The University of the State of New York

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

No. 22-103

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 Davenport, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondent, by John Henry Olthoff, 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 from a decision of an impartial hearing officer (IHO) which ordered it to fund compensatory educational services to remedy its failure to implement the student's stay-put placement during the pendency of the proceedings. 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]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). 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

In spring 2017, the student was referred to the Early Intervention Program (EIP) for special education services (see Dist. Ex. 18 at p. 2).[1] Thereafter, through the EIP, the parent referred the

[1] Although only some of the district's exhibits, as numbered, were offered and/or entered into evidence (specifically exhibits 1-3, 5-39, 43, 51-52, 57, 69-70, 72-79, and 81), the district filed district exhibits 1-81

student to the CPSE for an evaluation to determine whether he was eligible for special education as a preschool student with a disability and to ensure continuity of services (Dist. Ex. 15). The EIP obtained psychological, developmental, occupational therapy (OT), and speech-language therapy evaluations of the student between June and September 2017 (Dist. Exs. 3; 13; 14; 28). The CPSE obtained additional evaluations and reports about the student in October and November 2017, including a home language survey report, a physical therapy (PT) evaluation, a social history report, and a classroom observation (Dist. Exs. 2; 12; 20; 21; 32). Broadly speaking, the evaluations and reports indicated that the student had developmental delays across domains, including delayed cognitive, expressive and receptive language, gross and fine motor, sensory processing, social/emotional, and adaptive and self-help skills (see Dist. Exs. 3 at p. 6; 13 at pp. 8-9; 14 at p. 6; 28 at p. 6). The psychologist who conducted the September 2017 psychological evaluation opined that, while the student presented with social/emotional delays and repetitive behaviors, he did not meet the criteria for a diagnosis of an autism spectrum disorder (Dist. Ex. 13 at p. 9). The psychologist indicated that, given the student's "behavioral features," he was at risk for meeting the criteria for a diagnosis of attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder, and/or some other dysregulation disorder (id.). Reportedly, the student received the following services through the EIP in his home on a weekly basis: 10 hours of applied behavior analysis (ABA) therapy (although he was authorized to received 20 hours) from the agency Los Ninos, as well as three 30-minute sessions of speech-language therapy, three 30-minute sessions of physical therapy (PT), and three 30-minute sessions of occupational therapy (OT) through the agency Sensory Freeway (see Dist. Exs. 2 at p. 1).[2]

A CPSE convened on November 17, 2017, and, upon finding the student eligible for special education as a preschool student with a disability, recommended the student attend an 8:1+2 special class in an approved special education preschool program and receive related services on a weekly basis consisting of five 30-minute sessions of individual speech-language therapy, three 30-minute sessions of individual OT, and three 30-minute sessions of individual PT, all for an extended 12-month school year (Dist. Ex. 18 at pp. 1, 14-15, 17). The IEP had a projected implementation date of September 1, 2018 (id. at pp. 2, 14).[3] According to the CPSE administrator, during the meeting, the parent wondered whether special education itinerant teacher (SEIT) services with related services would be a program better suited to the student's needs but

inclusive with the record on appeal. Exhibits not entered into evidence have been disregarded.

[2] Although the IHO requested a copy of the student's individualized family service plan (IFSP) and the parent pre-marked the document for evidence, ultimately, the IFSP was not included in the hearing record (Tr. pp. 12, 651-55).

[3] Generally, a student's eligibility for early intervention services ends as of his or her third birthday (see 20 U.S.C. § 1432[5][A]; 34 CFR 303.211[a]); however, State law provides that children in EIPs who are evaluated by the district's CPSE before their third birthday and found to be eligible for preschool educational services under the IDEA, and turn three years of age on or before the last day of August, are eligible to continue receiving early intervention services until the first day of September of the same calendar year if their parents so elect (see Pub. Health Law § 2541[8][a][i]). The student turned three after the November and December CPSE meetings finding him eligible for special education as a preschool student with a disability but before August 31, 2018 (see Dist. Exs. 17 at p. 1; 18 at p. 1). According to the CPSE administrator, the parent had originally elected for the student to continue to receive services through the EIP through August 31, 2018 (Tr. pp. 270, 390-91, 579-80; see Dist. Ex. 29 at p. 1).

agreed to visit an 8:1+2 special class (Tr. pp. 296-97). The parent testified that she was given the name of two programs, which she visited, but that she was told the schools were full and, moreover, that the programs did not offer an appropriate environment for the student (Tr. p. 1817).

The CPSE reconvened on December 7, 2017 and modified the student's recommended program for the 2018-19 school year (compare Dist. Ex. 17, with Dist. Ex. 18). The December 2017 recommended the student receive five two-hour sessions per week of SEIT services, along with five 30-minute sessions of individual speech-language therapy per week, three 45-minute sessions of individual OT per week, and three 45-minute sessions of individual PT per week, to be delivered in a childcare program selected by the parent, all for an extended 12-month school year (Dist. Ex. 17 at pp. 1, 14-15).

Between March and June 2018, the parent and the district exchanged emails in which the parent expressed her preference that the student begin receiving services through the CPSE as soon as possible and the parent and the district discussed service providers and agreed to look into staffing options (see Parent Ex. C; Dist. Exs. 24; 26).[4]

The CPSE reconvened again on June 5, 2018 and changed the implementation date for the IEP to include summer 2018, beginning on July 1, 2018 (compare Parent Ex. B at pp. 2, 14, with Dist. Ex. 17 at pp. 2, 14; see Tr. pp. 424-25).[5] In a final notice of recommendation dated June 5, 2018, the district summarized the CPSE's recommendations and specified that the SEIT services would be provided by Little Miracles/Eden II (Eden II) (Dist. Ex. 23).[6]

A. June 2018 Due Process Complaint Notice and Subsequent Events

In a due process complaint notice dated June 6, 2018, the parent alleged that the district failed to offer the student a FAPE for the 2017-18 school year as of the date of the student's third birthday (Parent Ex. A). The parent requested that the student receive pendency services consisting of the student's CPSE IEP with the SEIT services increased to 20 hours per week and final relief consisting of district funding of independent educational evaluations (IEEs), IEP amendments, private school funding, and compensatory education (id. at p. 5).

[4] According to the parent, the student stopped receiving services through the EIP at some point in early 2018 because the student's sibling, who was without a school placement, exhibited behaviors that interfered with the providers' ability to deliver services to the student (see Tr. pp. 1812-13, 1815; Parent Ex. A at p. 2). In her due process complaint notice, the parent indicated that she "filed for due process via EI[P] . . . seeking the ABA services at home, but was unsuccessful" (Parent Ex. A at p. 2).

[5] Although the IEP bore the date June 5, 2017, the attendance page was dated June 5, 2018; the parties agree that the June 5, 2018 date was correct (Tr. p. 5; Parent Ex. B at pp. 1-2, 18).

[6] In a letter dated June 14, 2018, Eden II confirmed its ability to provide the student's SEIT services as of July 9, 2018 (Dist. Ex. 27).

In early July 2018, the district approved related service authorizations (RSAs), providing that the district would fund related services through Sensory Freeway (Dist. Exs. 6; 8; 9), and Sensory Freeway began delivering the services (see Dist. Ex. 70).[7]

On July 16, 2018, the district notified the parent that Eden II would no longer provide the student SEIT services and that the district would be contacting agencies to find a replacement (Dist. Exs. 25; 57 at p. 2). The evidence in the hearing record indicates that two teachers from Eden II who were assigned to and delivered services to the student asked to be removed from providing services to the student (Dist. Exs. 35; 52; see also Dist. Exs. 69 ¶¶ 5-12; 75 ¶¶ 5-7). According to the CPSE administrator, at that time she contacted other agencies to secure SEIT services, one agency declined due to the neighborhood, another agency could not work out a schedule with the parent due to the parent's failure to return phone calls, and another agency was informed by the parent that she already had a SEIT agency (Tr. pp. 456-57, 695-97).

On July 25, 2018, the impartial hearing began with a hearing date devoted to identifying the student's stay-put placement during the pendency of the proceedings (see Tr. pp. 1-26).[8] On September 12, 2018, the IHO issued an interim decision (IHO Ex. II). The IHO indicated that the IDEA does not entitle a student to a pendency placement consisting of the early intervention services during a dispute arising in the transition to the CPSE (id. at p. 5). However, based on the student's educational history at that time, the IHO found that the pendency placement consisted of "ABA/SEIT services, along with related services," specifically 10 hours per week of SEIT services "by a provider of the parent's selection" at a maximum hourly rate, as well as five 30-minute sessions per week of speech-language therapy, three 45-minute sessions per week of OT, and three 45-minute sessions per week of PT (id. at pp. 7, 8). The IHO found that the district was obligated to deliver the pendency placement as of June 6, 2018, the date of the parent's due process complaint notice (id. at p. 7). In addition, the IHO ordered the district to fund an independent functional behavioral assessment (FBA) and observation with a licensed behavioral analysis (LBA) (id.).

B. October 2018 Amended Due Process Complaint Notice and Subsequent Events

In an amended due process complaint notice dated October 9, 2018, the parent added allegations relating to the 2018-19 school year, arguing that the December 2017 and June 2018 CPSE processes and resulting IEPs denied the student a FAPE and that the district never fully implemented the IEPs (Parent Ex. F at pp. 2-4). In addition, the parent alleged that, since her June 2018 due process complaint notice, the district had not provided records or information requested

[7] On the July 2018 RSAs, the number of sessions for speech-language therapy and PT (five and three, respectively) were crossed out and a new number of sessions was hand-written in (four sessions for speech-language therapy and one session for PT) (Dist. Exs. 6 at p. 1; 8 at p. 1). In September 2018, new RSAs were approved for speech-language therapy (five sessions) and PT (two sessions) (Dist. Exs. 5; 7). According to the district CPSE administrator charged with arranging related services (related services CPSE administrator), in September 2018, Sensory Freeway informed her that their providers were changing, and they needed new contracts; however, she could not recall why the frequencies were different (Tr. pp. 944, 946).

[8] During the impartial hearing, the IHO directed that, until he had an opportunity to issue an interim decision on pendency, the district would be required to authorize the student's receipt of 10 hours per week of "SEIT ABA services" to be delivered by the provider identified by the parent, Kidz Success, at a specified rate (Tr. pp. 20-21).

or responded to the due process complaint notice and "refused to implement the 2018 IEP . . . without a pendency order" and, then, "did not timely implement the pendency order" (id. at p. 4). The parent sought an interim order increasing the student's SEIT services under pendency to 20 hours weekly and final relief consisting of IEP amendments, private school funding, and compensatory education (id. at p. 5).

Beginning on October 29, 2018, the student received some SEIT services from a special education teacher who reported that the student needed "reinforcement such as found in ABA methodology, to address noncompliance" and recommended an increase of the student's mandated SEIT services (Parent Ex. U at pp. 1, 4-5; see Parent Ex. H at p. 1).[9]

Pursuant to the IHO's interim decision, Bridge Kids conducted an independent FBA of the student over several dates in October and November 2018 (Parent Ex. H; see IHO Ex. II at p. 7). Based on a review of records, parent interviews, and observations of the student in the home and during related services sessions at Sensory Freeway, the evaluators described the student's behaviors as "interfere[ing] with his ability to learn and function more independently at home and in community settings" (Parent Ex. H at pp. 2, 10-11). The evaluators identified three potential interfering behaviors to target—tantrum behavior, elopement, and non-compliance—and opined about the functions of the behaviors (id. at pp. 2-11). The evaluators recommended that a behavioral intervention plan (BIP) be developed and that the student receive "at least 20 hours per week of 1:1 ABA services" from trained ABA therapists with supervision from a Board Certified Behavior Analyst (BCBA) or LBA (id. at pp. 11-12). The evaluators also recommended parent training and that the student receive a neuropsychological evaluation (id. at p. 12).

As of November 2018, Sensory Freeway stopped delivering related services to the student, citing issues with the student not attending appointments (Dist. Exs. 72; 74 at p. 3; see also Dist. Ex. 76 ¶¶ 10-11). Between February and April 2019, the parent contacted the district several times via email requesting that it implement the student's pendency placement (Parent Ex. AA).

The impartial hearing continued with dates on January 15, 2019 and February 28, 2019 devoted to scheduling future hearing dates and discussing the parent's request for a revision to the pendency order in light of difficulties with implementation of the student's stay-put placement (Tr. pp. 27-158). On March 12, 2019, the IHO issued a second interim decision related to pendency requiring the district to fund 10 60-minute sessions per week of 1:1 ABA, four 45-minute sessions per week of individual speech-language therapy, and three 45-minute sessions per week of individual OT to be delivered at the McCarton Center for Developmental Pediatrics (McCarton), and to provide three 45-minute sessions per week of individual PT (IHO Ex. III at p. 1). The IHO further ordered the district to fund door-to-door car service transportation to and from the services and to fund or provide a transportation aide (id.). In addition, the IHO ordered that the student could receive any pendency services missed since the date of the due process complaint notice and continuing through the end of the proceeding (id. at p. 2). Finally, the IHO ordered the district to fund an ABA assessment of the student to be conducted by McCarton (id. at p. 1).

[9] According to the parent's attorney, the student received SEIT for a "few weeks" in November 2018 but that the teacher "quit" (see Tr. pp. 42-43).

The student began attending McCarton in April 2019, and McCarton conducted an evaluation of the student over a two-week period (Dist. Ex. 79). The evaluator concluded that the student "was not seen as presenting with any deficits or delays and his scores ranged from average to superior" (id. at p. 7 [emphasis in the original]). The evaluator recommended that the student attend a general education preschool setting and found that a 1:1 therapeutic ratio was not warranted and would "set him up for failure in his future educational settings" (id. at pp. 4, 7). The evaluator acknowledged that the student had a history of "learned maladaptive behaviors" in the home and recommended that the parent receive behavioral training in the home to address the maladaptive behaviors the student demonstrated while with her (id. at p. 7).

C. May 2019 Due Process Complaint Notice and Subsequent Events

In a due process complaint notice, dated May 21, 2019, the parent alleged that the district failed to offer the student a FAPE for the 2017-18 and 2018-19 school years (IHO Ex. XIII). The May 2019 due process complaint notice reiterated some of the allegations from the October 2018 amended due process complaint notice and added allegations relating to the November 2017 IEP, which the parent alleged she first received in February 2019, as well as events that "transpired after" the October 2018 amended due process complaint notice (id.; compare IHO Ex. XIII, with Parent Ex. F). The parent further alleged that, up to that date, the district had failed to implement the IEPs and the IHO's orders (IHO Ex. XIII at p. 4). The parent indicated that the providers who had delivered services resigned and that the student "was out of school without services, in violation of his pendency from November 2018 to April 2019" (id. at p. 6). In addition, the parent indicated that the student received some services at McCarton in April 2019, but the district did not "timely or appropriately staff[] the travel aide or [PT]" (id. at pp. 7-8). The parent alleged that, after McCarton indicated that it could not provide services, the parent advised the district it would need to locate alternate providers (id.). The parent noted that she filed a complaint with the New York State Education Department (NYSED) which resulted in a determination that the district violated the student's pendency rights and a directive for the district to correct the situation (id. at pp. 6-7, 8).[10] As relief in the May 2019 due process complaint notice, the parent requested "[i]mmediate provision and/or funding for [the student's] stay-put program and transportation as ordered by the IHO and compensatory pendency services at appropriate providers" (id. at p. 9). In addition, the parent sought IEP amendments, compensatory education, prospective funding for a program that provides 1:1 ABA instruction and related services, as well as for a car service with a travel companion, payment and/or reimbursement of travel expenses, including an hourly rate for the parent's services as the student's travel aide, and IEEs (id.).[11]

As of June 7, 2019, it was arranged that providers with the agency Perfect Playground would deliver the student's speech-language therapy, OT, and PT services as well as make-up

[10] It appears that the parent filed a State complaint with NYSED and that, on or around March 26, 2019, a decision was issued requiring the district to, no later than May 31, 2019, implement the student's pendency and submit procedures for how it implements pendency, and, by April 26, 2019, compile a list of all missed sessions and provide a list of corresponding service providers (see IHO Ex. VI at p. 10). The decision arising from the State complaint was not included in the hearing record.

[11] In an interim decision dated July 20, 2019, the IHO ordered that the matters underlying the October 2018 amended due process complaint notice and the May 2019 due process complaint notice be consolidated (IHO Ex. XIV).

sessions with a start date of July 2, 2019 (Dist. Exs. 37-39). In addition, in June 2019, the district reached out to agencies in an attempt to locate a SEIT/ABA provider (Dist. Ex. 43; see Dist. Ex. 36).

At the hearing held on July 9, 2019, the parties again discussed the contours of the student's pendency placement given that McCarton had ceased delivering services, including whether the student was entitled to ABA as part of the stay-put program and the necessary qualifications of the travel aide (see Tr. pp. 159-207). As of July 2019, the student started receiving 10 hours per week of ABA therapy from Bridge Kids, the agency that conducted the independent FBA in October and November 2018 (Dist. Exs. 77 at p. 1; 78 at p. 1; see Parent Ex. H). According to a document dated July 30, 2019, the parent informed Perfect Playground that the schedule for related services "now interfered" with the student's ABA schedule (Dist. Ex. 81). Beginning in September 2019, the student attended a universal preschool program (Dist. Ex. 78 at p. 1).

The impartial hearing continued, and on September 6, 2019, the IHO issued another interim decision addressing the student's pendency placement (IHO Ex. IV). The IHO ordered the district to fund 10 hours per week of 1:1 ABA therapy during the pendency of the proceedings to be provided by Bridge Kids at a specified maximum rate with the proviso that, if Bridge Kids became unavailable or discontinued services, the parent would notify the district and elect whether the district would secure an alternate ABA provider or whether she would secure one on her own (id. at p. 3). In addition, the IHO ordered the district to provide or fund related services consisting of four 45-minute sessions per week of speech-language therapy, three 45-minutes sessions per week of OT, and three 45-minute sessions per week of PT (id.). Finally, the IHO ordered the district to provide or fund door-to-door car service transportation to and from all instruction and related services mandated in the order as well as a transportation aide (id. at pp. 3-4). The IHO indicated that the interim decision was to be effective retroactively to May 17, 2019, the date that McCarton indicated it would no longer provide pendency services (id. at p. 4).

In September 2019, Bridge Kids completed an ABA progress and assessment report (Dist. Ex. 78; see Parent Ex. H). The evaluator found that the student demonstrated skills "above what would be expected for a child his age" and that he did not "require specific intervention to learn and acquire new skills" (Dist. Ex. 78 at p. 6). In addition, the evaluation noted that the student exhibited lower rates of interfering behaviors (id.). Identifying a date of discharge of September 19, 2019, Bridge Kids indicated that "therapy was not warranted" and, therefore, terminated services (Dist. Ex. 77). The discharge report reflected recommendations that the student continue attending his preschool program with typically developing peers and that the parent obtain parent training in the home setting to learn strategies for addressing the student's behaviors in the home (id. at p. 3).

At the September 27, 2019 hearing date, the parent's attorney informed the IHO that the student had not received "any of the services" pursuant to the September 2019 interim decision (Tr. p. 602). In response, the district's attorney indicated that the district had been "making good-faith efforts to try to get services for [the student]" (Tr. p. 603). She indicated that, although an agency, Support by Design, had been available to provide related services, given the student's attendance at the universal preschool program, the district was seeking an agency that could deliver the services in the school (Tr. pp. 611-12). As for SEIT services, the district's attorney named an agency, "E&D," representing that it may be available to provide SEIT services but not ABA (Tr.

p. 612). The district's attorney also described difficulties agreeing on a travel aide (Tr. pp. 612-13). The district's attorney indicated that the parent was not responding to the CPSE or the agencies, which was frustrating the district's efforts to arrange services (Tr. p. 614). Based on the attorney's representations, the IHO noted that the student may be entitled to some equitable relief to remedy any implementation failures but that the parent's "actions or omissions" could be relevant to determining equitable relief (Tr. pp. 618-20).

According to a private neuropsychological evaluation, the parent reported that the student stopped attending the universal preschool program in November 2019 after he was the victim of sexual misconduct by a staff member (Parent Ex. T at p. 2). After this, the student briefly attended "a Head Start program," which the parent reported "was not a good fit for [the student's] needs," and then a preschool within a district public school (id.). In March 2020, school buildings closed due to the COVID-19 pandemic (see id.). According to the parent, the student did not receive special education services during that time other than some speech-language therapy and OT sessions (id.).

D. Other Proceedings and Intervening Events

The parent filed another due process complaint notice, dated January 31, 2020, which alleged that the district failed to offer the student a FAPE for the 2019-20 school year and that the district had failed to implement the student's pendency placement during the 2019-20 school year, and, among other things, requested district funding of an IEE of the student; in an interim decision dated March 9, 2020, the IHO declined to consolidate that matter with the pending proceedings (Mar. 9, 2020 Interim IHO Decision).[12] An impartial hearing proceeded separately in that matter (2019-20 proceeding) to which the same IHO was assigned. While not included in the hearing record, the IHO references decisions that arose from the 2019-20 proceeding, including a June 9, 2020 interim decision which ordered the district to fund an independent neuropsychological evaluation, and an April 21, 2022 final decision which directed the district to fund a bank of compensatory education services to remedy a denial of a FAPE for the 2019-20 school year, including 4,160 hours of 1:1 tutoring services, 260 30-minute sessions of individual speech-language therapy, 156 30-minute sessions of individual OT, and 156 30-minute sessions of individual PT (IHO Decision at pp. 21, 28 & n.12; see Tr. p. 1633).

While the impartial hearing underlying the present matter continued, the parent also pursued an action in the United States District Court for the Southern District of New York. On July 8, 2020, the assigned magistrate judge recommended granting the parent's request for an emergency order requiring the district to implement the IHO's September 2019 interim decision on pendency (L.V. v. New York City Dep't of Educ., 2020 WL 4043529 [S.D.N.Y. July 8, 2020]; see IHO Ex. VI at p. 15). The magistrate judge recommended ordering the district to provide in-person pendency services to the extent they could be performed safely in light of the COVID-19 pandemic, finding that remote services were not "accessible to [the student] insofar as they ha[d] not been tailored for his specific needs" and, therefore, did not meet the requirements of the IHO's

[12] Although the January 2020 due process complaint notice was not separately identified as an exhibit and entered into evidence, it was submitted with the hearing record on appeal as an attachment to the IHO's March 2020 interim decision.

September 2019 pendency order (L.V., 2020 WL 4043529, at *3, *6).[13] The magistrate judge recommended denying the parent's request for a fund upon which the parent could draw to satisfy prospective payment requirements of potential service providers, finding that the requested fund went beyond the pendency requirements of the IDEA and the parent did not meet the standard for such emergency injunctive relief (id. at *5-*6). The district court adopted the magistrate judge's recommendations (L.V. v. New York City Dep't of Educ., 2020 WL 4040958 [S.D.N.Y. July 17, 2020]).

On July 17, 2020, the magistrate judge recommended that the district's motion to dismiss be granted in part and denied in part (IHO Ex. VI at p. 5). As relevant here, the magistrate judge recommended that the parent's allegations claiming violations of the IDEA's stay-put provision survive the motion to dismiss as they were not subject to the exhaustion requirements of the IDEA (id. at p. 17). The district court adopted the magistrate judge's recommendations with respect to the district's motion to dismiss (L.V. v. New York City Dep't of Educ., 2020 WL 4677317 [S.D.N.Y. Aug. 12, 2020]; IHO Ex. V).

In a motion submitted to the IHO, dated August 21, 2020, the parent argued that, given the district court's decision denying the motion to dismiss the parent's pendency claims, the district court maintained jurisdiction over the issue of the district's compliance with the stay-put provision of the IDEA (IHO Ex. V at p. 1). Therefore, the parent argued that the pendency issues were not properly before the IHO (id. at p. 2). The parent sought to narrow the scope of the impartial hearing to questions relating to the substance and formation of the student's IEPs and strike all evidence and quash all subpoenas pertaining to facts relating to pendency (id.). The district opposed the parent's motion, arguing that the pending federal court action neither deprived the IHO of authority to hear any evidence, nor impacted his ability to modify pendency (IHO Ex. VI at p. 1). The district asserted that "[w]hile an IHO lacks jurisdiction to enforce orders on pendency," he could "still issue a decision on whether the [district] provided the student a [FAPE]" (id. at p. 2). The district argued that the IHO had defined the scope of the impartial hearing to include evidence of the parent's failure to comply with the district's attempts to implement pendency insofar as such evidence related to relief and equitable considerations (id.).

During proceedings held on August 27, 2020, the IHO found that, given that the federal court had retained jurisdiction over issues of implementation and/or enforcement of pendency orders, the IHO would not hear evidence or issue any rulings or remedies on the issue of the district's compliance with the pendency orders (Tr. pp. 1112-13, 1116-17). Rather, the IHO clarified that issues before him included the IEP services offered and delivered and, relatedly, the issue of the parties' "relative level of cooperation with one another during the school years at issue" (Tr. pp. 1115-18). Therefore, the IHO granted the parent's motion in part (Tr. p. 1116).

[13] The magistrate judge recommend that the parent be ordered to provide "the names of the service providers who ha[d] indicated a willingness to provide in-person services to [the student] notwithstanding the . . . COVID-19 crisis and that the [district] utilize these service providers provided they [we]re qualified and accept[ed] the [district] rates, or locate other qualified service providers willing to provide in-person services to [the student]" (L.V., 2020 WL 4043529, at *5). The magistrate judge also recommended that the district be required to "conduct an independent assistive technology evaluation" (id.).

Beginning in August 2020, the student received up to seven hours per week of 1:1 ABA programming from Allgood and Tehrani Licensed Behavior Analysts, PLLC (Tr. p. 1764; Parent Ex. GG ¶¶ 3, 5).[14]

An independent neuropsychological evaluation of the student was conducted in June and July 2020, the results of which were set forth in a report dated September 14, 2020 (Parent Ex. T). The evaluators reported that, cognitively, the student had an IQ in the average range with strength in superior fluid reasoning, average verbal and visual spatial abilities, and weaknesses in working memory and processing speed (id. at p. 7). The evaluators indicated that the student demonstrated single word reading, reading comprehension, and math concept and application skills within expectations but demonstrated spelling, written expression, and math calculation skills below expectations (id.). According to the evaluators, the student's handwriting was an additional concern (id.). In the social/emotional realm, the evaluators reported that the student struggled with attention, impulsivity, emotion regulation, anxiety, and adaptive skills (id.). The evaluators found that the student met the criteria for diagnoses with adjustment disorder with mixed disturbance of emotions and conduct, ADHD, combined presentation, and developmental coordination disorder (id. at pp. 7-8).[15] The evaluators recommended that the student attend a small, structured environment for bright students, receive speech-language therapy, PT, OT, and counseling or therapy services, and accommodations (id. at pp. 8-10).

Beginning in January 2021, the student began receiving academic instruction at Dyslexia Associates (Parent Ex. EE ¶ 4).[16]

In a decision dated February 22, 2021, the district court granted the district's motion to dismiss the parent's complaint for failure to prosecute (SRO Ex. 1).[17] The district court noted the district's position that the parent had "failed to cooperate with, or ha[d] taken affirmative steps to interfere with" the district's attempts to comply with the pendency order (id. at p. 1). Specifically, the district court indicated that the parent allowed arrangements for a transportation aide to fall through, did not transport the student to services, decided not to send the student to the preschool

[14] Allgood and Tehrani Licensed Behavior Analysts, PLLC conducted an ABA assessment of the student in March 2021 and recommended that the student receive 10 hours per week of 1:1 ABA therapy in the home setting (Parent Ex. DD).

[15] According to the September 2020 neuropsychological evaluation report, the student had previously received diagnoses of adjustment disorder with mixed disturbance of emotions and conduct (see Parent Ex. T at pp. 2, 7).

[16] The reading specialist from Dyslexia Associates conducted academic testing with the student on January 7, 2021, the results of which were summarized in a report dated February 23, 2021 (Parent Ex. CC). The reading specialist recommended that the student receive "intensive tutoring" in literacy and mathematics and recommended the Orton-Gillingham approach to improve spelling, reading, writing, and comprehension (id. at pp. 10, 14).

[17] The district submits a copy of the district court's order of dismissal as additional evidence on appeal. The district argues that it was not provided the opportunity to introduce the evidence during the impartial hearing. In his final decision, the IHO refers to the district court's dismissal without prejudice, citing the civil docket number for the district court case (IHO Decision at p. 25). The decision was considered by the IHO, is public record, and is also necessary for the purposes of reviewing the district's argument on appeal. For ease of reference, the copy of the decision offered by the district with its request for review will be cited (SRO Ex. 1).

in the district public school after the district had arranged for in-person services to be delivered there, did not schedule an assistive technology evaluation after representing that she wished to make her own arrangements, and refused to participate in discovery (id. at pp. 1-2). The court also noted that, when moving to withdraw, the parent's former counsel had expressed concerns about "'contradictory statements' and 'an apparent mischaracterization of facts'" relayed to her by the parent (id. at p. 2).[18] The district court also indicated that, according to the district, as of December 2020, the parent failed to have the student attend scheduled sessions with providers, failed to cooperate with the transportation aide, failed to have the student participate in remote sessions, rejected school placement offers, failed to respond to the district or providers' attempts to arrange services, and continued to change demands regarding the services, timing, and location, resulting in providers declining to provide services (id.). The court concluded that the parent "ha[d] been stymying [the district's] good-faith attempts to comply with the Court's orders, as well as refusing to cooperate in discovery, since at least July 2020" and had been warned that failure to respond to the order to show cause could result in dismissal (id. at p. 3). The district court also found that the district had "expended resources in good-faith attempts to effectuate the Pendency Order, diligently attempting to comply with [the parent's] demands and provide services to [the student], but those resources ha[d] been squandered due to [the parent's] non-cooperation," which the court opined was unlikely to change (id.). The court acknowledged that the parent could still proceed with the impartial hearing "to obtain the necessary accommodations" for the student (id.). The district court dismissed the civil action "without prejudice" (id.).

Given dismissal of the federal court action, the IHO, in the present matter, ruled that, although he had previously tried to separate the issues relating to implementation of pendency, he would consider evidence about what services the student had been offered or what had been delivered to the extent such evidence pertained to "issues of remedy" (Tr. pp. 1636-37). In light of the IHO's ruling, the district inquired whether it would have the opportunity to present additional evidence about implementation of pendency as part of its case-in-chief or present arguments in its post-hearing brief, and the IHO responded that the district could present evidence as part of a "rebuttal case" (Tr. pp. 1640, 1648, 1653).

The impartial hearing concluded on June 21, 2022 after a total of 24 days of proceedings (Tr. pp. 1-1865).[19] During the June 21, 2022 hearing date, the IHO indicated on the record that, given the length of time the impartial hearing had been pending (over 1,000 days), NYSED had directed him to close the hearing record and issue a decision or submit written justification as to why the matter should remain open (Tr. pp. 1854-55; see IHO Decision at p. 11).[20] The parent and district argued that the hearing record should not be closed (Tr. pp. 1856-59; Parent Ex. HH).

[18] The magistrate judge granted the parent's attorney's motion to withdraw in a decision dated November 17, 2020 (L.V. v New York City Dept. of Educ., 2020 WL 6782234 [SDNY Nov. 17, 2020]).

[19] During impartial hearing, the parent changed attorneys several times.

[20] The district's attorney attended the June 21, 2022 hearing date; however, neither the parent nor her counsel appeared (see Tr. pp. 1852-54). The parent's attorney submitted a written statement, dated June 30, 2022, requesting the opportunity to complete the parent's testimony (Parent Ex. HH).

E. Impartial Hearing Officer Decision

In a decision dated July 8, 2022, the IHO initially indicated that, after giving the parties an opportunity to be heard on the question, there was "insufficient justification for the case to remain open," and, therefore, closed the record (IHO Decision at p. 11).

The IHO found that, for the 2017-18 school year, the student was eligible to receive services through the EIP and was not under the jurisdiction of the CPSE (IHO Decision p. 21). The IHO held that the district's obligation to the student during this time was limited to evaluating the student to determine his eligibility for special education as a preschool student with a disability for the 2018-19 school year (id.).[21] The IHO determined that the parent's allegation that the district obtained inadequate evaluations of the student in spring 2017 had been sustained in a decision arising from the 2019-20 proceeding and that beyond the relief ordered in that matter—district funding of a neuropsychological IEE—no further remedy was warranted (id. at pp. 21-22).

Turning to the 2018-19 school year, the IHO found that the district failed to implement the student's IEP and, therefore, denied him a FAPE (IHO Decision at p. 22). The IHO found that, according to the evidence in the hearing record, the student only received SEIT services from July 9, 2018 through July 16, 2018 and received no related services after November 2018 (id. at p. 22). The IHO found that the CPSE "took no further action to secure SEIT services for the student" and failed to present evidence of its efforts to secure alternate related services providers after November 2018 (id.).

As to pendency, the IHO found "it [wa]s undisputed . . . that the [district] failed to fully implement the Pendency Orders issued in this matter" (IHO Decision at p. 23). The IHO acknowledged that IHOs and SROs do not have authority to enforce decisions and that the parent had attempted to enforce the pendency orders "through both State administrative and judicial forums" but that the district's compliance with a determination from NYSED was not part of the hearing record and the matter in the district court had been dismissed without prejudice (id. at pp. 23-24). To the extent the district pointed to the parent's inequitable conduct to relieve it of its pendency obligations, the IHO noted that, to be so relieved, the district needed to seek injunctive relief, which the IHO did not have authority to grant (id. at pp. 24-25). Therefore, the IHO ordered the district to calculate services not provided during the pendency of the proceedings and to provide them to the student in the form of a bank of services, which could be delivered by "providers of the parent's choosing at reasonable market rates" (id. at p. 25).

As to the parent's request for compensatory education services to remedy the denial of a FAPE for the 2018-19 school year, the IHO found such relief would be duplicative of the services required under pendency, as well as of the relief granted to the student in the 2019-20 proceeding, and therefore unwarranted (IHO Decision at p. 27).

[21] The IHO observed that, to the extent the student had not received early intervention services during the 2017-18 school year, "that issue was reportedly litigated at a hearing held under the EI system" and was beyond the scope of the impartial hearing (IHO Decision at p. 21).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by granting relief for the district's failure to implement pendency on the ground that the issue should have been deemed barred by the doctrine of res judicata and/or deemed a request for enforcement outside of the jurisdiction of the IHO.[22] In the alternative, the district argues that the IHO erred in closing the hearing record prematurely, depriving the district of due process, and requests that the matter be remanded to the IHO to develop the hearing record on this issue of the parent's failure to cooperate with the district's attempts to implement pendency.

In an answer, the parent responds to the district's material allegations with a general denial and argues that the IHO's decision should be upheld in its entirety.

V. Applicable Standards—Pendency

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,

[22] The district affirmatively states that it does not appeal the IHO's finding that it denied the student a FAPE for the 2018-19 school year; accordingly, the IHO's determination on that issue is final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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 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 [awarding full reimbursement for unimplemented pendency services 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 [awarding services that the district failed to implement under pendency 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]).

VI. Discussion

A. Res Judicata

The district argues that the parent's claim relating to the implementation of pendency was barred by res judicata since the matter had been litigated in district court. The district contends that the district court's dismissal of the matter did not provide the IHO "with the authority to pick-

up the matter and order relief that the Parent could have potentially been awarded by the District Court" (Req. for Rev. ¶ 14).

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6). Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013]).

Generally, a dismissal for failure to prosecute is not a dismissal on the merits, unless the order of dismissal so specifies (see Hanrahan v. Riverhead Nursing Home, 592 F.3d 367, 369 [2d Cir. 2010]; Regis-Dumeus v. Great Lakes Kraut Co., LLC, 462 F. Supp. 3d 292, 299 [W.D.N.Y. 2020]; see also Fed. R. of Civ. Pro. 41[b]). Here, the district court specified that the action was dismissed without prejudice (SRO Ex. 1 at p. 3) and, therefore, that matter does not have res judicata effect on the parent's claims relating to implementation of the student's pendency placement.

B. Enforcement

With respect to the IHO's authority to address the district's failure to implement the pendency orders, as the district argues, generally, neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (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]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]). However, here, the IHO did retain jurisdiction as the orders which the parent alleged were violated by the district were issued as interim decisions in this proceeding, and were not final decisions (see IHO Exs. II; III; IV). Moreover, allegations about the district's failures to implement the student's pendency placement were stated within the parent's October 2018 amended due process complaint notice and the May 2019 due process complaint notice as separate IDEA violations for which the parent sought relief in this matter (Parent Ex. F at p. 4; IHO Ex. XIII pp. 4, 6-9). Thus, the parent did not seek relief for the district's failure to implement previous orders in a separate matter; rather, the district was obligated to provide the student with a pendency placement in the first instance, independent of any order by the IHO (see Zvi D., 694

F.2d at 906). For this reason, the parent's allegation that the district was not implementing pendency services is distinguishable from a request for enforcement, and the IHO did not err in reaching the issue.

C. Conduct of the Impartial Hearing

The district argues that, by prematurely closing the hearing record, the IHO abused his discretion and deprived the district of its opportunity to cross-examine the parent and present witnesses to rebut the parent's testimony. The district requests that the matter be remanded to the IHO.

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation further provides that the IHO "shall exclude any evidence" that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]).

In the event that an IHO does not accord one or both of the parties due process during the impartial hearing, a remand may be an appropriate remedy (8 NYCRR 279.10[c] [providing that a State Review Officer is authorized to remand matters back to an IHO to take additional evidence or make additional findings]; see Application of a Student with a Disability, Appeal No. 22-054).

Here, the district presented its direct case over a number of days spread out for over a year (see Tr. pp. 208-1496), and, at the close of the proceedings on June 23, 2021, the parent had finished her direct case with the exception of her own testimony, after which it was contemplated that the district would have the opportunity to present a rebuttal case (see Tr. p. 1789).[23] On March 25, 2022, the parent presented direct testimony (see Tr. pp. 1803-45). At that time, the IHO and the parties discussed future dates and agreed, based on the parties' availability, that they would convene on June 2 and June 3, 2022 for completion of the parent's direct and cross-examination testimony (Tr. pp. 1847-48). The IHO indicated that a date for the district's rebuttal case would

[23] The IHO and the parties scheduled hearing dates for these purposes to take place on July 9, 2021 and July 21, 2021 (see Tr. p. 1789). However, the parties did not convene again until January 20, 2022, due to some "health issues that the parent encountered" (Tr. p. 1794). On January 20, 2022, it was agreed that the parent would present the remainder of her case in chief on March 25, 2022 and that the district would have the opportunity to present rebuttal evidence on April 8, 2022 (Tr. p. 1794).

be addressed after completion of the parent's testimony (Tr. p. 1849). However, the next appearance did not take place until June 21, 2022, at which time the IHO gave the parties an opportunity to state their positions as to whether the hearing record should be closed (Tr. pp. 1854-55; see Tr. pp. 1856-59; Parent Ex. HH).

On the last day of the hearing, the district argued that the matter should not be closed because the district had not yet presented its rebuttal, which counsel for the district described as "evidence to rebut what the Parent has testified to regarding her allegations against the [district], our alleged motive against her" (Tr. p. 1856). The district further asserted that the crux of this matter was parental lack of cooperation and that, based on equitable considerations, the district could mitigate any relief the parent may have been awarded if there was a finding of a denial of a FAPE (Tr. pp. 1856-57). In response, the IHO indicated he was aware that the district's rebuttal would have involved evidence of the district's attempts to implement the pendency orders in this matter; however, the IHO found that the hearing record included sufficient evidence of the district's efforts and that additional evidence would have been unduly repetitious (Tr. pp. 1859-60).

Thereafter, as summarized above, the IHO closed the record without completing the parent's testimony or hearing rebuttal evidence (see IHO Decision at p. 11).

The district did not have the opportunity to "confront all witnesses" insofar as the IHO closed the hearing record before it had the opportunity to cross-examine the parent (see 8 NYCRR 200.5[j][3][xii]). Additionally, while State regulations do not guarantee parties the opportunity to present rebuttal evidence as of right (8 NYCRR 200.5[j][3][xiii]), it was communicated that the district would have the opportunity to present evidence regarding implementation of the pendency orders after the conclusion of the parent's case (see Tr. pp. 1648-49, 1848).

On appeal, the district's sole objection to the IHO's order is the IHO's direction for the district to calculate services not provided to the student during the pendency of the proceedings and to provide them to the student in the form of a bank of services. Initially, evidence regarding the implementation of the pendency orders during the course of the proceedings appears as though it could have been relevant to the IHO's determination on this point. However, the IHO directly addressed the district's contention that the parent was partly to blame for the student being denied pendency services because she was uncooperative, unreasonable, and unresponsive (IHO Decision at pp. 24-25). The IHO found that "to be relieved of pendency obligations, school officials are entitled to seek injunctive relief " in a court of competent jurisdiction but that the district had not made such a request to the district court when the parent's civil action had been pending (IHO Decision at p. 25, citing Honig, 484 U.S. at 328). On appeal, the district does not challenge the IHO's finding in this regard. Based on the foregoing, even if the district had presented additional evidence in support of its argument that the parent was partly to blame for the district's failure to deliver pendency services to the student, it would not have resulted in a different outcome. As a general rule, "the party that 'seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted'" (Shinseki v. Sanders, 556 U.S. 396, 409-10 [2009], quoting Palmer v. Hoffman, 318 U.S. 109, 116 [1943]; see Snyder v. New York State Educ. Dep't, 486 Fed. App'x 176, 180 [2d Cir. 2012] [noting that "[t]he moving party has the burden of showing that 'it is likely that in some material respect the factfinder's judgment was swayed by the error'"], quoting Tesser v. Bd. of Educ., 370 F.3d 314, 319 [2d Cir. 2004]; see also Fed. Rules Civ. Pro. 61; Fed. Rules Evid. 103).

Accordingly, review of the hearing record shows that the IHO reasonably exercised his discretion to end the hearing without accepting further evidence. The impartial hearing took approximately four years to complete (see Tr. pp. 1-1866). In addition, at the June 21, 2022 hearing date, the IHO ruled that he had sufficient evidence in the hearing record such that further testimony "would be unduly repetitious" (Tr. pp. 1859-60, 1863-64; see 8 NYCRR 200.5[j][3][xii][c], [d]).[24] Thus, while the impartial hearing ended somewhat abruptly, under the circumstances, a remand is not warranted. This is particularly so given that, on appeal, the district has not articulated in any detail the evidence that it feels it was denied the opportunity to present or the difference it believes such evidence would have made to the outcome of this matter.

As a final note, the district has made no argument on appeal that the IHO erred in ordering it to calculate the amount of pendency services that were not provided or that the compensatory education services be provided in the form of a bank of services to be delivered by providers of the parent's choosing at reasonable market rates, and, accordingly, I decline to review these aspects of the IHO's order.

VII. Conclusion

Based on the foregoing, there is no basis to disturb the IHO's decision, which ordered the district to fund compensatory educational services to make up for lapses in the student's pendency services.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 17, 2022

STEVEN KROLAK
STATE REVIEW OFFICER

[24] Indeed, over a year and a half earlier, at the November 6, 2020 hearing date, the IHO expressed that he had enough information to make a determination (Tr. p. 1576).