The University of the State of New York

The State Education Department
State Review Officer
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No. 21-182

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

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

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which set an expiration date for the use of compensatory education ordered to make-up for lapses in the delivery of stay-put services during the pendency of the proceedings. Respondent (the district) cross-appeals from that portion of the IHO's decision which ordered the district to fund compensatory education for lapses in the delivery of stay-put services. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has been the subject of several prior impartial hearings involving the 2015-16 (kindergarten) through 2019-20 (fourth grade) school years (see Parent Exs. B-C; see also Parent Ex. A at pp. 4-10). The parties' familiarity with the facts and procedural history leading up to and including the previous proceedings is presumed and the details thereof will be not be summarized. The student began attending Happy Hour 4 Kids (HH4K) in February 2020 where he received 1:1 instruction using applied behavior analysis (ABA) in a group setting, as well as speech-language

therapy and occupational therapy (OT), and he attended weekly social groups (see Parent Ex. M at p. 1).[1]

In a decision arising from proceedings concerning the 2019-20 school year (2019-20 proceedings), dated May 8, 2020, an IHO ordered the district to provide the student with a 12-month school year program in a nonpublic school placement (approved or non-approved) that would provide 1:1 ABA instruction under the supervision of a Board Certified Behavior Analyst (BCBA) or a Licensed Behavior Analyst (LBA) (Parent Ex. B at p. 12). The IHO in that matter ordered that, if the district did not locate such a school within 15 school days, it would be required to "continue to fund the program located by the Parent" (id. at p. 13). The IHO further ordered the district to "provide or fund" the following related services on a 12-month school year basis: five 60-minute sessions of speech-language therapy per week, five 60-minute sessions of OT per week, and four 30-minute sessions of physical therapy (PT) per week "to be provided by providers of the Parent's choosing, at market rate" (id.). The IHO also held that the district would be required to "provide" the student with 20 hours of 1:1 "afterschool/center-based ABA therapy, along with five hours per week of BCBA supervision, one hour per week of BCBA program development, and one hour per week of parent counseling, all to be provided by an ABA therapist or BCBA "of the Parent's choosing, at market rate" (id.). The IHO also ordered the district to provide the student with special education transportation to and from the nonpublic school, including limited travel time and a 1:1 paraprofessional (id.). Finally, the IHO in that matter required the district to reconvene the CSE to develop an IEP to include a specific program and services (id. at pp. 13-14).

According to the parent, on or around June 16, 2020, a CSE convened to develop an IEP for the student for the 2020-21 (fifth grade) school year, but the meeting was adjourned when the committee was advised of the May 2020 IHO decision arising from the 2019-20 proceedings, and no IEP was developed (Tr. p. 157; see Parent Ex. A at p. 10).

In a letter to the district dated June 18, 2020, the parent noted that the district had not, as of that date, developed an IEP for the student, and stated her intent to seek funding from the district for the student's attendance at HH4K for the 2020-21 school year (Parent Ex. D).

A. Due Process Complaint Notice

In a due process complaint notice dated July 2, 2020, the parent alleged that the district denied the student a FAPE for the 2020-21 school year (Parent Ex. A).[2] The parent alleged that the student's most recent IEP was developed at a December 18, 2018 CSE meeting and that no IEP had been created since (id. at pp. 2, 10). As a result, the parent asserted that the district failed to offer the student a program or provide a "placement offer" for the 2020-21 school year (id. at p. 10). The parent further argued that, if the district "trie[d] to defend the issuance of an IEP for the

[1] The Commissioner of Education has not approved HH4K as a school with which school districts may contract to instruct students with disabilities (see Parent Ex. S at p. 1; 8 NYCRR 200.1[d]; 200.7).

[2] The parent also alleged systemic violations of section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794[a]) and the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.) and further stated that the case was being filed "pursuant to the New York State Constitution, United States Constitution and 42 U.S.C. §1983" (section 1983) (Parent Ex. A at pp. 1, 13-14, 15).

2020-2021 school year, it was late" and any such IEP was "substantively and procedurally flawed" (id.). The parent went on to set forth several procedural and substantive allegations related to any evaluations, CSE meetings, or IEPs conducted or developed for the student for the 2020-21 school year (id. at pp. 10-13).

The parent requested that the student's pendency placement be found to include a 12-month school year program in a nonpublic school that provides a full-day of 1:1 ABA instruction under the supervision of a BCBA/LBA and 20 hours per-week of "afterschool/center based ABA therapy home-based," five hours per week of BCBA supervision, one hour per week of BCBA program development, one hour per week of parent counseling and training provided by a BCBA, five 60-minute sessions of 1:1 speech-language therapy per week, five 60-minute sessions of 1:1 OT per week, and four 30-minute sessions of 1:1 PT per week, along with special transportation including limited travel time and a 1:1 transportation paraprofessional (Parent Ex. A at pp. 14-15). The parent requested that the after-school ABA services and BCBA supervision, program development, and parent counseling and training "be provided by a provider of the Parent's choosing at market rate" (id. at pp. 14-15).

For final relief, the parent sought an order requiring the district to develop an IEP that included the program and services noted above with respect to the parent's request for pendency, with the addition of a 1:1 in-school behavior paraprofessional (Parent Ex. A at p. 15). In addition, the parent requested compensatory education to remedy the denial of FAPE for the 2020-21 school year, as well as for "any time periods during the duration of the administrative proceedings during which [the student] does not receive services he is entitled to by law, including any failure of the [district] to provide pendency or comply with interim orders" (id. at pp. 15-16). The parent also sought reimbursement for any debts incurred or funds expended related to the student's education for the 2020-21 school year (id. at p. 16).

B. Subsequent Events

On July 14, 2020, the parent executed a contract for the student's enrollment in a program provided by Manhattan Occupational, Physical and Speech Therapies, PLLC (MOPS) for the 2020-21 school year, to consist of the program and services outlined in the May 2020 IHO decision (Parent Ex. N). Specifically, the contract indicated that MOPS would provide the student with a 12-month school year program consisting of a full-day of 1:1 ABA instruction, 20 hours per week of 1:1 afterschool center-based ABA therapy, as well as speech-language therapy, OT, PT, parent counseling and training, and BCBA supervision in the amounts and frequencies set forth in the May 2020 IHO decision (id. at p. 1).[3]

A CSE convened on August 4, 2020 to conduct the student's annual review and develop an IEP for the student for the 2020-21 school year (Dist. Ex. 1). The CSE found the student eligible

[3] The address and phone and facsimile numbers for MOPS are the same as those listed for HH4K (compare Parent Ex. N at p. 1, with Parent Exs. K; L at p. 1; M at p. 1; O at p. 1; P; Q; R at p. 1; T at p. 1). In addition, the same individual is identified as the owner of both MOPS and HH4K (compare Parent Ex. N at pp. 3, 5, with Parent Ex. S). It appears that the school uses the titles interchangeably. There is no dispute in this matter that the parent contracted for and that the student received a program and services delivered by HH4K (see, e.g., Parent Ex. S; IHO Ex. II at p. 10). Accordingly, further references to the school will use the name HH4K.

for special education as a student with autism and recommended that the student attend a 12-month school year program in a 6:1+1 special class in a district specialized school with the support of a 1:1 behavior support paraprofessional and receive related services of speech-language therapy, OT, and PT, and that the parent receive parent counseling and training (id. at pp. 1, 12-13, 15). The CSE also recommended special transportation including a 1:1 transportation paraprofessional, assistive technology, and a behavioral intervention plan (BIP) (id. at pp. 4, 12, 15).

In a prior written notice and a school location letter, both addressed to the parent and dated September 3, 2020, the district summarized the August 2020 CSE's recommendations and notified the parent of the particular public school to which it assigned the student to attend for the 2020-21 school year (Dist. Exs. 3-4).

C. Impartial Hearing Officer Decision

After a prehearing conference on December 21, 2020, the parties proceeded with an impartial hearing that concluded on July 14, 2021, after the tenth day of proceedings (see Tr. pp. 1-210).[4] In an agreement, dated December 22, 2020, the parties' stipulated that the student's pendency placement consisted of the program and services identified in the May 2020 IHO decision arising out of the 2019-20 proceeding (Parent Ex. E at p. 1; see Parent Ex. B at pp. 12-14). The parties further specified that the program and services would be delivered by HH4K (Parent Ex. E at pp. 1-2). The agreement indicated that the services could be provided remotely "at the parent's election," in which case the remote delivery of services would fulfill the student's pendency program (id. at p. 2).

During the impartial hearing, the district indicated that it would not defend its offer of a FAPE to the student for the 2020-21 school year (Tr. pp. 42-44, 52).

In a decision dated July 20, 2021, the IHO found that, based on the district's concession, the district failed to demonstrate that it offered the student a FAPE for the 2020-21 school year (IHO Decision at pp. 4, 9). The IHO also noted that, although the May 2020 IHO decision arising from the 2019-20 proceeding required a specific program and services to be added to the student's IEP, the August 2020 CSE failed to incorporate the order into the student's IEP (id. at pp. 7-8).

Next, the IHO found that the program and services provided by HH4K, including the home-based services, constituted an appropriate unilateral placement for the student for the 2020-21 school year, notwithstanding changes in the amount or manner of delivery of services during the COVID-19 pandemic (IHO Decision at pp. 6-8, 9). The IHO also found that no equitable considerations would warrant a reduction or denial of relief, noting that the district made no argument regarding equities and that the parent "credibly testified that she consistently cooperated with the [district]" (id. at pp. 8-9).

[4] While the impartial hearing took place over ten hearing dates, only three were devoted to the presentation of substantive testimonial and documentary evidence (see Tr. pp. 37-88). The remaining dates were devoted to status updates and other procedural matters, such as the parties' submission of post-hearing briefs (see Tr. pp. 1-36, 189-210).

The IHO ordered the district to fund the student's tuition, transportation, and related services at HH4K for the 2020-21 school year (IHO Decision at pp. 9, 11). In addition, the IHO found that the student was "entitled to an IEP that incorporates" a 12-month school year program in an "appropriate program (approved or non-approved)" that provides a full-day of 1:1 ABA instruction under the supervision of a BCBA or LBA and 20 hours per-week of 1:1 after-school center-based ABA therapy, 5 hours per week of BCBA supervision, one hour per week of BCBA program development, one hour per week of parent counseling and training, five 60-minute sessions of 1:1 speech-language therapy per week, five 60-minute sessions of 1:1 OT per week, and four 30-minute sessions of 1:1 PT per week, along with special transportation including limited travel time and a 1:1 transportation paraprofessional (id. at pp. 9-10, 10-11). The IHO further required the district to "bank the hours of services for any of the pendency services the Student did not receive for the 2020-2021 school year, and such services to be utilized by July 20, 2022" (id. at pp. 10, 11). Finally, the IHO required that the district provide the student with assistive technology supports and services (id. at pp. 10, 11).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in setting an expiration date for the use of the pendency compensatory education. The parent argues that the expiration date was "without justification," was unsupported by the hearing record, and failed to provide the student enough time to use the services.

In an answer with cross-appeal, the district responds to the parent's allegations with general admissions and denials. As for its cross-appeal, the district argues that the IHO erred in ordering it to fund missed pendency services. First, the district argues that the parent did not raise a claim related to missed pendency services with specificity in her due process complaint notice and, therefore, the IHO erred in ordering pendency compensatory education. Further, the district asserts that it should not be required to fund pendency compensatory education since the district did not fail to implement the pendency services. The district argues that the parent's unilateral placement of the student "at HH4K meant that HH4K bore a contractual obligation to provide [the student] the services to which he was entitled pursuant to pendency." The district claims that it had no authority to control whether HH4K delivered the services.

The parent responds to the allegations in the district's cross-appeal in an answer.

V. Applicable Standards

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

Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

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

VI. Discussion

Neither party has appealed the IHO's determinations that the district failed to offer the student a FAPE for the 2020-21 school year, that the parent's unilateral placement of the student at HH4K was appropriate, or that equitable considerations supported an award of district funding of the costs of the student's unilateral placement. Further neither party has appealed the IHO's order requiring that the district develop an IEP for the student with a specified program and services. Accordingly, these determinations have become final and binding on the parties and will not be discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). The parties' allegations on appeal are limited to challenging the IHO's order of compensatory education to remedy any lapse in the delivery of the student's stay put services during the pendency of this matter.

As noted above, the parent and the district agreed that HH4K would deliver the student's pendency program and services, including a full school day consisting of 1:1 ABA therapy, afterschool 1:1 ABA therapy, and related services, as well as BCBA supervision and program development and parent counseling and training (Parent Ex. E).

With respect to the program and services delivered to the student during the 2020-21 school year, the student attended HH4K in person during July and August 2020 and received speech-language therapy and OT, as well as afterschool ABA (Tr. pp. 87-88, 170; see Parent Ex. P). After the summer session, in September 2020, the student transitioned to remote learning with HH4K, the schedule for which mirrored the in-person school day program and consisted of 1:1 live sessions of instruction using ABA, as well as speech-language therapy and OT (Tr. pp. 89-90, 124, 126; see Parent Ex. O). The BCBA from HH4K testified that the student did not attend every remote session, either because his behavioral needs made it difficult for the family "to get him to sit and attend" or because a family member was not available due to their schedule (Tr. pp. 126-29). In addition, the parent indicated that, at some point, the length of the student's speech-language therapy sessions was shortened because of the student's inability to attend (Tr. pp. 174-75). A November 2020 "sample daily schedule" for the student reflected 30-minute sessions of OT and speech-language therapy (Parent Ex. O). Further, an April 2021 progress report completed by the student's providers indicated that between January and April 2021, the student attended 5 of 22 OT sessions and 2 of 21 speech-language therapy sessions (Parent Ex. T at p. 8). In addition, the student did not receive PT at any point during 2020-21 school year because the provider from HH4K left "unexpectedly due to COVID" and the school was unable to find a replacement provider (Tr. p. 100; see Tr. p. 176). While the student was participating in remote instruction during the school day, he did not receive afterschool ABA therapy due to restrictions and parent concerns related to the COVID-19 pandemic (Tr. pp. 93, 108-11, 131). The student's BCBA alternatively opined that the student was not receiving afterschool ABA services remotely because, if he did, the length of time in front of a screen would be excessive (Tr. pp. 131-32).

The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [directing full reimbursement for unimplemented

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

However, this is not a case in which a district was required to provide pendency services to the student and, having failed to have done so, an order of reimbursement for services the parent obtained or for compensatory make-up services from private providers (as opposed to district providers) may have been warranted (see E. Lyme, 790 F.3d at 456-57). If this were a situation in which a district was directly responsible for the actual delivery of services pursuant to pendency and there was a lapse in services, the appropriate relief would be compensatory or make-up services to remediate the deficiency as the Second Circuit indicated (see id.). However, that is not the circumstance presented here.

Rather, the parent obtained an IHO order allowing her to select the providers to deliver the student's programming (Parent Ex. B at pp. 12-14). The parent did not appeal that order. Thereafter, the parent contracted with a private agency for the delivery of the student's program and services (Parent Ex. N) and entered into an agreement with the district providing that the parent's selected provider would continue to deliver the services during the pendency of the proceedings at district expense (Parent Ex. E at p. 1). Having arranged for and agreed to the delivery of the services by the private agency, the parent elected to carry the responsibility for ensuring the delivery of the stay-put services, with the district remaining responsible only for funding the services so delivered. As such, the parent assumed the risk that unforeseen events would cause the terms of the pendency agreement to be undesirable. Thus, for example, HH4K's loss of and inability to replace a PT provider was a risk that the parent assumed, which came to fruition.

There is no allegation that the district failed to fund the student's pendency program or services or otherwise caused an interruption to the status quo.[5] "Even in light of the tremendous difficulties placed on all students, parents, and school employees by COVID-19," there is no indication that the district was not "substantially complying with the [pendency] [a]greement" between the parties (Killoran v. Westhampton Beach Sch. Dist., 2020 WL 5424722, at *2-*3 [E.D.N.Y. Sept. 10, 2020] [finding that a district did not violate stay put where neither a library nor the school was available for delivery of the student's pendency services during the COVID-19 pandemic and the parents did not want someone to deliver services in their home and did not agree to remote delivery of services]). Here, it was HH4K that did not deliver all of the student's services and it was the parent, not the district, who decided not to take advantage of afterschool ABA services for the student during the pendency of the proceedings. I am sympathetic to the

[5] As such, the circumstances here are distinguishable from the matter before the Second Circuit in Doe v. East Lyme Board of Education, wherein the district had ceased funding private services that it had previously funded and, therefore, interrupted the status quo, causing the parent to have to obtain the services she could afford and resulting in an award of compensatory education for the services that the parent did not fund (790 F.3d at 447, 456-57).

circumstances surrounding the parent's choice in this regard as related to concerns and challenges arising from the COVID-19 pandemic. But the parent's decision to not avail herself of the afterschool pendency services, however reasonable, does not result in an order requiring the district to fund compensatory education to make-up for any missed services that resulted from the parent's choice.

VII. Conclusion

Having found that the IHO erred in ordering compensatory education to remedy a lapse in the delivery of stay-put services by the parent's selected provider, the necessary inquiry is at an end. In light of my determination, I need not address the district's remaining argument regarding the scope of the impartial hearing.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated July 20, 2021, is modified by reversing that portion which ordered the district to provide or fund compensatory education services for any of the pendency services the student did not receive during the 2020-21 school year.

Dated: **Albany, New York**
September 30, 2021

STEVEN KROLAK
STATE REVIEW OFFICER