of individual speech-language therapy, and five sessions per year of parent counseling and training services in a group (see Dist. Ex. 21 at p. 1). The March 2018

when the parents filed the June 2018 due process complaint notice, the district had an IEP in place for the start of the 2018-19 school year on July 1, 2018 (compare Parent Ex. A at p. 1, with Dist. Exs. 15 at pp. 1, 11, and Dist. Ex. 21 at pp. 1, 16).[15]

The parents' disagreement with the March 2018 CSE's actions, as alleged in the June 2018 due process complaint notice, is more akin to an appeal of the December 2017 IHO decision, which neither the IHO in the present matter nor the undersigned would have the jurisdiction to address (see Educ. Law §§ 4404[2]). As noted above, the parents appealed portions of that prior IHO determination but withdrew that appeal prior to a State-level administrative determination after apparently coming to an agreement with the district. Herein lies one of the risks that a parent assumes when obtaining prospective placement as a remedy through administrative due process; as one SRO recently described, the prospective placement may be viewed "as an election of remedies by the parent as to the student's educational placement, subject only [to] further modification in judicial review, and the parent has now assumed the risk that unforeseen future events may . . . render the relief undesirable" (Application of a Student with a Disability, Appeal No. 19-018 [discussing at length the potential pitfalls that may arise as a result of an award of prospective placement]). Here, not only did the December 2018 IHO decision craft prospective relief in the form of IEP amendments and a requirement that the district defer the student's case to the CBST, the decision further built in a prospective alternative remedy in the event that the district failed to identify a State-approved nonpublic school for the student in a timely manner (Parent Ex. B at p. 22). That is, the IHO ordered that, "[i]n the event that the CBST is unable to locate a proper placement within 30 days of its receipt of the child's file, the DOE shall prospectively fund a private placement selected by the parent" (id.). The parents now take issue with the district's efforts to comply with the December 2017 IHO decision and identify a State-approved nonpublic school for the 2018-19 school year but have not pursued the built in alternative prospective relief set forth in the December 2017 IHO decision but instead now seek a new form of relief. However, having elected a remedy in the prior proceeding, the parents assumed the risk that the relief became undesirable, which risk has now come to fruition. The parents could have pursued their appeal of

IEP also reflected that the parents had requested a reevaluation of the student, and that during a previous CSE meeting held in January 2018, the parents requested an FBA—which had since been completed (id.). Additionally, the March 2018 indicated that the "IEP [was] in accordance to the findings, facts and decision [December 2017 IHO decision] regarding the appropriate placement to best meet [the student's] needs and recommended services" (id.).

[15] The evidence in the hearing record reflects that the district submitted two IEPs related to the 2018-19 school year—the first IEP was developed in January 2018 and was later modified at a CSE meeting held on March 29, 2018, to incorporate information obtained from an FBA completed by the district (compare Dist. Ex. 15 at pp. 1-2, 11, with Dist. Ex. 21 at pp. 1-3, 16; see generally Dist. Exs. 16; 18-20). Notably, in the due process complaint notice, the parents refer solely to an IEP created in "spring" 2018 and alleged violations thereto, which, inferentially, points to the March 2018 IEP as the contested IEP (compare Parent Ex. A at pp. 1, 14-18 with Dist. Ex. 21 at pp. 1, 16). Regardless, both the January 2018 and the March 2018 IEPs included recommendations that were to be implemented for the remainder of the 2017-18 school year (i.e., February 1, 2018 as projected date of implementation) and for at least the first half of the 2018-19 school year (i.e., July 1, 2018 through January 19, 2019 as the projected date of the student's annual review) (see Dist. Exs. 15 at pp. 1, 8-9; 21 at pp. 1, 10-11). For clarity, the March 2018 IEP will be referred to as the IEP in place on July 1, 2018, as it superseded the January 2018 IEP.

the December 2017 IHO decision but, having withdrawn that appeal, they may not now collaterally attack the prospective remedy in a new proceeding.

Regarding the district's efforts, notwithstanding that the district had the March 2018 IEP in place at the start of the 2018-19 school year, the district—at that time—had not located a State-approved nonpublic school within which to implement the IEP (see IHO Decision at pp. 3-5; Parent Ex. A at p. 13).[16] Rather, the evidence reflects that the student had been accepted by one State-approved nonpublic school in early July 2018, but otherwise identified the student's anticipated start date as September 6, 2018 (see Dist. Ex. 27 at p. 1; see also Dist. Ex. 25 at pp. 1-4).[17] In addition, the evidence reveals that the State-approved nonpublic school required the following modifications to the related services recommendations in the student's IEP: two 30-minute sessions of individual OT, two 30-minute sessions of individual speech-language therapy, one 30-minute session of speech-language therapy in a small group, and four 60 minute sessions of parent counseling and training per year (see Dist. Ex. 27 at p. 3).[18]

In the meantime, the impartial hearing proceeded and in October 2018, the parents filed another due process complaint notice asserting specific allegations related to the State-approved nonpublic school offered by the district, and the IHO consolidated the pending matter with the newly filed due process complaint notice (see generally Parent Ex. C; IHO Consol. Order). A CSE also convened during the impartial hearing on January 29, 2019 to conduct the student's annual review (see Answer Ex. 1 at pp. 1, 23). The January 2019 IEP reflected implementation dates of

[16] The evidence in the hearing record reflects that the district offered the student a public school location within which to receive services during summer 2018 (see Dist. Ex. 26).

