The University of the State of New York

The State Education Department
State Review Officer
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No. 21-236

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Brian J. Reimels, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondents, by Peter G. Albert, 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 district) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) awarding transportation as part of respondents' (the parents') daughter's pendency placement during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student for the 2021-22 school year. The parents cross-appeal from the IHO's determination which denied their request for a 1:1 paraprofessional and music therapy as part of the student's pendency. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

Due to the nature of this appeal from an interim decision related to pendency and a scant hearing record, a full recitation of the student's educational history is not necessary or possible. Briefly, the student began attending the International Institute for the Brain (iBrain) during the 2018-19 school year, which was the subject of two prior State level appeals (see Parent Ex. A at p. 3; Application of a Student with a Disability, Appeal No. 19-089; Application of a Student with a Disability, Appeal No. 18-123). For the 2019-20 school year, the student continued to attend iBrain and was the subject of two additional prior State level appeals (see Parent Ex. B; Dist. Ex.

1; Application of a Student with a Disability, Appeal No. 21-056; Application of the Dep't of Educ., Appeal No. 20-039).[1]

The CSE convened on May 6, 2020, to develop the student's IEP and recommended a program with an implementation date of May 22, 2020 (see generally Parent Ex. D). The CSE next convened on February 25, 2021 to develop the student's IEP and recommended a program with an implementation date of March 22, 2021 (see generally Parent Ex. E). The parents placed the student at iBrain for the 2019-20 and 2020-21 school years (see Parent Exs. C; F).

A. Due Process Complaint Notice

In a due process complaint notice dated July 8, 2021, the parents alleged that the district denied the student a FAPE for the 2021-22 school year (see Parent Ex. A). As relevant to this appeal, the parents asserted that the basis for the student's pendency placement was found in Application of a Student with a Disability, Appeal No. 21-056 (id. at p. 2). The parents asserted that their specific pendency request was for: (1) direct payment by the district of the student's tuition and costs for related services at iBrain; and (2) direct payment of special transportation services and support costs to and from iBrain (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 16, 2021 for the initial purpose of holding a prehearing conference to determine the parties' positions as to the student's pendency placement and continued for two additional days of proceedings with a pendency hearing occurring on October 27, 2021 (Tr. pp. 1-40). More specifically, while the parties agreed that pendency lay in the unappealed SRO decision in Application of a Student with a Disability, Appeal No. 21-056, at iBrain, they presented arguments and evidence regarding whether the student's pendency placement included music therapy, a 1:1 paraprofessional, and transportation (id.).[2] In an interim decision dated November 18, 2021, the IHO determined that he agreed with the district that the order for music therapy and the 1:1 paraprofessional should be denied as it was not addressed in the SRO decision (Nov. 18, 2021 IHO Decision at pp. 2-3).[3] In particular, the IHO referenced the district's argument that music therapy is not a related service contemplated by the regulations, and that services such as music therapy, which may be beneficial for the student, can be denied in the absence of evidence that a student could not receive a FAPE without it, noting the district's argument that there was no finding about music therapy and whether it was clinically necessary for this student to receive a FAPE (id. at p. 2). Further, the IHO noted that "[m]usic therapy was not at issue when [the] SRO 21-056 decision was rendered and it was not adjudicated" (id.).

[1] A copy of the SRO decision in Application of a Student with a Disability, Appeal No. 21-056 was submitted as an exhibit by both the parents and the district (Parent Ex. B; Dist. Ex. 1).

[2] I note that District Exhibits 5 and 6, the 2019-20 transportation contract and 2019-20 enrollment contract, respectively, were not admitted into evidence at the impartial hearing but were attached to the district's October 27, 2021 Pendency Letter Brief and, according to the record, were considered by the IHO prior to issuing his pendency order (see Written Clarification by Hearing Officer dated Dec. 6, 2021).

[3] The hearing record also includes a proposed pendency order dated October 27, 2021, which is unsigned (Oct. 27, 2021 Interim Order of Pendency; IHO Ex. I; see also Written Clarification by Hearing Officer dated Dec. 3, 2021).

However, the IHO agreed with the parents that pendency includes all costs of "special education" and "related services," including transportation, under New York law and the IDEA, and further found that "when a student receives special transportation services, an order on pendency without transportation to his school would render the award meaningless" (id.).

IV. Appeal for State-Level Review

The district appeals the November 18, 2021 interim order on pendency, initially asserting that the late filing of the notice of intention to seek review should be excused as the parents were not prejudiced by the late filing, and that the October 27, 2021 order should be declared a nullity as the IHO acknowledged it was sent to the parties in error and should be disregarded. The district argues that the IHO erred in concluding that pendency included transportation. Specifically, the district asserts that the IHO's "determination to award transportation as part of pendency given his reading that transportation is included as a related service pursuant to the IDEA and N.Y. Education Law" was a "misreading of the facts underlying this case." The district further asserts that "[e]ven if transportation is listed as a related service under applicable special education law, that mere fact does not equate to a finding" that the SRO's decision in Application of a Student with a Disability, Appeal No. 21-056 included transportation in its findings. The district contends that it is "clear" from the underlying IHO decision that transportation was not awarded because the IHO's calculation "explicitly excluded transportation" by only including the costs of iBrain's base tuition and the related services directly provided by iBrain, and due to the "exclusion of the separately billed and contracted transportation costs" from the calculation. Moreover, the district contends that the SRO decision in Application of a Student with a Disability, Appeal No. 21-056 was "silent as to transportation expenses" because the parents did not appeal from the IHO's lack of transportation relief, and "[i]t follows" that, as the SRO decision did not include transportation expenses as part of its award of relief, it cannot be said to be part of the student's pendency placement in this appeal. In addition, the district argues that the IHO's finding that "related services" includes transportation "is a misreading of the pendency regulation and the notion of stay-put" because to read "related services" as encompassing transportation "or any related service under the sun" would allow a prior IHO decision that awarded related services to be used as a "blank check" in subsequent years for parents to "pick and choose" any related services they wished to be funded via pendency which "runs afoul" of Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531-36 (2d Cir. 2020). Finally, the district argues that the IHO's determination that "when a student receives special transportation services, an order on pendency without transportation to his school would render the award meaningless" is a "misreading of the pendency regulations" because the IHO's role was not to determine what was "fair or appropriate" but only what the student's last agreed-upon program was, and further that the record does not indicate that the student is not being transported to and from iBrain during the 2021-22 school year, for which the parents may seek payment at the hearing on the merits.[4] In its request for relief,

[4] The district also asserts that the following additional evidence submitted with its request for review should be accepted in order to reach a proper conclusion as to the student's pendency, including: the underlying IHO Decision on appeal in Application of a Student with a Disability, Appeal, No. 21-056 (Req. for Rev. SRO Ex. A); the iBrain Tuition Affidavit dated Aug. 30, 2019 submitted into evidence as Parent Ex. H in the prior proceeding (Req. for Rev. SRO Ex. B); and email communication between the IHO and the parties confirming that the October 2021 proposed pendency order was sent to the parties in error and stating that a final decision was forthcoming (Req. for Rev. SRO Ex. C). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been

the district requests findings that the October 2021 pendency order is null and void and that the IHO's award of transportation as part of pendency be reversed.

In their answer, the parents respond with admissions and denials, and state that they "concur" that the "proposed" October 2021 pendency order was not an order issued by the IHO in this appeal and is "essentially a nullity" stating that the "proposed order on pendency" was submitted by the parents at the request of the IHO "after multiple proceedings and submissions on the issue of the [p]arents' request for pendency." As for a cross-appeal, the parents assert that the IHO correctly determined that special transportation is included in the student's pendency placement, however, that the IHO erred in excluding the 1:1 paraprofessional and music therapy as part of the student's pendency placement. With respect to special transportation, the parents argue that although neither relevant IHO or SRO decision explicitly includes special transportation, "there is no requirement that a pendency order or determination must enumerate each and every subject taught, service provided, or element of the student's educational placement" in order for it to be included as pendency, only that the student remain in the "then-current educational placement," also not specifically defined but held to be the substance of the program the student receives, including classes, individual instruction, and services. The parents also argue that pursuant to the IDEA and its regulations, transportation is included in the "very definition" of related services and pursuant to State education law and regulations, transportation is included in the "very definition" of special education. With respect to the 1:1 paraprofessional and music therapy, the parents argue that neither the relevant IHO nor SRO decisions "explicitly includes—or excludes" the 1:1 paraprofessional or music therapy for pendency and that both items are "integral parts" of the student's program without which she would be "unable to attend any educational placement or receive any educational benefits." The parents contend that the IHO based his decision on the student's program for the 2019-20 school year in Application of a Student with a Disability, Appeal No. 21-056 and the underlying IHO decision, in which the parents' enrollment contract provided that the student's base tuition included the cost of an individual paraprofessional and that the student has "continuously received" these services for several school years which are "clearly" part of her appropriate educational program and placement; the removal of which would prevent the student from receiving educational benefits and deny her a FAPE.[5]

offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). These documents were available at the time of the impartial hearing and they are not necessary in order to render a decision in this appeal. Further, proposed SRO Exhibits A and B are available as part of the hearing record in Application of a Student with a Disability, Appeal No. 21-056, and SRO Exhibit C is part of the hearing record in this proceeding (see 8 NYCRR 279.9[a]). However, when referring to the above documents that are already contained in the hearing record for either Application of a Student with a Disability, Appeal No. 21-056 or this matter, they will be cited to as SRO Exs. A, B and C for ease of reference.

[5] The parents request that the 2019-20 iBrain enrollment contract submitted with their answer be accepted as additional evidence (SRO Ex. 1). As noted above, generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). This document was available at the time of the

Likewise, the parents argue, music therapy is an "integral" part of the student's program and placement, the exclusion of which would diminish her ability to receive educational benefits.

In an answer to the parents' cross-appeal, the district asserts that the IHO correctly determined that the student's pendency does not include music therapy, but should include the 1:1 paraprofessional.[6] The district asserts that it agrees with the parents that pendency should include the provision of a 1:1 paraprofessional because the relevant SRO decision and underlying IHO decisions both describe the student as receiving the services of a 1:1 paraprofessional during the 2019-20 school year, which is confirmed by the 2019-20 iBrain enrollment contract stating that the student's base tuition included the cost of a 1:1 paraprofessional, and as such was included in the ultimate award of relief. The district argues that the IHO's decision in this appeal should be modified to include the 1:1 paraprofessional. The district next asserts that "for the same reasons," the IHO's determination that music therapy is not part of pendency should be sustained, as the record "is silent" on the student receiving music therapy during the 2019-20 school year—in laying out the student's related services received during the 2019-20 school year in Application of a Student with a Disability, Appeal No. 21-056, "music therapy was not listed as a related service that iBrain was providing to the [s]tudent"—thus, the district argues that it is "inescapable" that music therapy is not part of the student's pendency program. Finally, the district notes that the "appropriateness or benefit" of music therapy to the student's 2021-22 program has no bearing on whether it is part of the student's pendency entitlement.

In a reply, the parents state that contrary to the district's argument, it is "irrelevant" whether there is record evidence indicating that the student is currently receiving transportation services, rather pendency includes all elements of the student's educational placement for which she is entitled under federal and State law. The parents assert that neither the relevant SRO decision nor the underlying IHO decision "carve[d] out" an exception for the costs of the student's transportation to and from school so that "the award to the [p]arents included the costs of tuition, related services and transportation." The parents also include assertions, apparently for the first time, that transportation and music therapy are elements of the student's "operative placement"—transportation because the student "has received special transportation for multiple years" and music therapy because it was "a related service the [s]tudent received when the underlying due process complaint was filed."

impartial hearing and is not necessary in order to render a decision in this appeal. Further, proposed SRO Exhibit 1 is the same as District Exhibit 6 in this proceeding, and is available as part of the hearing record in Application of a Student with a Disability, Appeal No. 21-056 as Parent exhibit K.

[6] The district notes that the parents' first issue on cross-appeal appears to be an answer rather than a cross-appeal, as the parents were not aggrieved by the IHO's ruling on transportation, thus not necessitating an answer from the district. However, if an answer is required, the district asserts that in response to the parents' claim that without transportation the student would be unable to attend her educational program or receive educational benefits, the district reiterates that the hearing record does not indicate that the student is not currently being transported to and from iBrain on a daily basis, and the "only issue on appeal is whether payment for that transp[ort]ation is part of the [s]tudent's pendency entitlement, or relief which could be granted after a full hearing on the merits."

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., 752 F.3d at 170-71; 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).

VI. Discussion

Initially, I will discuss those claims upon which the parties agree and are no longer in dispute. First, the parties agree that the proposed order of pendency dated October 27, 2021 (IHO Ex. I) should be declared a nullity, as the parents "concur" with the district's request and state that the "proposed order on pendency" was submitted by the parents at the request of the IHO "after multiple proceedings and submissions on the issue of the [p]arents' request for pendency" to represent their pendency request, and also because the IHO—in an October 28, 2021 email communication with the parties on the subject stated that the proposed order "was sent in error please disregard" and that the IHO "w[ould] be submitting [his] final decision [s]hortly"—acknowledged that the October 2021 proposed pendency order was sent to the parties in error and that the November 18, 2021 IHO Decision was his final decision in this matter (see SRO Ex. C). Based on my review of the hearing record, and the agreement of the parties, I find that the October 2021 pendency order is null and void, as is the issue of the district's "late" filing of its notice of intention to seek review based on its service on December 1, 2021.[7]

Similarly, with respect to the student's 1:1 paraprofessional, the district now agrees with the parents that the 1:1 paraprofessional should be granted as part of the student's pendency. Here, the parties agree that the student's educational placement for purposes of pendency is based on the unappealed SRO decision in Application of a Student with a Disability, Appeal No. 21-056 dated April 5, 2021 (see Parent Ex. B). That SRO decision and the underlying IHO decision both described the student as receiving the services of a 1:1 paraprofessional during the 2019-20 school year—the SRO decision stated that "[a]ccording to the IEP, the student benefitted from 1:1 paraprofessional services … to maximize attention to tasks" (Parent Ex. B at p. 22)—and the underlying IHO decision noted that the student "had her own 1:1 paraprofessional" (SRO A at pp. 12-13). In addition, the 2019-20 iBrain enrollment contract stated that the student's "[b]ase [t]uition includes the cost of an individual paraprofessional" (Dist. Ex. 6 at p. 1). Therefore, as the parties request, I will modify the IHO Decision to include the student's 1:1 paraprofessional services as part of her pendency placement.

Turning to the crux of the parties' remaining issues on appeal, with respect to transportation, the district argues in its request for review that the IHO erred in including

[7] The district's notice of intention to seek review would have been late if calculated from the October 27, 2021 date of the proposed order based on its service date of December 1, 2021; however, as the proposed order is a nullity, the timing of the notice of intention to seek review is not an issue.

transportation as part of the student's pendency placement, while the parents argue to uphold the IHO's determination. Initially, the district argues that the IHO's award of transportation as part of pendency, "given his reading that transportation is included as a related service pursuant to the IDEA and N.Y. Education Law" was a "misreading the facts underlying this case."

In general, the IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]).

School districts in this jurisdiction are already required to comply with the minimum transportation requirements of nonpublic school students set forth in state law regardless of whether a student is disabled or not (see, e.g., Educ. Law § 3635), and local school officials often further extend transportation to all students in a manner that exceed the State requirements through locally promulgated policies (see Pupil Transportation: General Information For Parents and Others, available at http://www.p12.nysed.gov/schoolbus/Parents/htm/general_info_intro.htm). Specialized forms of transportation must be provided to a student with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Tatro, 468 U.S. at 891, 894; Dist. of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The requested transportation must also be "reasonable when all of the facts are considered" (Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 [5th Cir. 1986]).

According to a guidance document, the CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and that the IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate" ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B., 117 F.3d at 1375; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]).

With respect to the student's need for special transportation services, it should be noted that both the May 2020 and February 2021 IEPs included recommendations for special transportation for the student, including air conditioning, limited travel time, and the support of a 1:1

paraprofessional (Parent Exs. D at pp. 27-28; E at pp. 32-33). However, as noted above, the analysis for pendency is separate from the analysis of the program offered to 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 ["pendency placement and appropriate placement are separate and distinct concepts"]).

The district argues that it is "clear" that the underlying IHO decision did not award transportation because the IHO's calculation "explicitly excluded transportation" by only including the costs of iBrain's base tuition and related services and excluding the separately billed and contracted transportation costs, and it "follows" that the decision in Application of a Student with a Disability, Appeal No. 21-056 did not include transportation expenses, so they are not part of the student's pendency placement. The parents counter that although neither the relevant IHO nor SRO decision explicitly included special transportation, "there is no requirement that a pendency order or determination must enumerate each and every subject taught, service provided, or element of the student's educational placement" for it to be included in pendency, only that the student remain in the "then-current educational placement" which is the "educational program the student receives, including, but not limited to classes, individual instruction and services."

Here, as noted above, the parties agree that the student's educational placement for purposes of pendency is based on the unappealed SRO decision in Application of a Student with a Disability, Appeal No. 21-056 relating to the student's 2019-20 school year. With respect to transportation, the SRO decision, as the district points out, is "silent as to transportation expenses"; however, in a footnote the decision notes that "[o]n July 8, 2019, the parents signed a transportation contract for the 2019-20 extended school year for the student's transportation to and from iBrain" (Parent Ex. B at p. 6; Dist. Ex. 5). Review of the parent's due process complaint notice in that proceeding shows that the parents requested the cost of transportation for the student, including a 1:1 paraprofessional (Parent Ex. A at p. 3 in Application of a Student with a Disability, Appeal No. 21-056). However, the underlying IHO decision only included a statement referencing transportation in the unilateral placement discussion section, which provided that "[w]hile the student's tuition contract states that the iBrain's annual tuition cost is $153,000.00, the student's actual iBrain program cost, including the additional costs for related services and transportation for the 2019-2020 [s]chool [y]ear is approximately $260,458.00" (citing to the parents' transportation agreement, enrollment contract, and tuition affidavit exhibits) (SRO Ex. A at p. 26). The IHO concluded his decision with the flowing directive:

> I find that the DOE is to pay a reduced sum of 65% of the cost for tuition/related services ($208,518.00) to the iBrain school. This reduction is based upon the equitable prin[c]iples as stated herein for the 2019-2020 school year for [the student] and order as follows: That DOE is to pay a reduced sum [of] $135,536.70 to the iBrain school for the 2019-2020 school year for [the student], within 30 days of receipt of this decision.

(SRO Ex. A at p. 31).

Based on the 2019-20 tuition affidavit which gives the base iBrain tuition amount of $153,000 and the "supplemental tuition" which consists of the listed related services (OT, PT, speech-language therapy, assistive technology services, and parent counseling and training) costs of $55,518, it appears that the IHO's reduction calculation did not include the cost of transportation, but only the costs of tuition and related services equaling the amount of $208,518 to be paid to

iBrain, which the IHO reduced based upon equitable considerations that he found weighed against the parents (see SRO Ex. B).[8] As the only directive included in the IHO decision was the directive that the district pay the sum of $135,536.70 to iBrain, the IHO decision did not include an award for transportation expenses (SRO Ex. A at p. 31). In the parent's request for review in Application of a Student with a Disability, Appeal No. 21-056, the parents asserted that the IHO erred because he "improperly reduced the award of direct payment for tuition and related services (albeit not transportation) by 35%" (Req. for Rev. ¶9 in Application of a Student with a Disability, Appeal No. 21-056. However, the parents did not assert that the IHO erred in failing to address the request for transportation expenses nor did the parents request payment for transportation expenses on appeal (see Parent Ex. B). Accordingly, a fair reading of the determinations in Application of a Student with a Disability, Appeal No. 21-056 requires the conclusion that special transportation was not included as part of the award in that matter. As payment for the cost of special transportation for the student was not part of the decision establishing the student's pendency placement, the IHO erred in directing payment for those services as part of pendency.

Finally, in awarding payment for special transportation as part of the student's pendency, the IHO determined that "an order on pendency without transportation to [the student's] school would render the award meaningless" (IHO Decision at p. 2). However, as noted above, the parents privately obtained special transportation services for the student to and from iBrain during the 2019-20 school year (Dist. Ex. 5). There is nothing in the hearing record to suggest that the parents have been unable to obtain the same transportation services for the student for the 2020-21 or 2021-22 school years as they obtained for the student for the 2019-20 school year. In the event that the parents no longer wish to obtain private transportation services for the student (that are not covered under pendency), they may seek to have the district provide transportation for the student under the general requirements governing the district's responsibility to provide nonpublic school students with transportation to and from school "in a reasonably safe, economical and efficient manner" (Pupil Transportation: General Information For Parents and Others, available at http://www.p12.nysed.gov/schoolbus/Parents/htm/general_info_intro.htm; see Educ. Law 3635). Additionally, a request for special transportation is included in the parents' due process complaint notice and, in the event the parents are successful in litigating this matter, the parents may seek reimbursement or direct payment for the cost of special transportation provided to the student during the school year at issue after a hearing on the merits.

On the issue of music therapy, the parents argue in their cross-appeal that neither the relevant IHO nor SRO decision "explicitly includes—or excludes" music therapy for pendency purposes, and that music therapy is an "integral" part of the student's program and placement, the exclusion of which would diminish her ability to receive educational benefits. The district asserts that the IHO's determination that music therapy is not part of the student's pendency placement should be sustained, because the record "is silent" on the student receiving music therapy during the 2019-20 school year—particularly in Application of a Student with a Disability, Appeal No. 21-056, "music therapy was not listed as a related service that iBrain was providing to the [s]tudent" in its description of the student's related services received during the 2019-20 school

[8] This explains the difference of the total costs of the student's program as identified in the IHO Decision, with the cost of the student's program at iBrain including transportation being described as $260,458, and the cost of tuition and related services being described as $208,518 (SRO Ex. A at pp. 26, 31).

year—and that the "appropriateness or benefit" of music therapy to the student's 2021-22 program has no bearing on whether it is part of the student's pendency entitlement.

An IEP must include a statement of the related services recommended for a student based on such student's specific needs (8 NYCRR 200.6[e]; see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]). "Related services" is defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" and includes psychological services as well as "recreation, including therapeutic recreation" (20 U.S.C. § 1401[26][A] [emphasis added]; see 34 CFR 300.34[a]; 8 NYCRR 200.1[qq]).[9]

Here, a review of the hearing record does not indicate that the student was receiving music therapy as part of her 2019-20 program and placement. Neither the relevant SRO decision nor the underlying IHO decision indicate that the student was receiving music therapy—the SRO decision's only references to music are in a description of a social worker-conducted classroom observation in spring 2019 and in a description of the student's gross motor and adaptive skills in a June 2019 IEP—and while the IHO's underlying decision discusses the student's related services, there is no reference to music or music therapy (see Application of a Student with a Disability, Appeal No. 21-056, at pp. 14-15; SRO Ex. A). Thus, I find that music therapy is not part of the student's pendency placement.

Additionally, the hearing record includes copies of both the district and iBrain IEPs for the 2020-21 and 2021-22 school years (Parent Exs. C; D; E; F). The student's IEPs for the 2020-21 school year reflect that the student was recommended for music therapy services for two 30-minute sessions per week individually and one 60-minute group session per week, and for the 2021-22 school year the student's iBrain IEP reflects that she was recommended for music therapy for two 60-minute sessions per week individually and one 60-minute group session per week, and included descriptions of her activities, progress, and benefits related to music therapy (Parent Exs. C at pp. 10-12; D at pp. 8-10; F at pp. 17-18). It is noted that the 2020-21 district IEP did not list or discuss music therapy services in the related services sections of the IEP (see Parent Ex. D). I find that the "appropriateness or benefit" of music therapy to the student's 2021-22 program has no bearing on whether it is part of the student's pendency entitlement, as asserted by the district, nor does the presence of music therapy services in the 2020-21 IEPs. However, I note that if iBrain is providing music therapy to the student in addition to her base academic program for the 2021-22 school year, nothing determined herein would prohibit the continuation of those services. To the extent that the parents argue that music therapy is an "integral" part of the student's program and placement, the exclusion of which would diminish her ability to receive educational benefits, music therapy is a claim which the parents included in their due process complaint notice and for which they may

[9] Under State law, creative arts therapists, who are often trained in music therapy, are licensed as mental health practitioners (see Educ. Law § 8404[1][a], [b] [defining the practice of creative arts therapy as the "assessment, evaluation, and the therapeutic intervention and treatment . . . of mental, emotional, developmental and behavioral disorders through the use of the arts as approved by the [Education D]epartment" and involving the "use of assessment instruments and mental health counseling and psychotherapy to identify, evaluate and treat dysfunctions and disorders for purposes of providing appropriate creative arts therapy services"]; Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 386 [2004] [noting that for purposes of State licensing "music therapists" are now referred to as "creative arts therapists"]; People v. R.R., 12 Misc. 3d 161, 168 [Sup. Ct. New York Cnty. 2005]; see generally Educ. Law § 8412; 8 NYCRR 79-11.3, 79-11.7, 200.1[qq]).

seek relief at the hearing on the merits (see e.g., N.K., 961 F. Supp. 2d at 592-93 [finding that, although the evidence may have supported that music therapy was beneficial for the student, it did not support the conclusion that the student could not receive a FAPE without it]).

I also disagree, to the extent this argument is asserted by the parents in their reply, that transportation and music therapy are elements of the student's "operative placement"—transportation because the student "has received special transportation for multiple years" and music therapy because it was "a related service the [s]tudent received when the underlying due process complaint was filed." I note that the parents raise this argument apparently for the first time here, and find that they cannot assert that transportation and music therapy are part of the student's operative placement having already argued and agreed that the student's educational placement for purposes of pendency is based on the unappealed SRO decision in Application of a Student with a Disability, Appeal No. 21-056, as a student's then current placement is not some hybrid of options.[10]

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's ultimate determination that the student's pendency placement does not include the provision of music therapy, requires a finding that the IHO erred in finding that the provision of a 1:1 paraprofessional was not included as part of the student's pendency program, and also requires a finding that the IHO erred in directing the district to fund the cost of transportation as a part of the student's pendency placement, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that the IHO's decision dated October 27, 2021 is vacated; and

IT IS FURTHER ORDERED that that the IHO's decision dated November 18, 2021 is modified by reversing those portions which found that the support of a 1:1 paraprofessional was not included as part of the student's pendency placement and that the student's pendency placement included the cost of transportation services.

Dated: **Albany, New York**
February 18, 2022

CAROL H. HAUGE
STATE REVIEW OFFICER

[10] The parents are reminded that a reply is restricted by State regulation to addressing "any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal." (8 NYCRR 279.6[a]). The reply should not be used to impermissibly introduce new claims.