The University of the State of New York

The State Education Department
State Review Officer
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No. 23-022

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Westhampton Beach Union Free School District

Appearances:
Anne Leahey Law, LLC, attorneys for respondent, by Anne C. Leahey, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which dismissed the parent's due process complaint notice and granted the district's motion to dismiss. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student in this case has been the subject of 17 prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 22-168; Application of a Student with a Disability, Appeal No. 22-163; Application of a Student with a Disability, Appeal No. 22-147; Application of a Student with a Disability, Appeal No. 22-102; Application of a Student with a Disability, Appeal No. 22-010; Application of a Student with a Disability, Appeal No. 21-249; Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019; Application of a Student with a Disability, Appeal No. 20-135; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with

a Disability, Appeal No. 18-064; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Accordingly, the parties' familiarity with the facts and procedural history preceding this case—as well as the student's educational history—is presumed and, as such, they will not be repeated herein unless relevant to the disposition of this appeal.

The subject matter of this appeal is narrowly related to the district's implementation of the student's pendency placement during summer 2022. The parties concur that the 12-month services to which the student was entitled pursuant to pendency were those services set forth in a pendency agreement executed by the parties dated September 20, 2019 (see Dist. Exs. 1, ex. a, ex. d).[1, 2] In sum and substance, the agreement provided that the student would receive related services in the district public school in the morning, including speech-language therapy, physical therapy (PT), occupational therapy (OT), and adapted physical education (Dist. Ex. 1, ex. a at p. 2). Thereafter, the student was to receive special education instruction in the local library, accompanied by an aide (id.).

On June 16, 2022, the CSE chairperson acknowledged that the student was eligible for 12-month services and indicated that the CSE would discuss "specific recommendations for these services" (Dist. Ex. 1, ex. c). The chairperson indicated that students in the district would be attending a "Regional Summer School program" at a Board of Cooperative Educational Services (BOCES) program outside of the district (id.). The chairperson suggested that the student attend the BOCES program for 12-month services and requested that the parent inform the district by June 21, 2022 if the student would attend (id.).

According to the CSE chairperson, in an email dated July 7, 2022, the student's mother requested that the student receive 12-month services consistent with pendency (see Dist. Ex. 1 ¶ 9, ex. d).[3]

The CSE chairperson responded in a letter dated July 8, 2022 and indicated that, pursuant to pendency, the student would receive services between July 1, 2022 through August 18, 2022 consisting of two hours of special education instruction in the library (Dist. Ex. 1, ex. d). However, the CSE

[1] The IHO and the parties refer to special education programming provided during July and August as extended school year, "ESY" services, or "summer services"; however, State regulation refers to these services as 12-month services (8 NYCRR 200.4[d][2][x]). Accordingly, these services will be referred to as 12-month services within this decision except in quoting the record wherein the terms "ESY," "extended school year" or "summer services" are used.

[2] District exhibits were entered into the record in a general "Exhibit A" through "Exhibit H" format during the impartial hearing, however those designations were changed during the impartial hearing to a format consisting of "Exhibit 1" through "Exhibit 4" with lettered sub-exhibits as reflected in the exhibit list found in the IHO's decision (see Tr. p. 226; IHO Decision at p. 25). In the interest of clarity, I will refer to the exhibits in the manner employed in the IHO's decision, which first cites to the district exhibit by number with a capitalized "Dist. Ex.," followed by the cite to the sub-exhibit with lower case "ex." and the respective page number, if applicable (see, e.g., Dist. Ex. 1, ex. a; see generally IHO Decision). In addition, some of the sub-exhibits attached to District Exhibits 1 and 3 are duplicates. In instances where the sub-exhibits are the same, District Exhibit 1, the affidavit of the CSE chairperson, will be cited.

[3] A copy of the email from the mother is not included in the hearing record.

chairperson informed the parent that no providers were available to deliver the student's related services (id.; see Dist. Ex. 1, ex. b, ex. e). The CSE chairperson indicated that the parent would be notified if a provider became available (Dist. Ex. 1, ex. d).

A. Due Process Complaint Notice

In an undated due process complaint notice that was received by the district on July 20, 2022, the parent alleged that the district failed to implement the student's pendency 12-month services during the summer portion of the 2022-23 school year (Parent Ex. A; Dist. Ex. 3 at p. 1). The parent alleged that the district failed to provide teachers and related services and failed to convene a CSE to conduct an annual review to develop an IEP for the student (Parent Ex. A). For relief, the parent requested an order compelling the district to begin implementing the student's pendency 12-month services, to provide required compensatory services, and to convene a CSE (id.).

On August 4, 2022, the district responded to the parent's allegations and simultaneously moved to dismiss the due process complaint notice (see Dist. Ex. 3).

B. Events Post-Dating the Due Process Complaint Notice

In a letter dated August 11, 2022, the CSE chairperson notified the parent that, between August 15, 2022 and August 22, 2022, the district would provide the student with an additional 30-minutes of instruction per day at the library to "make up the time missed due to his teacher's absences" (Dist. Ex. 1, ex. f). The CSE chairperson further indicated that the district had still been unable to secure providers to deliver the student's related services during summer 2022 (id.).

In anticipation of the 10-month portion of the 2022-23 school year and the continuation of the student's pendency placement, the CSE chairperson wrote to the parent on August 30, 2022 confirming the details of those services (Dist. Ex. 1, ex. g). In addition, the CSE chairperson informed the parent that, "due to the unavailability of therapists, [the student's] ESY related services w[ould] be made up during the school year" (id.). In particular, the chairperson indicated that the student's therapists had been notified that he would receive six additional OT sessions and 12 additional speech-language therapy sessions (id.).

C. Impartial Hearing Officer Decision

After a prehearing conference on September 19, 2022, the IHO convened the impartial hearing on October 19, 2022 and November 28, 2022 (Sept. 19, 2022 Tr. pp. 52-63; Oct. 19, 2022 Tr. pp. 40-228; Nov. 28, 2022 Tr. pp. 1-160).[4] During the impartial hearing, the IHO reserved decision on the district's motion to dismiss the parent's due process complaint notice and on the

[4] The transcripts from the impartial hearing were not consecutively paginated; therefore, transcript citations in this decision will be preceded by reference to the date of the proceedings (e.g., "Oct. 19, 2022 Tr. pp. 40-228"). Additionally, the IHO makes reference to a prehearing conference conducted on August 24, 2022, that was held "with the parties on this and other pending matters" (IHO Decision at p. 5). While a transcript of the August 24, 2022 prehearing conference was not included together with the hearing record filed by the district in this matter, it was accidentally filed with the hearing record in another administrative appeal involving the same parties and, accordingly, has been considered.

parent's motion for a directed verdict in his favor, both pending the IHO's final decision (Oct. 19, 2022 Tr. pp. 216, 223; see IHO Decision at p. 5; Dist. Ex. 3).

In a final decision dated January 31, 2023, the IHO found no merit to the parent's claim that the district violated the terms of the 2019 pendency agreement during the summer portion of the 12-month 2022-23 school year, granted the district's motion to dismiss, and dismissed the parent's due process compliant (IHO Decision at pp. 1-23). The IHO noted that the issue to be determined was limited to whether the district violated the 2019 pendency agreement by failing to provide 12-month services during summer 2022 (id. at p. 3). The IHO held that the district had not unilaterally attempted to change the student's pendency, as alleged by the parent, but instead asked the parent if a particular suite of pendency services at a particular placement was agreeable (id. at p. 19). Further, the IHO found that, although there had been a delay in starting the special education instruction at the beginning of summer 2022, the district had ultimately implemented that portion of the program in compliance with the 2019 pendency agreement (id. at p. 21).

With respect to the related services portion of the student's 12-month pendency services, the IHO found that, although the district had failed to implement any of the OT or speech-language therapy sessions called for in the 2019 pendency agreement during summer 2022, it nonetheless complied with the obligations of the pendency agreement because that agreement contemplated circumstances wherein related service sessions might be canceled (IHO Decision at p. 22). In such circumstances the IHO found that the agreement called for the district to document any canceled related services sessions which would thereafter "be made up at a future date and time, as long as such time [wa]s provided within the normal time frames of [the student's] typical school day" (id). The IHO noted that the district's "provision of related services to the student during the ten-month school year, to make up for missed ESY related services, was consistent with the parties' 2019 Pendency Agreement" (id.).