[17] The evidence in the hearing record also reflects that the parents visited the State-approved nonpublic school that accepted the student, but informed the district in an email dated July 24, 2018 that they were rejecting the State-approved nonpublic school at that time (see Parent Ex. V at pp. 1-4). The parents and the district exchanged additional email correspondence on July 25, 2018 and August 1 and 2, 2018, which ultimately reflected that the district did not "have any other offer for placement at th[at] time," but the district would continue to "follow-up with the schools that ha[d] not responded" (id. at pp. 1-4, 6).

[18] Although a particular nonpublic school may meet the Commissioner of Education's criteria for approval to provide special education programs and services to students with a disability, it is the individualized needs of a student with a disability that must ultimately "determine which of such services shall be rendered" by an approved nonpublic school (Educ. Law § 4402[2][a]). State regulation provides that "no contract for the placement of a student with a disability shall be approved for purposes of State reimbursement unless the proposed placement offers the instruction and services recommended on the student's IEP" (8 NYCRR 200.6[j][2]). In the past, the district has been specifically directed by SED not to refer students to approved nonpublic schools that could not provide all of the related services recommended in the students' IEPs (see "Provision of Related Services to Students with Disabilities Placed in Approved Private Schools in New York City," Office of Special Educ. [Sept. 2016], available at http://www.p12.nysed.gov/specialed/dueprocess/NYC-IHO-RSA-912.pdf). As part of the same guidance and corrective action, SED also directed the approved nonpublic schools in question "to hire staff necessary to provide related services and to accept only those students for whom they can provide the special education program and services recommended in students' IEPs" (id.). Moreover, it must be ascertained whether a particular nonpublic school will meet the IDEA's mandate that a student's recommended program must be provided in the 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 111 [2d Cir. 20008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 105[2d Cir. 2007]; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

February 14, 2019 through the student's projected annual review on January 30, 2020 (id. at p. 1). When the January 2019 IEP came to the parties' attention at the impartial hearing, the parents' attorney noted her understanding that the district put all of the pendency services on that IEP (see Tr. p. 88). After having the opportunity to review the January 2019 IEP and to consider the implications, if any, with respect to the pending impartial hearing, the parents' attorney agreed with the district representative that the only issue left to resolve was compensatory educational services warranted as relief for any missed pendency services (see Tr. pp. 125-33). The parties also agreed to the amount of missed pendency services to be provided as compensatory educational services (see Tr. pp. 125-33). It was not until the IHO was discussing the potential contents of the IHO decision that the parents' attorney raised the issue of filing a closing brief, "to summarize, unless [the IHO was] going to already find that there was no FAPE and award compensatory education based on the facts"—after just having agreed, for all intents and purposes, to resolve the matter (Tr. pp. 142-44).

And therein lies the second complicating factor that the IHO faced, which was the degree of agreement reached between the parties during the impartial hearing, leaving in question what, if anything, was left for the IHO to address related to the 2018-19 school year and more significantly, what relief, if any, was warranted. To the extent the parents indicated the intention to file a due process complaint notice related to the January 2019 IEP, the hearing record fails to include any evidence demonstrating that the parents followed through with that intention and the parents have not indicated on appeal that they have done so (see generally Tr. pp. 1-152; Parent Exs. A-E; H-R; T-V; X; Dist. Exs. 3-31; IHO Exs. I-III). Accordingly, absent a due process complaint notice related to the January 2019 IEP, no mechanism existed to consolidate any claims based upon that IEP with the issues already properly before the IHO concerning the 2018-19 school year. Thus, the IHO was precluded from considering any disagreements related to the January 2019 CSE process or the January 2019 IEP as these issues were not before the IHO for adjudication. While there may have been issues of concern to the parents related to the January 2019 CSE processes or IEP, ultimately, the student continued to receive his pendency placement and services, and the parents have not challenged or appealed the IHO's interim order on pendency.

At this juncture, the March 2018 IEP has expired, and in accordance with its obligation to review a student's IEP at least annually, the evidence reflects that a CSE has convened to develop IEPs for the remainder of the 2018-19 school year—namely, the January 2019 IEP, which has not been challenged with respect to the recommendations for that portion of the 2018-19 school year—as well as creating another IEP in October 2019 (with implementation dates beginning November 4, 2019 through the projected annual review date of October 33, 2020) (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]; see generally Answer Exs. 1; 4). Thus, the parents' request to modify the IHO's final decision to include a determination that the March 2018 IEP failed to offer the student a FAPE for the 2018-19 school year, or to include an order directing the district to modify the March 2018 IEP to include specific recommendations, serves no purpose at this juncture.

As for the parents' stated concerns regarding the timeliness of the district's identification of a State-approved nonpublic school and the purported conditions for modifying the student's related services prior to enrollment, such claims, even if meritorious, were rendered academic once the parents' attorney agreed to resolve the matter by determining the compensatory educational services necessary to make up for any missed pendency services. Moreover, even if the IHO

proceeded to find that the district failed to offer the student a FAPE for the 2018-19 school year solely on this basis, the parents sought compensatory educational services as relief, which the parties agreed to redress at the impartial hearing thereby leaving no outstanding relief issues to be determined by the IHO.

Finally, the parents' argument that the IHO should have "deem[ed] all factual allegations in the DPC, as well as credible and unrebutted evidence" to be admitted by the district is another way of asserting that the IHO should have issued a default judgment against the district, which can only be plausibly grounded in the State's statute governing the burden of proof in IDEA due process hearings (Educ. Law § 4404[1][c]). However, the IHO was correct to hesitate since default judgments are disfavored by the federal courts (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]; see also G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 F. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]). The IDEA requires the IHO to make a determination on substantive grounds based on a hearing record. Given the accord reached by the parties at the impartial hearing, neither party presented testimonial evidence. Under these circumstances, I decline to modify the IHO's appropriate degree of restraint in delving into issues that, if decided, would have little practical effect, as demonstrated in the below discussion of the relief sought by the parent and agreed to by the parties during the hearing.

VI. Relief

The parties agree that the student is entitled to a recalculation of any additional compensatory educational services the district may have failed to provide under pendency during the time frame created by the IHO's protracted delay in issuing a decision and now through the pending administrative appeal. 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 (Doe v. E. Lyme Bd. of Educ., 790 F.3d at 456 [2d Cir. 2015] [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"]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *25, *26 [E.D.N.Y. Oct. 30, 2008] [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]).

On appeal, neither party has presented any evidence of missed pendency services during the relevant time frame (see generally Req. for Rev.; Answer; Reply). However, in the event the parents can identify a specific service that the student was due under pendency, which was not provided during the pendency of this proceeding, and the parties can not come to an agreement, the parents may pursue any such allegation by either filing a new due process complaint notice alleging a non-speculative implementation failure, by filing a State complaint against the district through the State complaint process for failure to implement the IHO's pendency decision, or by seeking enforcement through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties

need not initiate additional administrative proceedings to enforce prior administrative orders]; see also A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005]).

Finally, as for the parents' request for an "order directing the [district] to create an IEP with all of the recommended services, or order the [district] to provide prospective funding for [a] private program, school and services," I decline to order prospective relief in this matter. Awarding prospective placement of a student, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Student X, 2008 WL 4890440, at *16 [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"]).[19] Indeed, the prospective placement awarded as relief in the December 2017 IHO Decision inexorably led to the present dispute which, in large part, can be distilled to a form of "buyers' remorse" on the part of the parents with respect to certain aspects of the remedy granted therein. While in some instances, circumventing the CSE process through the award of a prospective placement may appear at first blush to be the most expeditious way to obtain appropriate services for a difficult-to-place student, the procedural and substantive difficulties encountered by the IHO is resolving the parents' claims in the instant matter were an unintended but predictable consequence of this form of relief. However, the parents are not without remedy with respect to the CSE's recommendations for the student which post-dated the due process complaint notice underlying this matter. For example, if the parents remain displeased with the CSE's recommendations for the student as set forth in the January or October 2019 IEPs or some subsequent IEP(s), they may obtain appropriate relief by challenging the IEP(s) in a separate proceeding (see Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the school year for which such placement is sought has been developed and the parent challenges that IEP]). Accordingly, there is no basis for prospective relief in this matter.[20]

[19] In addition, federal and State regulations also require a CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that, if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). State regulation further provides that, if appropriate, an IEP must be revised to address "any lack of expected progress toward the annual goals and in the general education curriculum," "the results of any reevaluation conducted . . . and any information about the student provided to, or by, the parents," or "the student's anticipated needs" (8 NYCRR 200.4[f][2][i-iii]).

[20] When fashioning relief, a compensatory education award that makes up for special education services that a student should have otherwise received previously is different than interfering with the cooperative educational planning process envisioned under the IDEA by Congress by dictating the services on a going forward basis. Thus, awarding prospective services to a student—under certain circumstances, such as here, where parents seek an IHO or an SRO to order the district to develop an IEP with recommendations for their preferred special education services—has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X, 2008 WL 4890440, at *16 [noting that "services found to be appropriate for a student during one school year are

VII. Conclusion

In summary, a review of the evidence in the hearing record does not support a modification of the IHO's decision or an award of additional relief, other than any missed pendency services to be identified by the parties.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 20, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER

not necessarily appropriate for the student during a subsequent school year"]).