The University of the State of New York

The State Education Department
State Review Officer
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No. 22-167

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 Frank J. Lamonica, Esq.

Law Office of Elisa Hyman, PC, attorneys for respondent, by Elisa Hyman, 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 the decision of an impartial hearing officer (IHO) which ordered the district to provide respondent's (the parent's) daughter with applied behavior analysis (ABA) services as compensatory educational services for missed pendency services. The parent cross-appeals from that portion of the IHO's decision which denied, in part, her request for compensatory educational services for missed pendency services and which wholly denied her requests for compensatory educational services for ABA supervision services under pendency and as relief for the district's failure to offer the student an appropriate educational program for the 2019-20 school year. The appeal and cross-appeals must be dismissed, and as explained below, the matter must be remanded for further administrative proceedings.

II. Overview—Administrative Procedures

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

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The hearing record in this case contains little, if any, evidence regarding the student's educational history, except for noting that the parent has continuously litigated the student's special education programming going back to 2008 (see generally Parent Exs. B-F; U-V). Relevant to this appeal, a CSE convened on April 10, 2019 to conduct the student's annual review and to develop an IEP for the student to be implemented beginning in April 2019 (see Dist. Ex. 1 at pp.

1, 26). Finding that the student remained eligible for special education as a student with autism, the April 2019 CSE recommended a 12-month school year program, which for July and August 2019 consisted of occupational therapy (OT), speech-language therapy, physical therapy (PT), assistive technology devices and services, and 35 hours per week of 1:1 ABA services (id. at pp. 18-19). For the remaining portion of the 2019-20 school year—September 2019 through June 2020—the April 2019 CSE recommended integrated co-teaching (ICT) services for English language arts (ELA), mathematics, social studies, and sciences; OT and speech-language therapy; supplementary aids and services, program modifications, and accommodations; assistive technology devices and services; and supports for school personnel on behalf of the student (id. at pp. 16-18).

A. Due Process Complaint Notice

By due process complaint notice dated July 27, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year based on procedural and substantive violations (see Parent Ex. A at pp. 1-2, 13-17). As relevant to this appeal, the parent requested the following as relief: an order directing the district to continue to fund the student's pendency services (as set forth in a March 2019 unappealed IHO decision) by a licensed behavior analyst (LBA); an order directing the district to continue to fund the student's pendency services either at home or in a nonpublic school selected by the parent; and compensatory, additional, or make-up services for any failure to implement pendency or for a failure to offer the student a FAPE and "injury caused due to discrimination for the [school years] at issue" (id. at pp. 17-18).

B. Impartial Hearing

On July 29, 2019, the parties proceeded to an impartial hearing, and the IHO conducted a pendency hearing (see Tr. pp. 1, 3; Parent Exs. A-B). At that time, the parties agreed that an unappealed IHO decision, dated March 2019, formed the basis for the student's pendency services (see Tr. pp. 3-4, 12; Parent Ex. B at pp. 13-14). In an interim decision on pendency, dated August 2, 2019, the IHO ordered the following as the student's pendency services: a full-time integrated co-teaching (ICT) classroom; the services of a full-time, individual paraprofessional to address behavior, safety, and health-related needs and "provide support to teachers and ABA providers for other school activities"; school-based related services consisting of speech-language therapy (four 30-minute sessions per week, individually), speech-language therapy (one 30-minute session per week in a group), OT (two 30-minute sessions per week, individually); related services provided by RSAs consisting of OT (one 60-minute session per week), OT (one 30-minute session per week), and PT (one 60-minute session per week); reimbursement to the parent for round-trip "mileage and toll transportation" to the RSA related services providers (or for car service or funding of prospective care service); school-based ABA instruction (35 hours per week, individual);[1] home-based ABA instruction (10 hours per week, individual); the services of an "inclusion expert"; assistive technology (calculator, computer, and iPad) at home and at school; planning and preparation for the student to take the computer-based New York State Alternate Assessments (NYSAA Exam); environmental management needs (as listed); and transition

[1] This portion of the student's pendency services included "formal and informal meetings between ABA [s]pecialists and school staff providing direct services to [the student]" (IHO Ex. I at p. 5).

activities, testing accommodations, and promotion criteria as set forth in the student's April 2018 IEP (IHO Ex. I at pp. 5-6).[2] In addition, the student's pendency services included a 12-month school year program, consisting of the following: 35 hours per week of individual ABA support for summer (six week program in July and August); related services provided by RSAs consisting of speech-language therapy (four 30-minute sessions per week, individually), speech-language therapy (one 30-minute session per week in a group), OT (five 30-minute sessions per week, individually), and PT (two 30-minute sessions per week, individually); district authorization to have the above services delivered in either 30-minute or 60-minute increments based on the parent's choice or ability to locate providers; and reimbursement for the costs of round-trip "mileage and toll transportation" to the RSA providers (id. at p. 6).

The impartial hearing resumed on April 29, 2020 (see Tr. p. 14). At that time, the district's representative indicated that the district would not be presenting a case-in-chief (see Tr. pp. 15-16). The IHO encouraged the district to settle the matter, both parties requested an extension to the compliance date, and the IHO adjourned the impartial hearing until "June 2nd" as the next date scheduled for the impartial hearing (see Tr. pp. 16-17).

Thereafter, on January 15, 2021, the impartial hearing resumed and the IHO conducted a "status conference" (see Tr. pp. 19-20). The district representative reiterated that the district would "not be presenting a case or calling any witnesses," and rested her case (Tr. pp. 20-21). In addition, the district representative indicated that the district was "not going to refer this to settlement" and the parent could proceed with her case-in-chief (id.).

The parent's attorney then asked if she could briefly explain the case with the hope of streamlining the issues, noting that it was not a unilateral placement case and she had not filed a subsequent case for the same student because the student was "already one of the named plaintiffs in a class action lawsuit about ABA and she ha[d] a separate case already pending in federal court" (Tr. p. 22). Briefly, the parent's attorney noted that, "for most of her educational career, [the student had] been receiving push-in services and in-home services in a public school placement" (id.). At that time, the student was supposed to be in "her second year in high school," and, according to the parent's attorney, "it would have been a horrible issue had the pandemic not happened" (Tr. pp. 22-23). The parent's attorney stated that the student had "been on a remote program the entire year, and she's actually doing better in one way on a remote program than she did in school" (Tr. p. 23). Given that the case involved the 2019-20 school year and the district had rested its case, the parent's attorney limited the requested relief to the following, in part: first, for the student's program to remain unchanged and that any pendency services the student should have received, but did not receive, would be "banked as compensatory education" (id.). Second, the parent's attorney noted that, because the IHO could not "really order anything going forward, the only piece of services that [the parent would] be interest[ed] in modifying from the pendency" was for "six hours of ABA supervision as compensatory education" that was to be added to the student's summer program (i.e., one hour per week during summer) (Tr. pp. 23-24). In addition, the parent's attorney requested "compensatory pendency services for related services over the last year and a half [when] things were not implemented, obviously due to COVID, so we're looking for compensatory pendency" (Tr. p. 24). And finally, the parent's attorney indicted that she sought

[2] The IHO's interim decision on pendency is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see generally IHO Ex. I).

an order that the district failed to offer a FAPE and for the "program until it changes by operation of law, would remain the same, the way it's being implemented"—explaining that the district had been "allowing any in-school services to be provided at home, and the school ha[d] been providing some of the related services," with the parent obtaining some related services through the issuance of RSAs (Tr. pp. 24-25). The parent's attorney further noted that this was "not even a [2020-21 school year] case," therefore, she did not think that the IHO could "order something going forward"—such as "chang[ing] the program"—because that would not "be something that would be within the scope of [the IHO's] decision" (Tr. p. 25).

At that time, the district's representative could not agree to the parent's requested relief, as it encompassed a request for "COVID related" compensatory educational services (Tr. p. 26). The parent's attorney clarified that pendency was not implemented, in part, due to COVID—as the student was "supposed to be getting a certain amount of ABA and they [we]re doing it remotely, but they ha[d]n't been able to implement all of it, in part because of scheduling issues relative to what [wa]s going on at the school with related services" (Tr. pp. 26-27). The parent's attorney stated that she was not "asking for compensatory education for them not providing the school, it would just be related services and any ABA," but only if the parties did not have to engage in litigation in this case (Tr. p. 27). If the parties did not litigate, the parent's attorney indicated that the relief sought was limited to "just the hours of ABA and related services" and the addition of "supervision hours" for one hour per week during the summer (id.).

The IHO repeated that the district representative could not agree to any relief at that time, and therefore, a witness would be necessary to "explain through testimony what was not delivered but could have been delivered, what should have been delivered, but wasn't delivered" (Tr. p. 27). The parent's attorney indicated that she understood that the "ABA was not implemented because of COVID"—but she did not "understand how that [wa]s the [district's] failure, because that scheduling ha[d] to do with the provider" (Tr. p. 28). In addition, the parent's attorney noted that, "technically, the SRO ha[d] ruled repeatedly that pendency ultimately [wa]s the [district's] responsibility," but this was not a unilateral placement case, the district did not "have the services," the district "never offered them," and the parent "has had to go get them privately" (id.). However, the parent's attorney argued that that did not "shift the entire responsibility to the parent" (id.). The parent's attorney indicated that if it was "going to be [her] burden to show pendency," then she wanted a subpoena to obtain information from the district concerning the "number of hours they've funded" (Tr. p. 30).

The district representative acknowledged that there was a pendency order for "ABA," but the provider had to send invoices to the district to pay for the services, and the parent "already had a provider" (Tr. p. 31). When the IHO indicated that she wanted to "hear from the provider," the IHO also asked if the provider had been selected by the parent, if the provider was on a district list of providers given to the parent, or if it was a private provider (id.). The parent's attorney stated that the district did not have a list for ABA services because "they don't offer ABA on any list or otherwise" and indicated that there was a "private provider for ABA" (Tr. p. 32).

Further discussion ensued with the parent's attorney stating her concern that the burden of proof was being shifted to the parent (see Tr. pp. 32-33). The IHO disagreed, and explained that the parent's attorney had the "burden to tell [her] how much comp[ensatory] ed[ucation] [they were] asking for, and the only way [they were] going to be able to do that [wa]s for [the IHO] to

hear from the provider to tell me what she need[ed] to get paid for," which was not shifting the burden of proof (Tr. p. 33). The IHO and the parties then scheduled the next date of the impartial hearing (see Tr. pp. 34-43).[3]

When the impartial hearing resumed on August 23, 2021, the district's representative indicated that, as a result of the parent's attorney forwarding an email with the relief being sought in the impartial hearing and further discussions with her "team," the district was in the position to refer the matter for settlement (see Tr. pp. 51, 53). The parent's attorney agreed to explore settlement and to one adjournment for that purpose (see Tr. p. 53). The parent's attorney clarified the relief sought: a finding that the district failed to offer the student a FAPE for the 2019-20 school year and "compensatory pendency services" as a "bank of hours that the student should have received but did not receive" (Tr. p. 54). The parent's attorney acknowledged that she would be "filing a new case," and explained that the email sent to the district had provided a "count of the ABA hours from the agency" but the parent's attorney did not yet have the hours sought for OT, PT, and speech-language therapy services and was contemplating the issuance of a subpoena for such information if the parties' settlement discussions did not result in a settlement (Tr. pp. 54-56). The IHO and the parties then scheduled the next date of the impartial hearing (see Tr. pp. 56-61).

On September 29, 2021, the impartial hearing resumed; both parties entered documentary evidence into the hearing record and the parent presented a board certified behavior analyst (BCBA) who provided ABA services to the student as a witness (see Tr. pp. 1, 72-91, 103, 160; Parent Exs. C-K; M-O; Q; Dist. Ex. 1; IHO Ex. I).[4] The district's attorney—who had been newly assigned to the case—indicated that the district would not be presenting any witnesses, but intended to litigate the matter (see Tr. pp. 70-71).

As part of her opening statement, the parent's attorney stated that the parent was "only seeking compensatory services under pendency and/or under the IEP, which [she] th[ought we]re one and the same, for approximately 1,400 hours of [ABA], which were not implemented during the applicable pendency period" (Tr. p. 104). While noting that the student's related services "were not fully implemented," the parent's attorney stated that the parent was "not seeking compensatory education of those hours" (id.). Additionally, the parent's attorney stated that, if the case continued to be litigated, the "main problem with respect to the [student's] high school placement [wa]s still an issue, even though the school year [wa]s over," and could be "capable of repetition yet evading review" (Tr. pp. 106-07). The parent's attorney further stated that the student was "transitioned into a high school that was completely inappropriate and was in sharp contrast to the manner in which the program was implemented in middle school" (Tr. p. 107).[5] However, according to the

[3] The impartial hearing resumed on February 23, 2021; however, while both parties agreed that the hearing date needed to be adjourned, neither party requested an extension to the compliance date and neither party appeared on that day (see Tr. pp. 46-49).

[4] During the opening statement, the parent's attorney noted that the student was a "main plaintiff in the M.G. v. New York City Department of Education class action," which related to the district's alleged "policies and procedures prohibiting ABA services, one-to-one instruction, and extended school day services" as recommendations in IEPs (Tr. p. 91, 94).

[5] The parent's attorney noted, for example, that the student's high school did not provide a room for the "ABA providers to pull the student out," the student was "placed exclusively in Regents and diploma-based classrooms,"

parent's attorney, when the COVID-19 pandemic resulted in school closures and the district "had authorized remote instruction, it was the first time that [the student] was able to receive her direct instruction at the high school level without having to be placed in an inappropriate environment," and the student could "receive work that did not have to be aligned with the inappropriate Regents based work that was being delivered in the classes" (Tr. p. 108). The student could, at that time, work on "her functional skills, her prevocational skills, and her communication skills through a quiet one-to-one setting, albeit a remote setting" and the student "developed reciprocal communication" (Tr. pp. 108-09). The parent's attorney also noted that, as the pandemic continued, "it became clearer and clearer . . . that it [wa]s inappropriate for the student to be returned back to that particular loud high school setting, and that the focus of her program"—given her age and moving towards aging-out of her IDEA eligibility—"should be on developing prevocational skills, independent living skills, work readiness skills, and social and communication skills" (Tr. p. 109). According to the parent's attorney, "with respect to the existing status of the pendency program, [the parent] w[as] negotiating with the [district] as to whether they were going to force [the student] to return to the building at the present time given this situation" and in light of other circumstances (id.). The parent's attorney stated that, "last week," the district "finally agreed . . . that they will allow the pendency program to continue to be implemented without requiring the student to be physically present at school until such time as the pendency [wa]s modified in some way by either this case or some subsequent case" (Tr. p. 110). The parent's attorney explained that, during the pandemic, the student received "ABA virtually," speech-language therapy services virtually "from the school," and "OT and PT through RSA[s] virtually" (id.). At that time, the parties had resolved that the student's "ABA providers [we]re going to resume in person partially, some virtually," and the district "issued RSAs for her PT and OT" (Tr. pp. 110-11). The only issue that remained unclear was the "status" of the student's speech-language therapy services (Tr. p. 111). The parent's attorney also explained that the "school ha[d been sending assignments home," but the student had not been "in high school since March of 2020 when the schools closed down"—and clarified that, during pendency, the student had been receiving services virtually, but during the 2020-21 school year, the student was "only receiving speech directly from the high school" and "was not engaging with the classes in that way, remote instruction in the classes" and had been "only receiving ABA and related services" (Tr. p. 111-12).

In summary, the parent's attorney stated that the district failed to offer the student a FAPE, and that, to the extent that "services were listed on the IEP, the [district] did not have a mechanism to fund or provide the services unless the parent, as per usual [was left] to her own devices to obtain the providers" (Tr. p. 114). The parent's attorney also stated that she would present evidence concerning a "shortage of ABA providers in the [S]tate," that the district did not "help to look for providers or attempt to staff the program," and that the program was not "implemented properly at the high school" (id.). In addition, the parent's attorney indicated that she would present evidence concerning the student's "engagement with remote instruction," her current needs, what an

"teachers were not providing lessons up front to the providers, [to] the ABA team so they could try to modify or differentiate the curriculum," the "teachers themselves were not differentiating or modifying the curriculum," and if the teachers did differentiate or modify the curriculum the ABA providers had no place to "deliver the differentiated curriculum" simultaneously to the student during "academic periods" with her classmates so she could be "integrated into the overall nonacademic portion of the day" (Tr. p. 107). The parent's attorney also noted that the high school building was "extremely loud and chaotic," with "many male voices," which the student could not manage (Tr. p. 108).

"appropriate program" for student "should have been" for the 2019-20 school year, and what compensatory educational services "should be provided and/or would be required by operation of law" pursuant to a decision by the Second Circuit Court in Doe v. East Lyme Board of Education, 790 F.3d 440 (2d Cir. 2015) (id. at pp. 114-15).

The impartial hearing continued with the presentation of the parent's first witness, a BCBA who provided ABA services to the student (see Tr. pp. 120-94). The BCBA first began working with the student, 1:1 in school, during middle school (the 2018-19 school year)—for one full day per week—and then "through remote services" (Tr. pp. 122-25). The BCBA testified that other ABA providers worked with the student during the 2018-19 school year, all of the student's ABA providers were from the same agency, and an ABA provider from the agency was with the student for all six hours during the school day at middle school (see Tr. pp. 125, 274-75). During the 2019-20 school year, the BCBA initially began providing ABA services to the student in school—within the student's classrooms—for one full day per week (six hours per day), and on occasion, for more hours per week (see Tr. pp. 139-40, 280).[6] She also testified that, during the 2019-20 school year, two other ABA "behavior therapists" from the same agency delivered services to the student in school, and the student received 10 hours per week of ABA services after school but she, herself, did not provide home-based ABA services to the student (see Tr. pp. 280-81, 283-84).[7] In March 2020, when the COVID-19 pandemic resulted in school closures, the BCBA provided the student with "remote instruction one-on-one . . . based on academic and language programming that—that we designed," and the student did "very well with that" (Tr. p. 151). Due to staffing changes that resulted from the COVID-19 pandemic, the BCBA "was actually able to pick up more hours working with [the student] than typical," increasing her weekly hours with the student from six hours per week to 12 hours per week through remote instruction (Tr. p. 152). The BCBA testified that she believed she began providing the student with 12 hours per week "within three weeks of the [school] closure" (Tr. pp. 152-53). The BCBA continued to provide the student with the same frequency of services throughout the 2020-21 school year (see Tr. p. 153). In addition, the BCBA testified that, from March 2020 throughout the 2020-21 school year, the student's "programs changed over time" as she mastered them, but the "hours remained consistent" (Tr. pp. 160-61). When asked if the student had been attending high school and had been receiving educational services from the high school "during COVID," as well as the BCBA's services, the BCBA testified that the parent could better answer that question (Tr. pp. 169-70).

When the BCBA's testimony resumed at the next impartial hearing date, October 19, 2021, the BCBA testified that she had recently started providing the student with "in-home services," and would be providing them "twice a week" this year (Tr. pp. 207, 219). At the impartial hearing, the BCBA identified parent exhibit "L" as the student's "remote" "Monday through Friday schedule" for the 2020-21 school year, and as the student's schedule that remained in place from

[6] The BCBA testified that the student's school-based ABA services during the 2019-20 school year were delivered consistent with the school calendar, meaning that the ABA services did not occur on days when school was closed (see Tr. p. 284).

[7] According to the BCBA's testimony, ABA providers from the same agency delivered the student's home-based services during the 2019-20 school year (see Tr. p. 284).

approximately March 2020 through July 2021 (Tr. pp. 242-46, 254-55).[8] The BCBA clarified that the student's schedule for the 2021-22 school year may have changed and may not be the same schedule as represented in parent exhibit "L" (Tr. p. 254).

With respect to the student's ABA schedule for the 2020-21 school year in parent exhibit "L," the BCBA testified that the agency and the parent collaborated to create the schedule that "work[ed] best for them because they ha[d] a lot of therapies to schedule" (Tr. p. 288). In addition, the BCBA testified that "we work[ed] together as a team with the family . . . and the other providers to make sure that the schedule work[ed] for them" (Tr. p. 289). With respect to the student's ABA schedule for the 2021-22 school year, the BCBA testified that she was then-currently providing "in-person days scheduled now on Tuesdays and Thursdays," and she no longer provided remote services "on those days" (Tr. pp. 289, 321). She further testified that another therapist provided remoted services to the student on Monday, Wednesday, and Friday (id.).

At the impartial hearing held on October 26, 2021, the BCBA indicated that three individuals—including herself—provided ABA services to the student, and the "team" also included an ABA supervisor (see Tr. pp. 302, 306). When the BCBA was referred to parent exhibit "R," she testified that while she had never seen the document before, she recognized it as a "summary of the hours" of services delivered to the student and she identified the two individuals named in the document as the co-founders of the agency where she worked (Tr. pp. 320-21; see generally Parent Ex. R). The BCBA also testified that while she delivered one-to-one ABA services to the student, she only used "discrete trials" with the student "when necessary," it was not "typically used within the school day," and "it wasn't something that [they] implemented commonly" with the student (Tr. pp. 322, 324). In addition, the BCBA testified that discrete trials were not used "commonly" with the student during remote instruction during the 2019-20 school year (Tr. pp. 324-25). With respect to the student's then-current schedule for ABA services, the BCBA testified that the "parent and the team members involved" created the schedule, and typically, the schedule was developed at the "beginning of each school year," but changes sometimes occurred (Tr. p. 328). At the time of the hearing, the BCBA delivered six hours per day of in-person ABA services to the student on two days per week, but she anticipated adding more in-person ABA services for the student because "another person join[ed] the in-person team th[at] month" (Tr. p. 332).

After concluding the BCBA's testimony on October 26, 2021, the IHO and the parties discussed what evidence remained necessary in order for the IHO to fashion a remedy of the compensatory educational services as the parent requested as relief in this case. Initially, the parent's attorney confirmed that the parent was only seeking "compensatory ABA services" as relief for missing pendency services since July 1, 2019 (Tr. p. 372). When the IHO asked if the case involved a "COVID issue" related to "some periods of time when they were unable to give [the student] ABA," and what affect, if any, that may have on the "bank of hours" sought by the parent, the parent's attorney explained that it "wasn't just a COVID issue," because "they have always had a problem staffing this case even before COVID" due to where the student's family lived and due to the "huge shortage of ABA providers" in the State (Tr. pp. 373-74). The parent's attorney stated her understanding that—consistent with the IHO's opinion—a witness would be

[8] The student's schedule for the 2020-21 school year reflects that the student received a total of approximately 19.5 hours per week of ABA services delivered by two providers (see Parent Ex. L).

needed to explain the summary of hours set forth in parent exhibit "R," which at that time, had only been marked for identification and which had not yet been entered into evidence in the hearing record (Tr. pp. 374-85).[9] Throughout the discussions, the parent's attorney asked for a statement concerning the district's position with respect to the requested compensatory educational services; in response, the district's attorney indicated that, as an overall position, the district was not certain that the parent was "entitled to all the compensatory education" being requested (Tr. p. 387).

At the impartial hearings held on November 4, 2021 and February 23, 2022, the parties and IHO discussed proposed additional evidence submitted by both parties, some of which were entered into the hearing record (see Tr. pp. 397-472; Parent Exs. U-V; WW; Dist. Exs. 2-3). During the February 2022 impartial hearing, the parent's attorney clarified that the parent was seeking compensatory educational services that should have been provided under pendency (see Tr. pp. 420, 425-26, 436). At that point, the parent's attorney indicated that it was the district's obligation to "clarify how many sessions the [district] funded under pendency" (Tr. p. 425). The parent's attorney further noted that, under "controlling case law," the student was entitled to missed pendency services on an "hour-for-hour basis" (Tr. p. 427). When discussing the parent's proposed evidence, the parent's attorney indicated that she was no longer submitting parent exhibit "R" into the hearing record as evidence, and therefore, she would not be calling a witness to explain the information contained within that document (see Tr. pp. 432-33). According to the parent's attorney, she withdrew parent exhibit "R" because, although it represented ABA services provided to the student by the agency, it included services provided to the student "under multiple case numbers," and thus, did not reflect only those services provided to the student under the current case number (Tr. p. 436). The parent's attorney also withdrew parent exhibit "T" as duplicative of an exhibit already entered into evidence in the hearing record by the district (see Tr. p. 437). However, the parent's attorney continued to seek to enter parent exhibit "S" into evidence (approximately 344 pages of documents), which purportedly comprised email exchanges explaining the invoices entered into evidence by the district and a "context for why some of these services have a different case number" (see Tr. pp. 439-44).[10] After continued discussions concerning parent's proposed exhibit "S," the IHO precluded its submission into the hearing record based on relevance (see Tr. pp. 444-57). At that point, both the parent and the district rested their respective cases (see Tr. pp. 458-59). The parties thereafter agreed to provide written closing statements to the IHO (see Tr. pp. 459-71).

[9] As noted by the IHO, the parent's attorney had indicated that "some of the hours" reflected in parent exhibit "R" were "based on pendency" and some of the hours "were based on something else"—and the anticipated witness would explain the information set forth within that exhibit (Tr. p. 389). The IHO also noted that she was uncertain of the ABA providers rate of pay, and the parent's attorney stated that the present matter did not involve the rate of pay for the services, as the district "has been funding these providers for years" and had already "approved the rate" (Tr. p. 392). According to the parent's attorney, the district was not implementing pendency because the district did not "have ABA services," which forced the parent to obtain private providers (Tr. pp. 392-93). The parent's attorney further stated that it was not "just about ABA," it was about "one-to-one instruction," and the district "not having programs for students" in the least restrictive environment (LRE), which left the "only option" as "segregated program[s]" (Tr. pp. 393-94).

[10] At the impartial hearing held on November 4, 2021, the IHO expressly asked the parent's attorney and the district's attorney to confer about, and to pare down, the relevant information contained in parent's proposed exhibit "S," which totaled approximately 900 pages of documents (Tr. pp. 401-02).

After submitting closing briefs to the IHO, the IHO and the parties met on May 24, 2022, at which time the parent's attorney argued to reopen the impartial hearing in order to take more evidence based on arguments that the parent's attorney asserted had been raised by the district for the first time in its closing brief (see Tr. pp. 473-512). Specifically, the parent's attorney asserted that the parent should have been allowed an opportunity to rebut the district's assertion that, by agreeing to allow the district to fund the private providers under pendency, the parent also agreed to shift the burden to implement pendency onto herself (see Tr. pp. 520-21). The district's attorney countered that he "never said that any burden shift[ed] to the parent," but rather, that the district agreed to fund the services provided by the agency providing ABA under pendency, and therefore, the facts of this case distinguished it from the facts in the East Lyme Board of Education case, as argued by the parent's attorney (Tr. pp. 521-24).

At the impartial hearing, the parent's attorney confirmed—as highlighted in the district's closing brief—that the parent had abandoned the following claims for relief: "the request to provide the student with appropriate school choice options" for the 2019-20 school year; "the request for continued funding for the student['s] pendency program at home or at a private school of the parent's selection";[11] "the request for an order directing the [district] to place the student in a school pursuant to the 2019 finding of fact and decision"; "[t]he request for an order of comprehensive staff training for staff at the school"; "[t]he request for an order requiring the [district] to provide an inclusion consultant on a weekly, monthly basis, who will provide meaningful amounts of ongoing instruction, feedback, guidance, training, [among other things]";[12] the request for the district to provide the student with "testing accommodations and promotional standards [that we]re appropriate given her disability, as well as an additional accommodation necessary for her to have equal access to the curriculum" for the 2019-20 school year; an order for "rates for all services at sufficient levels to ensure that the parent c[ould] obtain appropriately qualified and licensed staff to work with the student";[13] the request for "any claim for compensatory education, other than ABA services"—which, according to the parent's attorney, included "ABA supervision" services; the request for travel expenses; and the request to be reimbursed for "all costs affiliated with the services requested above, as well as the services previously obtained" (Tr. pp. 512-18; see Parent Ex. A at pp. 17-18; Dist. Post-Hr'g Br. at pp. 4-6).

Following further discussions about the need to possibly reopen the impartial hearing for additional evidence, the IHO and the parties scheduled another date for a status conference (see Tr. pp. 524-54). Thereafter, the IHO reopened the impartial hearing, which resumed on June 9, 2022, and concluded on October 7, 2022, after five total days of proceedings and the presentation

[11] The parent's attorney clarified that, while she was not abandoning any "pendency claims going forward," the parent agreed to abandon the request for a "private school to be implemented," as the district had agreed to allow the student to receive "services at home . . . and not in school, which [wa]s what[wa]s happening" (Tr. pp. 514-15).

[12] The parent's attorney confirmed that the parent was abandoning this claim for relief and did not continue to seek this relief, "other than whatever [wa]s in the pendency" order (Tr. p. 516).

[13] The parent's attorney clarified that the district was currently funding the student's providers at "market rate," and that this was "not a rate case" (Tr. p. 517).

of one additional witness by the parent and an additional document submitted into the hearing record as evidence (see Tr. pp. 556-804; see generally Parent Ex. WW).

C. Impartial Hearing Officer Decision

In a decision dated November 11, 2022, the IHO determined that the district failed to offer the student a FAPE for the 2019-20 school year (see IHO Decision at pp. 6, 14).[14] In fashioning relief, the IHO limited her analysis to the parent's request for compensatory educational services for missed ABA services under pendency, finding that the parent belatedly requested compensatory educational services for additional missed services under pendency—such as speech-language therapy and ABA supervision services—and had completely failed to raise a request for ABA supervision services at the impartial hearing (id. at pp. 5-6, 15-16). As a result, the IHO ordered the district to provide the student with the following relief: 670 hours of compensatory ABA services to be used as the parent chose and the provision of "additional compensatory ABA services to the extent that [the student] ha[d] not received at least 2,129 hours of ABA at-home for each school year in which the pendency order ha[d] been in effect or will be in effect going forward" (id. at p. 18). The IHO denied, without prejudice, the parent's request for compensatory educational services for missed speech-language services and for ABA supervision services under pendency (id.).

To support the awarded relief, the IHO found that, since the beginning of the 2019-20 school year, the district funded the student's ABA services provided by 121 Learning Works (or agency) (see IHO Decision at p. 8). The IHO determined that while the student attended in-person instruction prior to the COVID-19 pandemic and school closures, an agency employee provided ABA services to the student for six hours per day—or for the "duration of every school day" (id. at pp. 8-9). In addition, the IHO determined that the student also received home-based ABA services from an agency employee funded by the district (id. at p. 9).

Next, the IHO indicated that, after school closures occurred as a result of the COVID-19 pandemic, the "parent and [district] agreed that the [district] would continue to fund ABA services" provided to the student "remotely" by the agency (IHO Decision at p. 9). The IHO also indicated that the district "funded the services provided by the [a]gency for the remainder" of the 2019-20 school year (id. at pp. 9-10). In addition, the IHO found that although the student did not return to the district's high school during the 2020-21 and 2021-22 school years, the district continued to fund the services provided by the agency during those school years (id. at p. 10).[15] Thereafter, the IHO described the progress the student made in all of her areas of need since the 2019-20 school year that had been addressed by the ABA services (see IHO Decision at pp. 10-12).

Turning to the relief sought by the parent, the IHO initially clarified that, under pendency from July 2019 through the date of the decision, the student was entitled to receive 35 hours per

[14] The IHO's decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see generally IHO Decision).

[15] The IHO indicated in a footnote that the hearing record did not include a schedule of the student's services for the 2020-21 and 2021-22 school years (see IHO Decision at p. 10 n.7). However, the hearing record does include a schedule—identified as parent exhibit "L"—which the agency BCBA testified was representative of the student's ABA schedule for at least the 2020-21 school year (Tr. p. 245).

week of ABA services during summer 2019, summer 2020, and summer 2021, noting however that "another summer" had passed for summer 2022 (IHO Decision at p. 12).[16] According to the IHO's calculations, the student was entitled to a maximum of 740 hours of ABA services—meaning, 35 hours per week for six weeks per summer—for "those three summers all of which the parent and the agency may not have scheduled" (id.). For the "40-week school year period of time" from September through June, the IHO noted that the parent had calculated the student's entitlement to school-based and home-based ABA services totaling 45 hours per week (id.).[17] While finding that the student did not attend school for much of the 2019-20 school year due to the COVID-19 pandemic, the IHO determined that the student had received all of the ABA services she was entitled to receive, and for that portion of the 2019-20 school year when schools closed, as well as for the 2020-21 school year, the student received "her ABA services virtually whenever they could be scheduled between the agency and the parent" (id. at pp. 12-13, citing Parent Ex. L).

Next, the IHO reached conclusions of law with regard to the relief sought by the parent (see IHO Decision at pp. 14-18). The IHO determined that the "only remaining issue [wa]s whether the [district] must compensate the student with ABA services that match[ed] 1:1 the hours provided for in the pendency order or whether other factors may be considered in making that calculation" (id. at p. 14). Relying on legal authority issued by the Second Circuit—and limiting the analysis to the parent's request for "compensatory ABA services"—the IHO calculated that the student had received approximately "2,129.21 hours of ABA in school and home combined" from July 2019 through July 2021 (id. at p. 16, citing Parent Exs. L; R).[18] The IHO also calculated that, following the school closures in March 2020, the student did not receive 45 hours per week of ABA services—noting further, however, that the student "responded very well to the hours of ABA which were provided at-home virtually" (IHO Decision at p. 16). The IHO found that for the 2020-21 and 2021-22 school years, the student "received only virtual instruction," which, according to one of the student's ABA providers, the student "continued to greatly benefit from the amount of virtual at-home instruction" (id.). The same ABA provider had opined that the student's "virtual schedule should continue indefinitely to meet her current needs" (id.). Finding that this constituted a "major change to the student's pendency order in question which require[d] 35 hours of in-school ABA services plus [10] hours of ABA at home," and that this "change in the student's continued progress with virtual instruction exceeded expectations after the ABA services

[16] The IHO noted that despite the parties' attempts to stipulate to the number of hours of ABA services the student had received under pendency, "the process was complicated by the fact that some compensatory services and pendency services were provided under prior decisions and case numbers" (IHO Decision at p. 12). The IHO also noted that the parent had "offered over 800 additional pages of emails as evidence to support her calculations," but the IHO precluded the parent from entering them into the hearing record as evidence due to the district's objection concerning the "lack of testimony from any witness about the accuracy of these emails or which of them involved invoices that were actu[a]lly relevant to this case, were paid and/or that services were actually delivered by the agency" (id. at n.8).

[17] To be clear, the 10-month school year from September through June consists of 36 weeks, not 40 weeks, as represented by the parent's calculations.

[18] The IHO indicated that the parent's calculations for the September to June portion of each school year consisted of 40 weeks; however, as has already been noted, the 10-month portion of the school year—i.e., September to June—consists of 36 weeks (see IHO Decision at p. 16).

went virtual," the IHO concluded that the student's "pendency order [wa]s no longer appropriate to meet her current needs" (id. at pp. 16-17).

In light of this conclusion, the IHO determined that the student was entitled to receive 45 hours per week total of compensatory ABA services from March 2020 through June 2020, based on the student's progress report dated September 2019 through July 2020 (see IHO Decision at p. 17, citing Parent Ex. J). The IHO found that approximately 20 weeks spanned March 2020 through June 2020, which totaled 900 hours of ABA services (45 hours per week x 20 weeks), and the student had already received 230 hours of home-based ABA services from April 2020 through June 2020, which resulted in a compensatory ABA services award of 670 hours of ABA services to compensate for the hours the student missed during the 2019-20 school year (id., citing Parent Ex. R). However, based on the student's "significant progress utilizing the alternative method of virtual delivery of her ABA services" as reflected in subsequent progress reports—dated July 2020 through January 2021 and March 2021 through August 2021, respectively—the IHO determined that the student's needs "changed considerably and were su[b]stantially met after she received 2,129 hours of ABA" (IHO Decision at p. 17, citing Parent Exs. P; Q). As a result, the IHO found that the pendency order was "no longer the appropriate measure to use in calculating compensatory educational services" (IHO Decision at p. 17). Instead, the IHO concluded that if the student received "2,129.25 hours of ABA services per year" for both the 2020-21 and 2021-22 school years, and "those services were already paid for" by the district, then the student "would not be entitled to receive any additional hours since the evidence showed that such an amount of services met her current needs" (id.). However, to the extent that the student had not received "2,129.25 hours of ABA services per year," the IHO found that the student "should receive the difference between that amount and what she actually received" (id. at pp. 17-18, citing E. Lyme Bd. of Educ., 790 F.3d at 452). The IHO noted that "upon presen[t]ation to the [district] by the parent/provider that any amount of those services were not provided or paid for, they shall be given as part of this order for compensatory ABA services" (IHO Decision at p. 18).

Therefore, as relief, the IHO ordered the district to provide the following: 670 hours of compensatory ABA services to be used as the parent chose and the provision of "additional compensatory ABA services to the extent that [the student] ha[d] not received at least 2,129 hours of ABA at-home for each school year in which the pendency order ha[d] been in effect or will be in effect going forward" (IHO Decision at p. 18).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by awarding compensatory educational services for missed pendency services. More specifically, the district contends that the IHO erred because the district complied with the pendency order by funding all of the ABA services the student received during the 2019-20 school year, the student made significant progress with the district-funded ABA services, and alternatively, the IHO erred in calculating the compensatory educational services awarded.

In an answer, the parent responds to the district's allegations and generally argues that the district was responsible for implementing the student's pendency services, and the parent was not required to locate providers and did not assume the responsibility for doing so. The parent also argues that funding a portion of the student's pendency services did not equate to implementing

pendency services. Next, the parent asserts that the student is entitled to the full value of pendency services regardless of whether the student experienced harm. The parent further asserts that pendency violations continued to accrue after the initial closing date of the impartial hearing on March 31, 2022. Finally, the parent argues that the district misconstrued evidence of the student's progress, noting that any progress made after June 30, 2020, was irrelevant to whether the student was entitled to compensatory educational services for the district's failure to offer the student a FAPE for the 2019-20 school year.

As a cross-appeal, the parent argues that the IHO erred by failing to award sufficient compensatory ABA services for the student for the 2019-20 school year. The parent also argues that an SRO should award additional compensatory educational services for missed pendency services for the entire time period the district was obligated to implement pendency services. Next, the parent asserts that the student is entitled to compensatory educational services for the district's failure to offer the student a FAPE for the 2019-20 school year regardless of the student's progress. The parent contends that the IHO erred by failing to award compensatory educational services for the failure to provide ABA supervision, which was a part of ABA services, and erred by denying the requested relief without prejudice. Finally, the parent asserts that the SRO should accept the additional documentary evidence submitted for consideration on appeal.[19]

In an answer to the parent's cross-appeal, the district responds to the parent's allegations and generally argues to grant the district's appeal and to dismiss the parent's cross-appeal. In addition, the district objects to the consideration of the additional documentary evidence submitted with the parent's cross-appeal.

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

[19] In addition, the parent contends that student is a class member in two class action lawsuits—M.G. et al v. New York City Department of Education, 162 F.Supp.3d 216 (S.D.N.Y. 2016) and L.V. v. New York City Department of Education, 03-cv-9917 (S.D.N.Y.) (resulting in a consent decree for the district's failure to implement orders)—and the district continually fails to bring these cases to the SRO's attention, which has resulted in the issuance of "decision[s] involving pendency funding that [we]re inconsistent with th[e] consent decree." To that end, the parent submitted a copy of the Stipulation of Settlement reached in the L.V. matter, as well as a letter from the district acknowledging that, pursuant to that stipulation, the student was a member of said class action with respect to the IHO decision in this case, dated "August 15, 2019." Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Given the disposition of the appeal and cross-appeal, it is not necessary at this juncture to determine whether to accept the parent's additional documentary evidence submitted for consideration on appeal; however, I will take judicial notice of the district's letter to the parent acknowledging that the student is a member of the L.V. class action, dated December 12, 2022, and identified as "SRO Ex. B."

[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]).[20] 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

[20] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

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).

Once a student's "then-current educational" placement or pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino, 959 F.3d at 532; Schutz, 290 F.3d at 483-84; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington, 421 F. Supp. 2d at 697; Murphy, 86 F. Supp. 2d at 366; Letter to Hampden, 49 IDELR 197). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings" (S.S., 2010 WL 983719, at *1 [emphasis in the original]). And upon a pendency changing event, such changes apply "only on a going-forward basis" (id.). With that said, it has been held that in certain circumstances a court may, on equitable grounds, retroactively adjust a student's pendency placement if a State-level administrative decision in a parent's favor was not issued in a timely manner (see Mackey, 386 F.3d at 164-66; Arlington, 421 F. Supp. 2d at 701; O'Shea, 353 F. Supp. 2d at 457-58; Murphy, 86 F. Supp. 2d at 366-67).

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

VI. Discussion—Pendency and Remand to the IHO

A review of the evidence in the hearing record establishes that the parties in this matter focused much of their time and energy at the impartial hearing attempting to discern the specific amount of the allegedly missed pendency services in order to inform the IHO's award of compensatory educational services as relief. However, neither party appears to acknowledge that the difficulty in affixing a number to the allegedly missed pendency services derives not so much from the voluminous and confusing invoices, the absence of clear and unequivocal evidence, or how or whether to apply the Second Circuit's decision in East Lyme Board of Education to fashion relief, but instead resulted from the evolving and changing nature of the student's pendency services, itself; changes which, based on the evidence in the hearing record, and as explained further below, the parties appear to have agreed upon during the course of the administrative proceedings. The IHO acknowledged as much in the decision; for instance, when noting the student's enhanced progress with remote instruction, the IHO stated that the "pendency order [wa]s no longer appropriate to meet [the student's] current needs" nor did it serve as an appropriate basis upon with to calculate a compensatory educational services award (IHO Decision at pp. 16-17). Notably, the IHO did not delve further into what the student's then-current pendency services were, and instead, fashioned conditional relief that left the parties to fully formulate the relief required (id. at pp. 17-18).

However, despite noting that changes occurred in the student's pendency services, the hearing record does not contain sufficient evidence upon which to determine the exact details of the student's pendency services; as a result, the matter must be remanded to the IHO to determine when the student's pendency services changed, what the student's pendency services were as a result of those changes, and what, if any, compensatory educational services may be warranted to remedy any missed pendency services. This endeavor requires the presentation of evidence—and not arguments or factual statements set forth by the attorneys representing each party—specifying what services the student actually received (ideally, agreed upon by both parties regardless of which party bears the burden of proof), the hourly amount of services provided to the student and by whom, evidence of payment for those services, and evidence concerning the agreements made between the parent and the district that formed the basis for the changes in the student's pendency services or whether the student's pendency services were unilaterally changed by one party.[21]

A. 2019-20 School Year

Here, the IHO initially issued an interim decision on pendency, dated August 2, 2019, which ordered pendency services based on an unappealed IHO decision, dated March 21, 2019 (see IHO Ex. I at pp. 1, 3-6).[22] As reflected by the evidence in the hearing record, the parties agreed that the unappealed IHO decision formed the basis for the student's pendency services on the first day of the impartial hearing held on July 29, 2019 (see Tr. pp. 1, 4). In seeking compensatory educational services for the allegedly missed 1:1 home-based and school-based ABA pendency services, the parent sought—and continues to seek—an award of relief based on a calculation of the total hours, i.e., 45 hours per week of 1:1 ABA services, set forth in the August 2019 pendency decision, on an hour-for-hour basis, and pursuant to the case number assigned to the present matter (see Parent Post-Hr'g Br. at pp. 8-9; Answer & Cr. App. ¶¶ 21-22).[23] For that portion of the 2019-20 school year from September 2019 through March 2020, the evidence in the hearing record appears to support a finding that the student was entitled to receive the 45 hours per week of 1:1 ABA services as set forth in the August 2019 pendency decision along with the other services identified in the pendency order.[24] Consistent with the pendency decision, it appears that

[21] Although the parent withdrew her request to submit parent exhibit "R" into the hearing record as evidence at the impartial hearing, this is the type of evidence required and regardless of whether the IHO erred by relying on the information contained in this exhibit, the parties should reconsider its submission into the hearing record and present a witness to explain the information contained therein.

[22] In the parent's post-hearing brief, the parent's attorney indicated that the IHO issued a prior interim order on pendency, and the August 2, 2019 interim decision on pendency was the second decision on pendency issued by the IHO (see Parent Post-Hr'g Br. at p. 4). The hearing record in this case does not include any other interim decision on pendency, except for the decision dated August 2, 2019, nor any other references to a prior interim decision on pendency (see generally Tr. pp. 1-804; Parent Exs. A-Q; u-V; WW; Dist. Exs. 1-3; IHO Ex. I).

[23] In the parent's cross-appeal, the parent challenges the IHO's decision denying her request for compensatory educational services for ABA supervision services that were allegedly not provided pursuant to pendency (see Answer & Cr. App. ¶¶ 26-29). However, given that the matter must be remanded to the IHO for further administrative proceedings, it is unnecessary to address this portion of the parent's cross-appeal at this time.

[24] The evidence in the hearing record also supports a finding that the student was entitled to receive 35 hours per week of 1:1 ABA services during summer 2019, consistent with the interim decision on pendency (see Interim IHO Decision at p. 6).

the evidence in the hearing record reflects that the student attended an ICT classroom for the 2019-20 school year from September 2019 through March 2020 with a 1:1 ABA provider from the agency for the duration of each school day, although neither party submitted any evidence to establish the length of the student's school day, other than perhaps confusing invoices left to the IHO and now the SRO to examine and analyze in order to calculate the amount of ABA services the student received (compare IHO Ex. I at pp. 5-6, with Tr. pp. 139, 280, 283-84; see generally Parent Exs. J; WW; Dist. Ex. 2).[25]

However, as in most IDEA cases involving the 2019-20 school year, the COVID-19 pandemic and related school closures in or around March 2020 complicated the delivery of services to the student, and more specifically, the pendency services in the August 2019 pendency decision. At some point following the COVID-19 school closures—and based on statements made by the parent's attorney at the impartial hearing—the district had "been allowing any in-school services to be provided [to the student] at home, … the school ha[d] been providing some of the related services," and the parent obtained some related services for the student through the district's issuance of RSAs (Tr. pp. 24-25). The parent's attorney also stated at the same impartial hearing held on January 15, 2021 that the student's pendency services had not been implemented "partially because of COVID," noting that the student was "supposed to be getting a certain number of ABA . . . but they haven't been able to implement all of it, in part because of scheduling issues relative to what's going on at the school with related services" (Tr. pp. 19, 26-27). The parent's attorney acknowledged that the ABA services were being delivered to the student remotely (id.). The parent's attorney also noted that it was not the district's "failure" to implement the ABA services "because the scheduling ha[d] to do with the providers" (Tr. p. 28). According to the parent's attorney, when the COVID-19 pandemic "closed the schools down and the [district] had authorized remote instruction, it was the first time that [the student] was able to receive her direct instruction at the high school level without having to be placed in an inappropriate environment" and the student could then "receive work that did not have to be aligned with the inappropriate Regents based work that was being delivered in the classes" (Tr. p. 108). According to counsel for the parent, this was the first time that the student was able to work "on her functional skills, her prevocational skills, and her communication skills through a quiet one-to-one setting, albeit a remote setting" (Tr. pp. 108-09).

[25] According to the parent's assertion in her post-hearing brief to the IHO, the student's pendency services could not be implemented at the district high school she attended for the 2019-20 school year prior to the COVID-19 pandemic and the resulting school closures for a variety of reasons, such as: the "school setting was too loud and filled with loud, male voices"; the "school did not provide a quiet space or setting for [the student's] providers to pull [her] out either for 1:1 instruction or in situations where [the student] was dysregulated"; and the "teachers did not differentiate instruction or provide any information to the ABA team and failed to afford them lesson plans, worksheets, syllabus or any information in advance so they could modify the lesson for [the student]"; and the "school did not make any effort to incorporate [the student] into the school or the school community and she had no opportunities for socialization" (Parent Post-Hr'g Br. at pp. 6-7). When compared to the IHO's interim decision on pendency, the services identified by the parent as examples of the district's failure to implement the student's pendency services are not all listed as pendency services in the decision (compare Parent Post-Hr'g Br. at pp. 6-7, with IHO Ex. I at pp. 5-6). Rather, some of the examples noted by the parent in her post-hearing brief appear to be differences the parent noted between the manner in which the student reportedly received services in a district middle school during the 2018-19 school year, eighth grade, versus the manner in which the student reportedly received services at the district high school during the 2019-20 school year (see Parent Post-Hr'g Br. at pp. 3-4, 6-7).

In her post-hearing brief to the IHO, the parent indicated that, after the COVID-19 pandemic related school closures and the initiation of remote instruction, the student "continued to receive remote ABA, and related services" (Parent Post-Hr'g Br. at p. 7). The evidence in the hearing record further indicates that the student has not returned to a district school building since approximately March 2020, and therefore, no longer received instruction in an ICT classroom (see Tr. p. 332; see also Tr. pp. 108-109, 111).

At the impartial hearing, the owner of the agency (agency owner) employing the student's ABA providers testified that, prior to the COVID-19 pandemic, five staff members from the agency worked with the student (see Tr. pp. 638, 641). The agency owner testified, however, that when the COVID-19 pandemic school closures occurred, two agency employees left their employment with the agency, and the agency "shifted the staff" who then-currently worked with the student to increase their hours in order to "provide as many hours" to the student as the agency could provide while they "transitioned from providing services in the school setting to providing services virtually" (Tr. pp. 641-42).[26] The agency owner testified that it "took quite a bit of time" to learn from the district whether it had "approved" funding used to pay for the student's school-based services to "transition into [funding the] home[-based, remote services]" (Tr. pp. 642-44, 750; see Tr. pp. 108-09). In addition, the agency "looked at adding additional service providers" for the student once the agency learned "how much [the student] could tolerate" with respect to virtual instruction (Tr. p. 642).

The district indicated in its post-hearing brief to the IHO that when the COVID-19 pandemic school closures occurred and the student received remote instruction, the parent and the district "agreed that the [district] would continue to fund ABA services the [a]gency provided [to the student] remotely" (Dist. Post-Hr'g Br. at p. 2). The district also noted in its post-hearing brief that the district continued to fund the student's ABA services provided by the agency for the "remainder" of the 2019-20 school year, and continued to fund the ABA services provided to the student during the 2020-21 and 2021-22 school years when the student did not return to school (id.; see Tr. p. 332).

In addition to the foregoing, the parent submitted a schedule of the student's services, which was identified at the impartial hearing as the schedule for the student's remote services—including 1:1 ABA services—that remained in place for the student from approximately March 2020 through July 2021 (see Tr. pp. 160-61, 245, 254-55; Parent Ex. L). Upon review of the student's schedule, it reflects that the student received approximately 19.5 hours per week of ABA services from two ABA providers (see Parent Ex. L).

Based upon the foregoing, it appears that the student's pendency services changed as a result of the COVID-19 pandemic for various reasons, including staffing changes at the agency providing the student's ABA services. It also appears that the student's pendency services changed

[26] The agency BCBA who testified at the impartial hearing indicated that the agency's staffing changes related to the COVID-19 pandemic allowed her to increase the hours she worked with the student from approximately 6 hours per week to 12 hours per week, which she began within approximately 3 or 4 weeks of the school closures (see Tr. pp. 152-53). She also testified that the frequency of her services with the student remained the same during the 2020-21 school year; however, the schedule in the hearing record does not reflect that this agency BCBA/ABA provider delivered 12 hours per week of 1:1 ABA services to the student during the 2020-21 school year (compare Tr. p. 153, with Parent Ex. L).

from school-based services to fully remote, home-based services delivered in a 1:1 setting, which initially arose due to the COVID-19 pandemic school closures, but which thereafter appears to have been agreed upon between the parties.

B. 2020-21 School Year

As noted above, the student's schedule for services for the 2020-21 school year reflected that two agency ABA providers delivered approximately 19.5 hours per week of 1:1 ABA services to the student for the entire 2020-21 school year (see Tr. pp. 160-61; Parent Ex. L). At the impartial hearing, the agency owner testified that the student had four ABA providers as of September 2020 (see Tr. p. 650). In addition, the agency owner testified that an additional provider was added to the student's team in February 2021, and then a new team member was added in October 2021 (see Tr. p. 670). The student's schedule of services also included the schedules for the student's related services (see Parent Ex. L).[27] In addition, the parent's attorney noted that the student had not been in school since March 2020 and had only been receiving "ABA and related services" during the 2020-21 school year; according to counsel for the parent, the student "was not engaging with the classes" (Tr. pp. 111-12). Given this information, it appears that the parent and district agreed to pendency services that differed from the August 2019 pendency decision and not just with respect to how much 1:1 ABA services the student received, but also with respect to the litany of other services ordered in the August 2019 pendency decision, such as an ICT classroom, the services of a 1:1 paraprofessional, reimbursement for mileage and toll transportation to access the student's RSA providers, and the services of an inclusion expert, among other things (see IHO Ex. I at pp. 5-6).

C. 2021-22 School Year

With respect to the 2021-22 school year, the hearing record indicates that the district and the parent had been negotiating whether the student would be "force[d] . . to return to the [school] building" (Tr. pp. 63, 109-10). As of September 29, 2021, the parent's attorney reported that the district "finally agreed as of last week that they w[ould] allow the pendency program to continue to be implemented without requiring the student to be physically present at school until such time as the pendency [wa]s modified in some way by either this case or some subsequent case" (Tr. p. 110). The parent's attorney clarified that the district agreed to allow the student to receive ABA services virtually, as well as OT and PT (via the issuance of RSAs), but the delivery of the student's speech-language therapy had not yet been settled (see Tr. pp. 110-11). According to the parent's attorney, the student received ABA services virtually during the previous school year and, as of the September 29, 2021 hearing date, she was going to begin receiving some of her ABA services in-person (see Tr. p. 110). This information suggests that the pendency services changed through some type of negotiations between the parties, but the hearing record does not contain sufficient evidence to determine what agreement the parties reached with respect to those services.

[27] At the impartial hearing, the parent's attorney ultimately withdrew her request to enter parent exhibit "R" into the hearing record as evidence (see Tr. p. 432). However, the IHO appeared to rely on the information contained in parent exhibit "R" in reaching her conclusions in the decision; parent exhibit "R" reflected the ABA services actually delivered to the student by the agency on a monthly basis from July 2019 through July 2021 and the document indicates that it was created by the agency (see IHO Decision at pp. 16-17).

In general, the switch to remote instruction, itself, did not constitute a change in the student's educational program for the purposes of pendency (see J.T. v. de Blasio, 500 F. Supp. 3d 137, 184 [S.D.N.Y. 2020], aff'd in part, K.M. v. Adams, 2022 WL 4352040 [2d Cir. Aug. 31, 2022] ["the switch to remote learning did not require any change to students' IEPs"]). However, in light of the above, the hearing record shows that there were agreed upon changes in the student's educational programming after the issuance of the August 2019 interim decision, including the removal of the student's in-class instruction with the support of ICT services and the support of a 1:1 paraprofessional; accordingly, it is unclear as to what educational program constituted the student's pendency placement at the different stages of this proceeding. In order to determine whether a compensatory award for missed pendency services is warranted, the exact contours of the student's agreed-upon educational program must be established as a part of the hearing record. For example, once it was agreed that the student would not attend a general education class with the support of ICT services (either in-person or remotely) and would receive all of her instruction through ABA providers with related services, it does not necessarily follow that the parties' expectations were that the student would have received the same number of hours of school-based and home-based ABA instruction as was required to support the student's educational program in school. A hearing is required to determine what the parties agreed to when changes to the student's educational programming were made. After making such a determination, a calculation can then be made to determine if the student missed services that the parties' considered a part of the student's pendency program.

In addition, as the administrative proceeding continued into the 2022-23 school year and pendency services remained in place for the student, it is imperative that the parties and the IHO reach a determination concerning what educational program makes up the student's current agreed-upon educational program, as any subsequent administrative proceedings will serve to continue the student's pendency services.

VII. Conclusion

Having concluded that the evidence in the hearing record demonstrates that the student's pendency services changed during the course of the impartial hearing, and as noted, the hearing record does not contain sufficient evidence to determine the student's agreed-upon educational program at the different stages of this proceeding, the IHO's decision must be vacated and remanded for further administrative proceedings consistent with this decision.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated November 11, 2022, is modified by vacating that portion of the decision which found that the district failed to implement the student's pendency services during the 2019-20, 2020-21, and 2021-22 school years; and,

IT IS FURTHER ORDERED that the IHO's decision, dated November 11, 2022, is modified by vacating that portion of the decision that ordered the district to provide the student with compensatory educational services for missed pendency services during the 2019-20, 2020-21, and 2021-22 school years; and,

IT IS FURTHER ORDERED that the matter is remanded to the IHO to reconvene the impartial hearing and issue a determination as to the student's educational program after changes were made to the student's pendency services during this proceeding and whether the student is entitled to any compensatory educational services for missed pendency services during the 2019-20, 2020-21, and 2021-22 school years.[28]

Dated: **Albany, New York**
February 22, 2023

STEVEN KROLAK
STATE REVIEW OFFICER

[28] The parent has expressed a number of arguments related to pendency in this proceeding as being part of a settlement agreement in a class action suit filed in federal court (Ans. With Cross-Appeal at pp. 10-11; Reply at pp. 2-3). As noted by the parent, a class action lawsuit was filed against the district regarding its failure to implement IHO decisions in a timely manner on a system-wide basis (L.V. v. New York City Dep't of Educ., 2005 WL 2298173, at *8 [S.D.N.Y. Sept. 20, 2005]). However, jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69, 75 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925, 933 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011]; Application of a Student with a Disability, Appeal No. 12-039 [indicating that "[n]o provision of the IDEA or the Education Law confers jurisdiction upon a state educational agency or a local educational agency to sit in review of or resolve disputes over injunctions or consent orders issued by a judicial tribunal"]). In the event that the parent does not want to continue her challenge to the implementation of pendency as part of this proceeding, she is free to choose to assert her legal rights pursuant to the stipulation of settlement reached in the federal court action in federal court rather than continue, on remand, with the impartial hearing in this matter.