With respect to the parent's request for compensatory education to remedy the failure to implement related services during summer 2022, the IHO found that it was unnecessary to award compensatory education "on top of the make up related services provided to the student" in this instance because there was no evidence the student suffered regression from missing the services and cited authority to the effect that compensatory education was not mandatory in circumstances where the deficiencies had already been mitigated (IHO Decision at pp. 22-23).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in finding no lapse in the district's implementation of the student's 12-month services pursuant to the 2019 pendency agreement and failing to find that the district denied the student a FAPE. The parent contends that, although the 2019 pendency agreement did not specify what 12-month services were to be provided, there was no dispute that 12-month services were required under pendency. The parent asserts that the IHO erred in finding that the failure to deliver the related services during summer 2022 was contemplated in the pendency agreement provisions concerning missed or cancelled sessions because the agreement did not contemplate a circumstance "in which [the district] would fail to provide for related services throughout any future [12-month services period]." The parent contends that the IHO erred in finding that making up missed pendency 12-month services during the regular school year was sufficient, and asserts that the IHO should have found that

implementing the 12-month pendency services during the summer portion of the 12-month school year was required for the student to receive a FAPE. Moreover, the parent asserts that the IHO erred in finding that the missed related services had in fact been made up; rather, the parent contends the district offered no proof of the delivery of the make-up services.

Next, the parent contends that the IHO erred in failing to order compensatory education to remedy the district's failure to implement the pendency related services during summer 2022. Relatedly, the parent contends that the IHO erred in finding that the student had not regressed in the absence of the pendency related services, noting that the district would bear the burden to show regression or lack thereof, and further noting that there were no related service provider reports upon which one could draw a conclusion about regression.

For relief, the parent requests that the IHO's decision be reversed. The parent seeks findings that the district violated the student's pendency and denied the student a FAPE for the summer portion of the 12-month 2022-23 school year. The parent requests an order mandating compensatory make-up services for those services which were not implemented "inclusive of . . . a process capable of discerning the necessary additional hours of related service provision that is necessary to account for the substantial education regression" suffered by the student.

In an answer, the district denies the material allegations contained in the request for review and asserts that the IHO's decision should be upheld in its entirety. Additionally, the district argues that the parent's request for review fails to comply with practice regulations governing appeals to the Office of State Review and asserts that certain of the parent's arguments regarding the import of the 2019 pendency agreement are either unpreserved or otherwise improper.[5] The district asserts that the IHO correctly determined that there had been no failure to implement the 12-month services as part of the student's pendency and further asserts that there are equitable considerations in light of the parent's alleged lack of cooperation that would bar an award of compensatory services.

V. Applicable Standards

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.

[5] I have considered the various preliminary claims asserted by the district including the claim that the parent's request for review fails to cite specific findings of the IHO on appeal, fails to assert the relief requested, raises arguments concerning the 2019 pendency agreement not asserted in the due process complaint notice, and raises arguments concerning the 2019 agreement that are barred by res judicata, having been litigated in a prior proceeding. I need not make discrete findings on each of these arguments in light of my findings on the merits herein and I note these arguments do not run to the merits of the parent's appeal and are not otherwise compelling arguments. The parties have both set forth cogent and cognizable arguments on the issues in dispute herein, sufficient for me to render a decision.

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]).[6] 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).

[6] 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).

VI. Discussion

The parties agree, and the IHO found, that the student's pendency placement was governed by a pendency agreement executed between the parties dated September 20, 2019 (Dist. Ex. 1 ex. a; see IHO Decision at pp. 17-19; Req. for Rev. at pp. 1-5; Dist. Mem. of Law at pp. 13-19).[7] The parties and the IHO also appear to agree that the pendency program to be implemented during the summer of the 12-month 2022-23 school year included related services to be delivered "at the defendant district" consisting of "physical therapy, adaptive physical education, speech pathology and occupational therapy" (IHO Decision at pp. 17-18; Dist. Ex. 1, ex. a). It is undisputed that the district attempted to secure providers to implement the student's pendency related services during the summer portion of the 12-month 2022-23 school year, but was unable to do so, and the student did not receive any related services during summer 2022 (see Dist. Exs. 1, ex. e at pp. 1-22, ex. g; IHO Decision at pp. 21-22; Req. for Rev. at pp. 8-9; Dist. Mem. of Law at pp. 6-8).[8]

In my view, it appears that the parties' 2019 pendency agreement envisioned that there may be certain unspecified days when a related service provider may have scheduled a session to work with the student but that due to illness or other similar reason the session might have to be rescheduled and made up (Dist. Ex. 1, ex. a). But in this case, no provider schedules were established for the entirety of summer 2022 because the district was unsuccessful in its efforts to have providers at all during that period despite the parties' agreement that 12-month services were required. Thus, there were no scheduled sessions, no cancellations, and no makeups scheduled, and remediation of the lost related services did not begin until after the regular school year commenced in September 2022. In light of the above I find that the placement as implemented without the provision of the related services constitutes a failure to maintain the student's educational placement under pendency, notwithstanding the district's intentions to provide make-up related services at a later date during the regular 10-month portion of the school year (see E. Lyme, 790 F.3d at 452). Accordingly, the IHO's determination to the contrary must be reversed (IHO Decision at pp. 21-23).

Having found that the district did not implement pendency related services for the student during summer 2022, the student may be entitled to some relief for the lapse in pendency. 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

[7] The parent refers to the pendency agreement dated September 2019 as the "May 2019 Pendency Agreement" in the request for review, apparently because the agreement may have been developed at that time (Req. for Rev. at pp. 1-5).

[8] As an aside, I do not find, as the parent argues, that the district was required to begin implementing the 12-month services on the day that the 2021-22 school year ended because, as the district points out, State regulations only require that 12-month services "operate for at least 30 school days during the months of July and August, inclusive of legal holidays" (see 8 NYCRR 200.1[eee]).

"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]).

The parent does not specify the type and amount of compensatory related services sought to remedy the district's failure to implement the pendency related services during summer 2022 (Req. for Rev. at pp. 1-10; Parent Ex. C at pp. 1-18). Moreover, the parent does not assert that the district's calculation of the missed related service sessions as consisting of 12 30-minute sessions of speech-language therapy and six 30-minute sessions of OT is incorrect or should include some other form of related services (see Dist. Ex. 1, ex. g).[9] Rather, the parent requests an unspecified "process capable of discerning the necessary additional hours of related service provision that is necessary to account for the substantial education regression" (Req. for Rev. at p. 10).

In calculating a compensatory education award for a lapse in pendency, the Second Circuit indicated that the purpose of "the stay put provision . . . to guarantee the same general educational program" should be taken into account (Doe v. E. Lyme Bd. of Educ., 962 F.3d 649, 665 [2d Cir. 2020]). It is less clear that the underlying purpose of the services that happened to become the pendency placement—in the case of 12-month services to prevent regression—should inform the award. Therefore, the compensatory education award should include the pendency services owed or "analogous educational services appropriate to the Student's needs" (E. Lyme, 790 F.3d at 456; see E. Lyme, 962 F.3d at 665-66). In this case the parties have already agreed in the 2019 pendency agreement that cancelled related service sessions could be made up at a later date and I see little reason not to order similar relief for services that were never scheduled in the first place due to the failure to locate providers.

In light of the above and in the interest of judicial economy, I will order the district to provide compensatory pendency services on an hour for hour basis to remedy the number and type of missed sessions required pursuant to the pendency agreement. Without documentary proof the district contends that all of the required make-up services have been provided, while the parent contends that there is no such proof and, instead, there was only a promise from the district that the make-up services would be provided. In light of the factual dispute on this point, the district will be ordered to provide the compensatory services to the extent it has not already done so. I have considered the district's contention that equitable considerations stand in the way of an order for compensatory pendency services and find it unpersuasive given that the parent was not compelled to accept an alternative arrangement for the student's 12-month pendency program.

[9] The district did not specify in the hearing record how much physical therapy (PT) had been missed during summer 2022 and the parent has not specified a number of missed hours or sessions they are seeking, if any, in their request for relief on appeal. The pendency agreement itself does not specify the quantity of services and instead seems to focus on the time of day and location(s) where instruction and related services are provided. This is unsurprising given the parties long-standing disagreement over the provision of an in-district versus out of district location for the student's special education programming (see, e.g. Application of a Student with a Disability, Appeal No. 17-079).

VII. Conclusion

Having determined that the IHO erred in finding that the district implemented the student's 12-month services in pendency, I will order compensatory pendency services as set forth below.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated January 31, 2023, is modified by vacating that portion of the decision which found that the district appropriately implemented the student's 12-month pendency services during the 2022-23 school year; and

IT IS FURTHER ORDERED that, to the extent it has not already done so, the district is directed to provide or pay for PT called for by the 2019 pendency agreement, 12 30-minute sessions of 1:1 speech-language therapy, and six 30-minute sessions of 1:1 OT as make up services to the student to be completed within one year of the date of this decision.

Dated: **Albany, New York**
March 17, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER