



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-176

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

Appearances:

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

Law Office of Olga Vlasova, PLLC, attorney for respondent, by Olga Vlasova, 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 found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it, in part, to directly fund the costs of a home-based program for the 2022-23 school year, to add the home-based program to the student's individualized education program (IEP), and to provide the student with compensatory educational services for missed pendency services. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an 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 student in this case began receiving special education services—speech-language therapy, occupational therapy (OT), and physical therapy (PT)—through the Early Intervention Program (EIP) when she was 2.5 years old (see Parent Exs. H at p. 1; V ¶ 5). At three years of age, the student began receiving applied behavior analysis (ABA) services, and attended Shema Kolainu preschool where she received OT, PT, speech-language therapy, and ABA services through the Committee on Preschool Special Education (CPSE) (see Parent Exs. H at pp. 1-2; V ¶

2).¹ The evidence in the hearing records reveals that the student thereafter continuously attended Shema Kolainu—an "ABA based educational program"—through the current school year (2022-23) (Parent Ex. H at p. 2; see Parent Exs. U ¶¶ 6-7; V ¶ 7; see generally Parent Exs. I-J). The evidence further reflects that the student had received home-based feeding therapy for "three hours per week" as a service initially recommended in at least one of the student's previous IEPs and that the feeding therapy began "a few years ago" (Parent Ex. V ¶¶ 8-11).² For the 2021-22 school year, the student attended a 6:1+3 special class at Shema Kolainu and received the following school-based related services: three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of OT, three 30-minute sessions per week of individual PT, and art therapy (see Parent Exs. M at p. 1; N at pp. 1, 3; O at pp. 1, 3; P; Q).

By letter dated June 17, 2022, the parent notified the district of her intention to unilaterally place the student at Shema Kolainu for the 12-month, 2022-23 school year and to seek reimbursement and direct payment of the costs of the student's tuition from the district (see Parent Ex. D at p. 1). The parent also requested that the district provide the student with round-trip transportation to Shema Kolainu, pursuant to State law, beginning on July 5, 2022 (id. at p. 2). In the letter, the parent indicated that, during the 2021-22 school year, the student had attended a 6:1+3 special class at Shema Kolainu, where she received ABA services and related services consisting of speech-language therapy, OT, PT, and art therapy; the parent further indicated that the student had been receiving three hours per week of home-based feeding therapy (id.). According to the parent, the district failed to convene a CSE meeting and failed to develop an IEP for the student for the 2022-23 school year (id.). In addition, the parent indicated that, although the student's previous CSE meeting had taken place in April 2021, she had not received a copy of the IEP, and another IHO had ordered the district to convene a CSE meeting to "develop an appropriate IEP," but the district had "failed to implement that portion" of the order (id.).³ The

¹ According to a neuropsychological evaluation report, dated June 2021, it was reported that the student attended a different preschool and began attending Shema Kolainu when the student was five years old (compare Parent Ex. H at pp. 1-2, with Parent Ex. V ¶ 2).

² At the impartial hearing, a speech-language pathologist then-currently employed by the district testified that she had been providing the student with three hours per week of home-based speech-language and feeding therapy since 2015, had most recently delivered services to the student on June 9, 2022 and, prior to that date, had last delivered services to the student in December 2021 "due to maternity leave" (Tr. pp. 35-36; see Parent Ex. V ¶¶ 8, 11, 28). The hearing record does not indicate why this same speech-language pathologist no longer provided the student with therapy after June 9, 2022 (see generally Tr. pp. 1-115; Parent Exs. A-W; IHO Ex. I).

³ In the parent's due process complaint notice, dated July 5, 2022, the parent indicated that a CSE had "reconvened" on April 27, 2021 and recommended a 6:1+1 special class placement in a district specialized school (Parent Ex. A at p. 2). The parent further noted that she had disagreed with this recommendation as "not supportive enough" to address the student's needs (id.). As further noted in the due process complaint notice, the student had been reevaluated during the 2020-21 school year in the areas of "speech and feeding, OT and PT," and the parent provided the district with copies of the evaluation reports "prior to the April 27, 2021 CSE meeting"; however, according to the parent, the district failed to offer "additional services, including after-school [speech-language therapy], OT, and ABA that were recommended in the independent evaluations" (id.). The evidence in the hearing record includes copies of a November 2020 OT evaluation report, a November 2020 PT evaluation report, and a December 2020 speech-language-communication and feeding evaluation report, which, by virtue of their completion dates, would have been available for review and consideration by the April 2021 CSE (see generally Parent Exs. E-G). The parent testified that, prior to the April 2021 CSE meeting, she provided

parent also noted that the district had failed to "offer any school placement" for the 12-month, 2022-23 school year (id.).

On June 22, 2022, the parent executed an enrollment contract for the student's attendance at Shema Kolainu for the 12-month, 2022-23 school year (July 5, 2022 through June 30, 2023) (see Parent Ex. L at pp. 1-2).

On July 5, 2022, the student began attending a 12-month school year program at Shema Kolainu, where she attended a 6:1+3 special class placement and received the following school-based related services: three 30-minute sessions per week of individual speech-language therapy; three 30-minute sessions per week of individual OT; and three 30-minute sessions per week of individual PT (see Parent Exs. J at pp. 1-2; K; L at p. 1; R at pp. 1, 3; U ¶¶ 34-37). In addition, the student received art therapy—one 30-minute session per week individually and one 30-minute session per week in a group—as well as individual ABA services and adapted physical education at Shema Kolainu during the 2022-23 school year (see Parent Ex. U ¶¶ 36, 38, 40).⁴

A. Due Process Complaint Notice

By due process complaint notice dated July 5, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A at p. 1).⁵ As relevant to this appeal, the parent sought the following as relief: an order directing the district to fully fund the student's unilateral placement at Shema Kolainu for the 2022-23 school year; an order directing the district to fund the student's home-based feeding therapy (three 60-minute sessions per week) by a "provider of the [p]arent's choice at the provider's customary rate"; an order directing the district to provide the student with round-trip transportation for the 2022-23 school year from her home to Shema Kolainu; an order directing the district to add

the district with copies of the OT, PT, and speech-language-communication and feeding evaluations completed in November and December 2020 (see Parent Ex. W ¶¶ 15-16). The parent further testified that the April 2021 CSE recommended a 6:1+1 special class placement and "feeding therapy after school, three hours per week" (id. ¶ 17). However, according to the parent, the April 2021 CSE denied her request at that time for a home-based ABA program, as well as "additional therapies, such as ABA and OT" (id.). Thereafter, during summer 2021, the parent privately obtained a neuropsychological evaluation of the student, which would not have been available to the April 2021 CSE; the hearing record does not indicate whether the parent shared this evaluation report with the district, and if so, when it was shared (see generally Parent Ex. H). The hearing record does not contain a copy of the April 2021 IEP, nor does the hearing record include any evidence or information concerning whether the parent challenged the special education program and related services recommended in the April 2021 IEP (see generally Tr. pp. 1-115; Parent Exs. A-W; IHO Ex. I).

⁴ As reflected in the student's schedule for the 2022-23 school year, the student received approximately 1.5 hours of per day of individual ABA services (discrete trials) (see Parent Exs. J at p. 1; U ¶ 28).

⁵ The parent asserted in the due process complaint notice that the student was entitled to a pendency placement based on an unappealed IHO decision, dated March 3, 2021 (see Parent Ex. A at p. 3). The parent further noted that the pendency placement consisted of the student's placement at Shema Kolainu at district expense, three 60-minute sessions per week of home-based feeding therapy, and round-trip special transportation to Shema Kolainu—all of which were to be provided on a 12-month school year basis (id.). The hearing record does not include a copy of the March 2021, unappealed IHO decision (see generally Tr. pp. 1-115; Parent Exs. A-W; IHO Ex. I).

"additional" speech-language therapy, ABA services, OT, and feeding therapy—as a home-based or "after school" program—to the student's IEP for the 2022-23 school year; and an order directing the district to provide compensatory educational services, such as "additional feeding therapy and ABA services," based upon the evidence adduced at the impartial hearing (id. at pp. 3-4).

B. Impartial Hearing Officer Decision

On August 9, 2022, the parties proceeded to an impartial hearing, and the IHO conducted a prehearing conference (see Tr. pp. 1-12). Shortly thereafter, on August 11, 2022, the district executed the pendency form submitted by the parent (see Parent Ex. C at pp. 1-2). According to the form, an unappealed IHO decision, dated March 3, 2021, formed the basis for the student's pendency placement, which consisted of the following: a 12-month school year program at Shema Kolainu (to be paid via parent reimbursement and direct payment to the school), three 60-minute sessions per week of home-based feeding therapy delivered by a private provider via direct payments (12-month school year basis), and daily special transportation provided by district busing (12-month school year basis) (id. at p. 1).⁶ In addition, the form indicated that the student's pendency placement should be implemented as of the date of the due process complaint notice, July 5, 2022 (id. at pp. 1-2).

On August 26, 2022, the district provided the parent with a response to the due process complaint notice (see Parent Ex. B at pp. 1, 4).

The impartial hearing resumed on September 19, 2022, and concluded on October 7, 2022, after three total days of proceedings (see Tr. pp. 13-115). In a decision dated November 17, 2022, the IHO found that the district failed to offer the student a FAPE, the 12-month school year program at Shema Kolainu was an appropriate unilateral placement, and equitable considerations weighed in favor of the parent's request for direct funding of the student's tuition costs at Shema Kolainu for the 12-month, 2022-23 school year (see IHO Decision at pp. 5-13, 17). In addition to the school-based program at Shema Kolainu, the IHO determined that the evidence supported a conclusion that the student also required a home-based program, consisting of three hours per week of individual feeding therapy to be "provided after school, two [30]-minute sessions of individual [OT] per week to be provided at home and [25] hours of individual at home ABA therapy to be provided afterschool at home per week to prevent regression as part of the [s]tudent's placement to enable her to apply the skills taught to her in [Shema Kolainu] at home to become independent" (id. at p. 11). The IHO determined that Shema Kolainu's program "along with the at home program provide[d] by a preponderance of the evidence educational instruction designed to meet" the student's needs (id.). In light of the foregoing, the IHO ordered the district to directly fund the costs of the student's tuition at Shema Kolainu (12-month school year), as well as to directly fund the costs of the student's home-based program: 25 hours per week of individual ABA services by a "certified B[oard] C[ertified] B[ehavior] A[nalyst]" (BCBA), three hours per week of individual feeding therapy, and two 30-minute sessions per week of individual OT (id. at pp. 12-13). The IHO noted that the home-based program was "necessary to allow the [s]tudent to retain the skills

⁶ The parent testified that she had difficulty locating and securing "another provider for feeding therapy," but had "recently found another therapist, who [wa]s supposed to start working with [the student] on September 13" (Parent Ex. V ¶ 29).

she learn[ed] at [Shema Kolainu] to enable her to be more independent and to engage in basic self-care" (*id.* at p. 12).

Next, the IHO addressed the parent's request for compensatory educational services (*see* IHO Decision at pp. 13-15). First, the IHO found that the district failed to timely implement the student's feeding therapy pursuant to pendency—from July 5, 2022 through September 13, 2022—and therefore, the student was entitled to receive 21 hours of home-based feeding therapy as compensatory educational services to "put her back in the position she would have been in but for the [d]istrict's failure to provide feeding therapy" under pendency (*id.* at pp. 14-15). With respect to the parent's request for "compensatory ABA services and [OT] from July 5, 2022 until the date of [the IHO's] decision," the IHO found that, while a home-based program of ABA services, OT, and feeding therapy was "necessary to provide the [s]tudent a FAPE along with her [p]rivate [s]chool placement," additional ABA and OT services—beyond the home-based program already awarded—would not provide the student with any benefit, and thus, the IHO denied the parent's request (*id.* at p. 15).

As relief, the IHO ordered the district to directly fund the student's tuition at Shema Kolainu for the 12-month, 2022-23 school year and to provide the student with round-trip transportation to Shema Kolainu (*see* IHO Decision at pp. 15-16). The IHO also ordered the district to fund a home-based program for the student, consisting of 25 hours per week of ABA services, three hours per week of feeding therapy, and two 30-minute sessions per week of OT (*id.* at p. 16). The IHO noted that the district must directly fund the "licensed [p]rovider[s] of the [p]arent's choosing in their respective fields at the [p]rovider's standard rate" (*id.*). Next, the IHO ordered the district to fund 21 hours of feeding therapy as compensatory educational services for missed pendency services (*id.*). Finally, the IHO ordered the district to convene a CSE meeting to develop an IEP that included recommendations for a home-based program consisting of 25 hours per week of ABA services, three hours per week of feeding therapy, and two 30-minute sessions per week of OT, as well as with "meaningful and measurable goals and objections, taking into account the recommendations of the [s]tudent's independent evaluator(s) and the program set forth in this [o]rder" (*id.* at pp. 16-17).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by awarding a home-based program consisting of ABA services, feeding therapy, and OT, as the parent had not obtained such services as part of the student's unilateral placement and the parent was not entitled to an award of compensatory educational services—or funding for compensatory educational services—for the home-based program in order to fill the gaps in services not provided by Shema Kolainu.⁷ Next, the district contends that the IHO erred by awarding compensatory educational services consisting of 21 hours of home-based feeding therapy for the district's alleged failure to timely implement

⁷ The district affirmatively asserts that it is not challenging the IHO's finding that Shema Kolainu was an appropriate unilateral placement for the student for the 12-month, 2022-23 school year or the related awards of direct funding for the costs of the student's tuition, as well as round-trip transportation. Consequently, these determinations have become 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]).

the student's pendency placement. And finally, the district argues that the IHO erred by ordering the district to convene a CSE meeting to develop an IEP for the 2022-23 school year that included recommendations for specific services, namely, a home-based program consistent with those services awarded by the IHO.

In an answer, the parent responds to the district's allegations and generally argues to uphold the IHO's decision in its entirety.

V. Discussion—Relief

A. Compensatory Educational Services—Pendency

The district contends that the parent was not entitled to an award of compensatory educational services for the district's purported failure to timely implement the student's feeding therapy pursuant to pendency. In support of this assertion, the district points to the pendency form, executed by the district on August 11, 2022, which indicated that the feeding therapy was to be delivered to the student by a "Private Provider" via direct payments by the district to the private provider. The district asserts that it was the parent's obligation to implement feeding therapy, and therefore, any lapse in services did not warrant an award of compensatory educational services. Alternatively, the district contends that, even if the parent was entitled to compensatory educational services, the IHO erred by awarding services from July 5, 2022—the date of the due process complaint notice—to September 13, 2022—the date the new provider could begin providing feeding therapy—because the district executed the pendency form on August 11, 2022.

The parent argues that, as a matter of law, it is the district's responsibility to implement pendency, and in this case, the district failed to timely implement the student's home-based feeding therapy. The parent also argues that the district failed to timely execute the pendency form until August 11, 2022—nearly one month after the date of the due process complaint notice, July 5, 2022—and the district failed to offer any district or private provider to implement the student's feeding therapy services during the pendency of these proceedings. According to the parent, the district improperly shifted the burden to the parent to obtain these services, noting further that the pendency form was never executed by the parent and it did not constitute a contract that otherwise relieved the district of its obligation to implement pendency.

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, 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 (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. of the 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]).⁸ 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 to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

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

⁸ 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).

Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; 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 Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; 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).

At this juncture, neither party disputes the services to be delivered as the student's pendency placement. Instead, the dispute focuses on which party bore the responsibility to implement the student's home-based feeding therapy, and whether any delay therein must be remedied.

As reflected by the evidence in the hearing record, the parent completed the pendency form used by the district and forwarded the document to the district email designated for pendency requests on July 22, 2022 (see Tr. pp. 1, 6-7). When discussing whether an impartial hearing date should be scheduled for a pendency determination, the parent's attorney indicated that, although she did not know how long it would take the district to review the pendency form, she was willing to "wait a bit longer to see if they c[ould] process [the pendency form] so that [the parties] d[id]n't have to schedule a pendency hearing" (Tr. pp. 6-7). More specifically, the parent's attorney stated her willingness to schedule a pendency hearing in approximately two weeks to allow the district time to execute the pendency form (see Tr. p. 7). The parent's attorney also agreed on the first day of the impartial hearing—August 9, 2022—to send the pendency form to the district's attorney, who requested that she send the pendency form to him (id.). The district executed the pendency form on August 11, 2022 (compare Tr. p. 1, with Parent Ex. C at p. 2).

According to the pendency form, the parent and the district agreed that Shema Kolainu would deliver that portion of the student's pendency program and services, which consisted of a full school day with 1:1 ABA services and related services on a 12-month school year basis, and, as a home-based program, the student would also receive pendency services consisting of feeding therapy to be delivered by a private provider (see Parent Ex. C at p. 1). The pendency form further reflects that the district would directly fund the costs of the student's tuition at Shema Kolainu and would also directly pay the private provider who delivered the home-based feeding therapy (id.). At the impartial hearing, the parent testified that she had difficulty locating and securing a provider

to deliver the student's home-based feeding therapy until approximately September 13, 2022 (see Parent Ex. V ¶ 29).

The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at *25, *26 [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

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

Rather, the parent obtained the student's pendency placement through a pendency form she completed, which allowed her to select the providers to deliver the student's programming (see Parent Ex. C at p. 1). The parent does not dispute the services selected—or the means for delivery specified—on the pendency form, as completed, or that she elected on the form to have a private provider deliver the student's home-based feeding therapy services under pendency via direct payment by the district. Thereafter, the parent secured a private provider to deliver the student's home-based feeding therapy, which began on September 13, 2022 (see Parent Ex. V ¶ 29). Having arranged for and agreed to the delivery of the services by the private provider, the parent elected to carry the responsibility for ensuring the delivery of the stay-put services, with the district remaining responsible only for funding the services so delivered. As such, the parent assumed the risk that unforeseen events would cause the terms of the pendency agreement to be undesirable. Thus, for example, the parent's difficulty in locating a private provider was a risk that the parent assumed, which came to fruition.

Moreover, there is no allegation that the district failed to fund the student's pendency program or services or otherwise caused an interruption to the status quo. As such, the circumstances here are distinguishable from the matter before the Second Circuit in Doe v. East Lyme Board of Education, wherein the district had ceased funding private services that it had previously funded and, therefore, interrupted the status quo, causing the parent to have to obtain the services she could afford and resulting in an award of compensatory education for the services that the parent did not fund (790 F.3d at 447, 456-57).

In addition, there is no indication that the district was not "substantially complying with the [pendency] [a]greement" between the parties (Killoran v. Westhampton Beach Sch. Dist., 2020

WL 5424722, at *2-*3 [E.D.N.Y. Sept. 10, 2020] [finding that a district did not violate stay put where neither a library nor the school was available for delivery of the student's pendency services during the COVID-19 pandemic and the parents did not want someone to deliver services in their home and did not agree to remote delivery of services]). Here, it was the parent, not the district, who decided to select a private provider to deliver the student's feeding therapy services during the pendency of the proceedings. Thus, while I am sympathetic to the circumstances surrounding the parent's choice in this regard and her initial difficulty finding a provider, it was nevertheless the parent's decision to choose a private provider in the first instance for the student's home-based feeding therapy pendency services and, accordingly, any missed services that accrued during the relevant time period are not eligible for make-up services as compensatory education.

Consequently, the IHO erred by awarding the parent 21 hours of compensatory educational services for the district's alleged delay in implementing the student's home-based feeding therapy pursuant to pendency, and the IHO's award must be vacated.

B. Prospective Relief

1. Home-Based Program

Here, the crux of the parties' dispute is whether the IHO erred by ordering the district to fund a home-based program for the student, consisting of 25 hours per week of ABA services, three hours per week of feeding therapy, and two 30-minute sessions per week of OT (delivered by licensed providers selected by the parent).⁹ A review of the evidence in the hearing record supports a finding that, consistent with the district's contentions, the IHO erred and the award of the home-based program must be vacated.

Generally, a parent may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 838-39 [2d Cir. 2014] [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "private placement furnishes every special service necessary" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 365 [2d Cir. 2006]). However, for the outside services to represent a portion of the unilateral placement, the parent must undergo the financial risk associated with unilateral placements (see Ventura de Paulino, 959 F.3d at 526 ["Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test"]

⁹ While both parties frame and argue the IHO's award of direct funding for the home-based program as an award of compensatory educational services, it is altogether unclear how or why the parties interpret the IHO's award in this manner, especially when the IHO limited any discussion of compensatory educational services to the alleged missing pendency services for feeding therapy—which the IHO granted—and then the IHO turned the discussion to the parent's request for compensatory educational services for OT and ABA services from the date of the due process complaint notice through the date of the IHO's decision—which the IHO denied (see IHO Decision at pp. 13-15).

[first emphasis added] [internal quotations marks and footnotes omitted]; see also Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993]). To the extent a parent cannot afford to front the costs of the services, the district may be required to directly fund the services, but only if it is shown that the parent was legally obligated to pay for the services but, due to a lack of financial resources, had not made payments (see Mr. & Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]).

Here, to the extent that either the parent sought to add a home-based program to the program already provided by the student's unilateral placement or the IHO determined that the student required a home-based program as part of an appropriate unilateral placement, an analysis of the student's entitlement to such services funded by the district relates more directly to the issue of whether Shema Kolainu was an appropriate unilateral placement for the student or whether the parent cobbled services together, in addition to Shema Kolainu, such that the parent was entitled to either prospective funding or reimbursement for such services as part of the unilateral placement. However, as reflected by the evidence in the hearing record, the student did not receive a home-based program of ABA services or OT services or feeding therapy services (other than what was provided under pendency) and there is no evidence in the hearing record that the parent attempted, but failed, to obtain such services during the 2022-23 school year when the student attended Shema Kolainu (see generally Tr. pp. 1-115; Parent Exs. A-W; IHO Ex. I). In this case, it is unclear whether the parent would be able to establish that the student required home-based services to receive educational benefits despite never having received them. Although parents need not show that a unilateral placement provides every special service necessary to maximize the student's potential, the placement must be "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d 356, 364-65 [2d Cir. 2006]; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 115 [2d Cir. 2007]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 188-89 [1982]; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]). Consequently, there was no basis upon which to predicate the IHO's award of the home-based program or, moreover, to order the district to directly fund such services, and the IHO's award thereto must be vacated on this basis.

Notwithstanding the foregoing, the evidence in the hearing record reflects, absent a home-based program, the student made progress during her school day program at Shema Kolainu; moreover, as explained herein, the evidence in the hearing record demonstrates that any recommendations for a home-based program were premised on the purpose of reinforcing and generalizing skills. Notably, several courts have held that the IDEA does not require school

districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13-*14 [S.D.N.Y. Jul. 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *11 [S.D.N.Y. Mar. 31, 2014]; see also Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]).

Regarding the IHO's award of home-based feeding therapy, the evidence in the hearing record shows that in November 2020, the parent reported that the student did not "know how to chew," she only typically ate pureed or mashed foods, and at home she was mainly fed (Parent Ex. O at pp. 4-5). At that time, the student could scoop a thick consistency food and bring the spoon to her mouth, but she immaturely scooped too much food, did not appropriately pace herself, did not stabilize her bowl, and used an immature grasp on the spoon (id. at p. 5). Additionally, the student had difficulty with self-feeding and exhibited moderate spillage while doing so (id.). In a December 6, 2020, feeding evaluation report, a private speech-language pathologist indicated that the student did not exhibit oral movements upon request, and she demonstrated difficulty maintaining appropriate posture for mealtimes, held pieces of food in her mouth without attempting to swallow or spit the food out, and did not use her tongue to clean out her mouth (see Parent Ex. E at pp. 3-5). Although the student recognized food when presented on a spoon, she did not open her mouth when it was presented on a fork (id. at p. 3). The student was not able to drink from an open cup independently or use a straw (id. at pp. 3, 4). During the evaluation the student did not make any independent attempts to self-feed when presented with food, and required verbal prompts to grasp a spoon, was unable to scoop food onto the spoon, and needed hand-over-hand support to bring the spoon to her mouth (id. at pp. 4-5). When self-feeding, the student demonstrated "very poorly coordinated, jerky, and slow movement," resulting in "messy eating" (id. at p. 5). The student did "accept[] mashed, finely chopped, and blended foods," and the evaluator noted that all of the student's meals were a "soup like consistency" (id. at pp. 3-4). The student was not observed to attempt to bite solid foods upon request and with physical cues; the evaluator concluded that the student did not have the motor planning sequence for biting food or chewing it (id. at p. 5). At that time, the private speech-language pathologist recommended that the student receive three 60-minute sessions per week of home-based feeding therapy (id. at p. 11).

In summer 2021 as part of a privately obtained neuropsychological evaluation (August 2021 neuropsychological evaluation), the parent reported that due to the student's "persisting challenges chewing, her foods must be pureed, mashed or finely chopped," and that she was "not independent in activities of daily living" (Parent Ex. H at pp. 1-2). January 2022 progress information from a speech-language pathologist who provided the student's home-based feeding therapy remotely for a portion of the 2021-22 school year indicated that the student was able to pick up and drink from an open cup independently, she "more readily" tolerated new tastes, textures, and tactile input on her face or in her mouth, was able to self-feed with a spoon, picked up small pieces of food and placed them in her mouth, and intermittently used a spoon to feed

herself without prompting (see Parent Ex. S at pp. 1-3).¹⁰ The home-based speech-language pathologist recommended that the student continue to receive three 60-minute sessions per week of home-based "speech/feeding therapy" (id. at p. 3).

The June 2022 Shema Kolainu OT progress report reflected that the student continued to have difficulty grading pressure when drinking from an open cup and self-feeding, noting moderate spillage with "watery" foods (Parent Ex. O at p. 1). However, by report, the student "continue[d] to work on, and show[ed] improvement in, simulated feeding tasks using a spoon," and the occupational therapist opined that the student would "likely make progress with continuation of OT services for [the] current mandate" of three 30-minute sessions per week (Parent Exs. O at p. 3; see Parent Ex. J at p. 2). According to the June 2022 Shema Kolainu progress report prepared by the student's classroom teacher (during summer 2022) and the student's BCBA classroom supervisor, the student "continue[d] to independently feed herself when the food [wa]s mostly solid, such as oatmeal" (Parent Exs. M at pp. 1, 3, 5; U ¶ 26). The report indicated that the student would "often ask for help with foods, such as soup" which were more difficult for the student to eat independently (Parent Ex. M at p. 3). To increase her independence, the student was "verbally prompted to eat the first few spoons herself when the bowl [wa]s fuller and easier to spoon" and she was provided with assistance with the rest of the bowl (id.). The June 2022 Shema Kolainu speech-language progress report indicated that the student "continue[d] to independently complete activities of daily living (i.e., feeding)" (Parent Ex. N at pp. 1, 3). At that time, the speech-language pathologist recommended continuing speech therapy "at [the student's] mandate" of three 30-minute sessions per week (id. at p. 3).

The student's BCBA classroom supervisor testified that, during the 2022-23 school year, classroom staff worked with the student during snack and lunchtime on developing appropriate eating habits, including using a spoon independently and wiping her mouth (see Parent Ex. U ¶ 30). The parent testified that, "due to the hard work of the therapists at school, our feeding therapist at home, as well as [the parent's] close involvement in working on [the student's] feeding skills," the student was able to drink from a cup and improved her ability to allow familiar people to "work" with "her mouth muscles" and to introduce new foods to her (Parent Ex. V ¶¶ 9-10).¹¹ According to the parent, the student needed to continue with home-based feeding therapy because "her progress [wa]s slow," she continued to exhibit "feeding issues" that interfered with her ability to eat age appropriate foods, and without feeding therapy, she was at risk of the losing skills she had learned (id. ¶¶ 27-28).

At the impartial hearing, the BCBA classroom supervisor testified that, although Shema Kolainu staff were targeting the student's feeding skills in school, "because of [the student's] . . .

¹⁰ According to the January 2022 progress report, the student's home-based feeding therapy services were provided pursuant to a related services authorization (RSA) (see Parent Ex. S at p. 1). The speech-language pathologist testified at the impartial hearing that she was employed by the district and had been providing the student's home-based feeding therapy since 2015 (see Tr. pp. 35-36).

¹¹ The parent also testified that in April 2021, the district agreed to provide the student with three hours per week of home-based feeding therapy, which she had been receiving for a number of years (see Parent Ex. V ¶¶ 8, 17).

difficulties generalizing" skills and the difficulty she had at home with feeding, she would benefit from additional therapy outside of school (see Tr. pp. 53-54).

Turning to the IHO's award of home-based ABA services, at the time of the August 2021 neuropsychological evaluation, the parent reported that since attending Shema Kolainu, the student had "made steady gains in her overall behavioral functioning" (Parent Ex. H at p. 2). At the conclusion of the evaluation, the private clinical psychologist indicated that "a multimodal treatment approach that include[d] special education services in a highly structured, nurturing academic environment in conjunction with intensive interventions outside of the school setting [was] essential to augment [the student's] ongoing learning, adaptive functioning and psychosocial development" (id. at p. 7). As such, the private clinical psychologist determined that "in order to make the greatest functional gains" the student "require[d] 1-1 ABA services at a minimum of 35 hours per week at school and an additional 15 [to] 25 hours per week in after-school and the home setting" (id.). Specifically, the private clinical psychologist noted that the 1:1 after-school or home-based ABA services were to "improve [the student's] learning, adaptive skills and social-emotional functioning and facilitate generalization of learned skills across environmental settings" (id.).

The June 2022 Shema Kolainu progress report indicated that the student had "benefit[ed] greatly from a 6:1:3 classroom ratio with a center-based program [that] utilize[d] the [ABA] approach to learning" (Parent Ex. M at p. 1).¹² The student's classroom teacher during summer 2022 and the BCBA classroom supervisor reported that the student required constant repetition, reinforcement, and "direct 1:1 ABA instruction to acquire new skills," and she "continue[d] to work on the covered skills each day through the [d]iscrete [t]rial [t]raining methodology" (id. at pp. 1, 5). According to the progress report, the student "ha[d] made moderate progress th[at] semester" and staff were "so proud of the progress she ha[d] made so far," noting that they were "looking forward to seeing more progress in the next semester" (id. at pp. 1, 4). Specifically, in the area of verbal behavior (requesting), the student "c[ould] independently request for help, ask to use the bathroom, and ask for a drink when necessary" (id. at p. 1). In the area of verbal behavior (attention), the report indicated that the student "c[ould] now gain her teachers['] attention by saying their name and then expressing her desires, such as asking for a high five," noting that she had generalized that skill and could adapt to saying the name of new and unfamiliar people after being told their name (id.). The student was able to answer "who, what, and where questions" when "presented with action cards or GIFS" and at the time the progress report was prepared, she was working on answering "what" questions using picture scenes (id. at p. 2).

¹² According to the 2022-23 Shema Kolainu description, the program was designed for students with autism and was "assessment based" in that classroom teachers completed assessments of students three times per year using measures such as the Assessment of Basic Language and Learning Skills (ABLLS-R), and expressive language assessments based on "the behavioral analysis of language" (verbal behavior) (Parent Ex. I at p. 1). Further, "the instructional goals for each student [were] individualized" and "scripted in behavioral terms and data [were] collected and graphed throughout the day" (id.). Additionally, data analysis was conducted daily, and "data trends [were] reviewed to assess whether or not the instructional tactic that [wa]s implemented [wa]s effective or any changes should be made. Previously mastered long and short term objectives [were] placed on maintenance drills to ensure that previously mastered content [wa]s maintained and generalized" (id.).

Academically, the June 2022 progress report indicated that the student was "increasingly more motivated to learn and complete academic tasks," and she had "shown progress th[at] semester" in the areas of reading, comprehension, spelling, and language (Parent Ex. M at p. 4). In reading, the student was working on completing phonetic worksheets based on previously mastered skills, and by report, "c[ould] complete middle sound worksheets when letters A and E w[ere] missing" in a given word and had moved on to placing a different missing letter in words (id. at p. 2). By report, the student was learning to read using the "Edmark program Level 1 curriculum," and could read the first and second lessons; by the time the report was prepared, the student had progressed to working on Lesson 3 (id. at pp. 2, 4). Additionally, using a different reading program that "target[ed] association and awareness between picture and word text," the student was able to "pair a picture to text for a variety of objects as well as colors" (id. at p. 4). In the area of comprehension, the student was able to "receptively identify 'whole' and 'broken' pictures with gestural prompts" and at the time the progress report was prepared, was working on identifying "whole" and "broken" items independently (id. at p. 2). The progress report indicated that in spelling, the student was using the "grade one spelling curriculum" and at that time, "c[ould] already spell up to 18 words independently" (id. at pp. 1-2). Additionally, the report reflected that the student was able to "spell the words from week 1 to 6" and had progressed to working on words from week 7 (id. at p. 4). In math, the student "c[ould] count from one to nine," and was then-currently working on counting to ten and eleven (id. at p. 2). The student's classroom teacher during summer 2022 and the BCBA classroom supervisor did not recommend a change in the student's ABA programming at that time (id. at p. 5).

Regarding the 2022-23 school year, the student's BCBA classroom supervisor testified that, "since [Shema Kolainu] [was an] ABA school, [staff] use[d] ABA in everything" and during the school year, the student "receive[d] special education instruction using the ABA methodology throughout her school day" (Parent Ex. U ¶¶ 15, 21, 26). The BCBA further testified that since the 2022-23 school year started, she had "multiple opportunities to observe [the student] in the classroom and to assess her progress" (id. ¶ 26). According to the BCBA, the student's schedule included approximately 1.5 hours per day of 1:1 "discrete trial teaching instruction in verbal behavior, listener and speaker domains on [a] daily basis," at which time the student worked on improving her communication and academic skills (id. ¶ 28). During group activities throughout the school day, the student received 1:1 support and individualized attention "to work on her social and play skills" and "generalize what she learn[ed] during her 1:1 sessions" (id. ¶ 29).

The BCBA classroom supervisor also testified that since the beginning of the 2022-23 school year, the student had shown some progress in reading skills, spelling words, and play skills, and she "continue[d] to require intensive, individualized special education instruction using the ABA methodology" (Parent Ex. U ¶¶ 39, 40). She opined that "without the discrete trial teaching that [the student] currently receive[d], she would have [had] a lot of difficulty learning new skills and maintaining the progress that she [had] ma[de]" and that the student's program at Shema Kolainu "appropriately addresse[d] her needs" (id. at ¶ 40).

At the impartial hearing, the BCBA classroom supervisor testified that the student had "extensive needs" that staff at Shema Kolainu targeted, but that "[s]he ha[d] difficulty . . . generalizing her skills that she learned to other environments, so as much as [staff] work[ed] on . . . everything in the school setting . . . there ha[d] been instances that she [had] been doing things in school but not doing it . . . in other environments, at home," which was why "tutoring outside

of the school schedule" was "necessary" (see Tr. pp. 46-47). According to the BCBA, the student "responded very well to ABA services" and "made a lot of progress in her program," but "because she ha[d] such a hard time generalizing these skills [], as much as [staff] [were] giving she would benefit from more" (Tr. p. 47).

The private clinical psychologist testified that the student required "intensive services grounded in ABA principles" at both school and at home, because they were "really only effective if they [were] provided across settings, because if they [were] not provided across settings then we [could] not establish generalization of learned skills across settings" (Tr. pp. 61-62). When asked about the amount of ABA services outside of school that was recommended, the private clinical psychologist testified that, as the student was "still experiencing very significant delays across all adaptive areas . . . 25 hours per week would be what would be the most helpful for her, especially because we kn[ew] the greater amount of intervention that we give, right, the greater amount of services the greater the potential for better outcomes" (Tr. pp. 65-66).

Next, with regard to the IHO's award of home-based OT services, the evidence shows that in November 2020, a private occupational therapist conducted an OT evaluation (see Parent Ex. F at p. 1). The private occupational therapist concluded that the student exhibited decreased executive functioning skills, hand weakness, and significant limitations in her motor planning and visual-perceptual motor skills; she lacked foundational skills needed for school-related visual motor and writing tasks, demonstrated delayed activities of daily living skills, and may have had "vulnerabilities in her sensory processing system" (*id.* at p. 5). The private occupational therapist recommended that the student receive two 30-minute sessions per week of home-based OT and opined that a collaborative approach between the school staff, parent, and therapist would "ensure carryover and generalization of skills and strategies to all her varying environments" (*id.*). At the conclusion of the August 2021 neuropsychological evaluation, the private clinical psychologist indicated that it was "imperative that [the student] receive[] 1-1 OT services in the home setting . . . to improve her independence in basic self-care . . . and other adaptive skills and ensure carryover and generalization of learned skills across settings" (Parent Ex. H at p. 8).

The private clinical psychologist testified, however, that she had not received direct reports about the student involving progress or regression since completing the August 2021 neuropsychological evaluation of the student (see Tr. pp. 57-58). In addition to the reasons stated in the August 2021 neuropsychological evaluation report, the private clinical psychologist also testified that "OT services in the home [were] needed to help caregivers to modulate the environment to reduce any unpleasant stimuli" (Parent Ex. W ¶ 32(h)).

The June 2022 Shema Kolainu progress report reflected that the student's "pre-writing skills ha[d] increasingly improved this past semester," and she independently built a Lego tower by using both hands to stabilize it (Parent Ex. M at p. 2). The June 2022 Shema Kolainu OT progress report indicated that the student demonstrated improvement with activities targeting finger strength, coloring for longer duration, consistently following one to two step directives to touch various body parts, engaging in clapping games, performing simple gross motor imitation, and donning or doffing a pullover shirt (see Parent Ex. O at pp. 1-2). According to the occupational therapist, the student would "likely make progress" with the then-current OT mandate of three 30-minute sessions per week (*id.* at p. 3).

In light of the foregoing evidence of the student's progress at Shema Kolainu during the school day, the student does not require afterschool or home-based services in order to receive an educational benefit from her school program, therefore, the same services would not be required for the provision of a FAPE. Additionally, to the extent that the home-based services sought in this case were for the purposes of generalization of skills learned at school and/or the maximization of potential, this basis, alone, does not warrant the provision of such services, and the IHO's award of direct funding for a home-based program must be vacated.

2. IEP Recommendations

The district argues that, by ordering a CSE to convene to make specific recommendations for a home-based program in the student's IEP, the IHO effectively circumvented the statutory process that tasks a CSE with reviewing and revising, if necessary, a student's IEP annually. In addition, the district contends that, since the student was unilaterally placed for the 2022-23 school year and the district has not appealed the direct funding relief for that unilateral placement, there is nothing to gain from an order to modify the student's IEP.

The parent asserts that, contrary to the district's arguments, IHOs enjoy broad discretion when fashioning equitable relief and therefore, the IHO acted within that discretion when ordering the district to convene a CSE meeting and to develop an IEP with specific recommendations for a home-based program. The parent contends that the district failed to create an IEP for the 2022-23 school year and failed to act after receiving the parent's 10-day notice of unilateral placement to develop an IEP. As a result, the parent argues there is no basis upon which to disturb the IHO's award.

Generally, an award of prospective relief in the form of IEP amendments or the prospective placement of a student in a particular type of program and placement, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X, 2008 WL 4890440, at *16 [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

In this case, the IHO ordered the district to convene a CSE meeting for the purpose of developing an IEP to include the home-based program awarded in the decision (see IHO Decision at pp. 16-17). The IHO's order did not otherwise describe whether the newly developed IEP would be in place for the remainder of the 2022-23 school year—the same school year the parent unilaterally placed the student at Shema Kolainu—or whether the IEP was intended to serve as a recommended program for the student for some future school year not yet in dispute (*id.*). Nevertheless, the IHO's order of prospective relief effectively circumvented the CSE's statutory process and, as already explained, failed to consider evidence in the hearing record demonstrating that the student made progress at Shema Kolainu without a home-based program, which, as reflected by the evidence, was recommended primarily for the purpose of generalization of the student's skills outside the school environment. Thus, while the IHO's order directing the CSE to

convene to develop an IEP for the student with a home-based program must be vacated, the parties—if they have not already done so—should convene a CSE meeting to develop an IEP for the upcoming 2023-24 school year, which includes the consideration of any and all evaluative information contained in the hearing record, as well as any new or additional evaluative information from the parent or Shema Kolainu.

VI. Conclusion

In summary, having determined that the evidence in the hearing record establishes that the IHO erred by awarding 21 hours of compensatory educational services for missed feeding therapy services under pendency, by awarding direct funding for a home-based program, and by ordering the district to convene a CSE meeting to develop an IEP that included recommendations for a home-based program, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated November 17, 2022, is modified by reversing that portion which ordered the district to convene a CSE and to develop an IEP for the student that included specific recommendations for a home-based program; and

IT IS FURTHER ORDERED that the IHO's decision, dated November 17, 2022, is modified by reversing that portion which ordered the district to provide the student with 21 hours of compensatory educational services consisting of home-based feeding therapy for missed pendency services; and

IT IS FURTHER ORDERED that the IHO's decision, dated November 17, 2022, is modified by reversing that portion which directed the district to directly fund a home-based program for the student consisting of 25 hours per week of ABA services, two 30-minute sessions per week of OT, and three 60-minute sessions per week of feeding therapy.

Dated: **Albany, New York**
 January 26, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER