The University of the State of New York

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

No. 24-636

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Kule-Korgood & Associates, PC, attorneys for petitioners, by Kira I. Epstein, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for an award of compensatory education and funding for services from respondent (the district). The appeal must be sustained.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely 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, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the

parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). 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 has been the subject of a prior State-level appeal addressing the student's stay-put educational program during the pendency of this proceeding (Application of a Student with a Disability, Appeal No. 24-628). Accordingly, the parties' familiarity with the student's educational

and this proceeding is presumed, and the facts and procedural history of this matter will not be recited in detail.

Briefly, in an earlier due process proceeding regarding the 2018-19 school year, the IHO presiding over that matter (IHO I) issued a decision dated November 9, 2019, which found that from July 1, 2018 through June 30, 2019, the student was entitled to 40 hours per week of individual special education itinerant teacher (SEIT) services; four 30-minute sessions per week of individual speech-language therapy; three 45-minute sessions per week of physical therapy (PT); three 45-minute sessions per week of individual occupational therapy (OT); seven hours per week of individual enhanced OT incorporating astronaut training and therapeutic listening; two hours per week of parent counseling and training; and two hours per week of BCBA supervision (Parent Ex. F at pp. 4-5).[1] An April 25, 2021 psychological and educational evaluation report included a recommendation that the student continue to receive the above services at the same frequencies (see Parent Ex. G).

On May 26, 2021, the CSE convened and, finding the student continued to be eligible for special education as a student with autism, developed an IESP for the student which recommended that the student receive four 30-minute sessions per week of individual speech-language therapy; four 45-minute sessions per week of individual OT; and three 30-minute sessions per week of individual PT (Dist. Ex. 1 at pp. 1, 11).

On May 17, 2022, the parents filed a due process complaint notice, alleging a denial of a free appropriate public education (FAPE) for the 2020-21 school year and an IHO (IHO II) was ultimately assigned to that matter resulting in an interim pendency decision, dated December 19, 2022, and a final decision nearly two years later, dated September 25, 2024 directing the district to fund compensatory education for missed services missed during the pendency of that proceeding (Parent Ex. E; see Parent Exs. U ¶7; see also Req. for Rev. Exs. A; B).

IHO II's December 2022 interim pendency decision in the prior matter related to the 2020-21 school year found that the student's pendency placement consisted of 40 hours per week of individual SEIT services; seven hours per week of enhanced OT; two hours per week of parent counseling; two hours per week of BCBA services; three 45-minute sessions per week of individual OT; three 45-minute sessions per week of individual PT; and four 30-minute sessions per week of individual speech-language therapy; with all services on a 12-month school year basis and to be delivered by providers at prevailing rates (Parent Ex. E).

[1] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities). A list of New York State approved special education programs, including SEIS programs, can be accessed at https://www.nysed.gov/special-education/approved-preschool-special-education-programs. SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; see Educ. Law § 4410[1][k]).

The student attended a general education classroom at a private school on a 12-month basis for the 2022-23 school year, which was the student's sixth grade school year (Parent Exs. U ¶ 10; T ¶ 4). According to the student's mother, the parents used a combination of pendency services and previously-awarded compensatory education services to provide for the student's special education and related services needs during the 2022-23 school year (Parent Ex. U ¶ 10).

On March 28, 2023, the CSE convened and, after finding the student continued to be eligible for special education services as a student with autism, developed an IESP for the student with an implementation date of April 20, 2023 with recommendations that the student receive seven periods per week of group special education teacher support services (SETSS); four 30-minute sessions per week of individual speech-language therapy; four 45-minute sessions per week of individual OT; and three 30-minute sessions per week of individual PT (Dist. Ex. 2 at pp. 1, 15-16).[2]

In a letter dated July 20, 2023, the parents notified the district of their objections to the March 2023 CSE process and resultant March 2023 IESP and advised the district of their intent to file for due process to continue the student's "last agreed-upon services on a twelve -month basis at public expense" (Parent Ex. D).

A. Due Process Complaint Notice

Nearly a year later, in another due process complaint notice dated June 24, 2024, the parents alleged that the district denied the student a FAPE for the 2022-23 school year (see Parent Ex. A). More specifically, the parents contended that the district failed to convene a CSE to develop an educational program for the student prior to the start of the 2022-23 school year, asserting that the CSE last convened on May 26, 2021 (id. at p. 5). The parents also raised a number of allegations related to the March 2023 CSE meeting and resultant IEP (id. at pp. 5-8). As part of those allegations, the parents noted that a prior IHO had determined that the student needed 40 hours per week of 1:1 SEIT services at home and at school, as well as seven hours per week of enhanced 1:1 OT incorporating astronaut training and therapeutic listening, contending that the March 2023 CSE refused to consider those supports (id.at p. 6).

The parents asserted that the student's pendency placement was based on the November 9, 2019 IHO decision, and they requested an order directing the district to fund the student's services for the 2022-23 school year at enhanced rates and an order directing the district to fund compensatory SEIT, enhanced OT, parent counseling and training, BCBA supervision, and OT, PT and speech-language services that were not provided to the student during the 2022-23 school year (id. at p. 8).

[2] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH), (IHO III), on September 23, 2024 and concluded on October 16, 2024 after three days of hearings (Tr. pp. 11-135; Oct. 16, 2024 Tr. pp. 1-38).[3, 4]

While the proceeding was pending, on September 25, 2024, IHO II issued a decision for the prior matter involving the 2020-21 school year (Req. for Rev. Ex. B). As will be discussed in more detail below, the September 2024 IHO decision was not entered into the hearing record in the instant proceeding.

In the present proceeding, IHO III issued an interim decision on pendency, dated November 12, 2024, which ordered pendency based on the unappealed November 2019 IHO decision and directed the district to deliver 40 hours per week of individual SEIT services; four 30-minute sessions per week of individual speech-language therapy; three 45-minute sessions per week of PT; seven hours per week of individual enhanced OT; two hours per week of parent counseling and training; and two hours per week of BCBA supervision all during a 12-month school year (November 12, 2024 Interim Decision). According to the November 2024 interim decision, all services were to be provided on a 12-month basis (id.). The decision further indicated that the district did not contest the pendency program and that it was retroactive to the date of filing of the due process complaint notice until the conclusion of the proceeding, unless modified by a subsequent order or agreement (id.).[5]

In a final decision dated November 15, 2024, IHO III found that the district denied the student a FAPE for the 2022-23 school year (IHO Decision at pp. 3, 4-5). Initially, IHO III denied the district's motion to dismiss the matter for lack of subject matter jurisdiction as IHO III determined that the matter was not related to implementation of an IESP, but instead related to a claim that the district failed to fully fund pendency services during the 2022-23 school year (id. at p. 3). The IHO then found that because the district did not prove that it fully funded the student's pendency services during the 2022-23 school year, the district did not meet its burden of showing it provided the student with a FAPE (id. at pp. 4-5). Turning to relief, IHO III found that the parents were requesting equitable relief as they were "asking the IHO to devise an appropriate remedy" (id. at p. 5). IHO III further determined that the parents were specifically seeking compensatory education for missed pendency services; however, IHO III determined that the parents failed to prove that there was a pendency order in place for the entire 2022-23 school year (id. at pp. 6-7). IHO III denied the parent's request for an award of compensatory education and

[3] A prehearing conference was held on August 8, 2024 (Tr. pp. 1-10).

[4] The August 8, 2024 through October 9, 2024 transcripts are all consecutively paginated and will be referred to as "Tr.". The October 16, 2024 transcript begins again at page one and will be referenced in this decision as "Oct. 16, 2024 Tr.".

[5] IHO III's interim decision on pendency was appealed to the Office of State Review and in a decision dated April 28, 2025, IHO III's interim decision was amended to reflect that in addition to the services already included as part of the student's pendency program, the student's education program during the pendency of this proceeding also includes three 45-minute sessions per week of individual OT on a 12-month basis (Application of a Student with a Disability, Appeal No. 24-628).

related services because without knowing when pendency was in effect during the 2022-23 school year, IHO III was unable to determine what, if any, compensatory education was owed (id. at p. 7).

IV. Appeal for State-Level Review

The parents appeal, alleging that IHO III erred in denying the parents' request for compensatory education and asserting that IHO III failed to address their request that the district fund the student's SEIT and related service providers under pendency. According to the parents, there was sufficient evidence to establish that the pendency decision in the prior matter covered the entire 2022-23 school year and the IHO erred in finding otherwise. In addition, the parents submit the May 17, 2022 due process complaint notice regarding the 2020-21 school year and the September 2024 IHO decision as additional evidence in support of their claim that pendency was established in the prior matter. The parents assert that the hearing record contains evidence establishing what hours were owed for compensatory education and related services during the 2022-23 school year and requests an order directing the district to directly pay the student's service providers at the providers' rates and to fund compensatory education for any services not delivered under pendency during the 2022-23 school year.

In an answer, the district argues that IHO III's determination should be affirmed because the parents failed to present sufficient evidence to establish when pendency was in effect for the 2022-23 school year.[6, 7] The district also asserts that the parents are not entitled to compensatory education for pendency services because the parents took it upon themselves to secure the student's pendency services and the district should not be responsible for services that the parents failed to obtain. According to the district, the pendency decision in effect during the 2022-23 school year only directed the district to fund services delivered by the parents' chosen providers at "prevailing rates."

The parents submit a reply to the district's answer asserting that the student should not be penalized for the parents' inability to secure all of the student's services pursuant to the pendency order and that compensatory education services should be awarded at enhanced rates. The parents request that if OSR finds that the record lacks sufficient evidence, that the matter be remanded to IHO III for further development of the hearing record.

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[6] Although the district served and filed a document labeled "Verified Answer and Cross-Appeal," review of the document as a whole shows that it does not contain a cross-appeal in that it does not identify any precise rulings, failures to rule, or refusals to rule of the IHO of which the district seeks review (see 8 NYCRR 279.8[c][2]), accordingly, for purposes of this decision, the pleading will be referenced as the district's answer. Additionally, the parent's pleading labeled as a "Verified Answer to Cross-Appeal" will be treated as a reply.

[7] Although the district asserts that the parents failed to present sufficient evidence during the hearing as to what portion of the 2022-23 school year was covered under the prior pendency decision of IHO II, the district does not specifically object to the parents' presentation of the May 17, 2022 due process complaint notice or IHO II's final decision in that matter, dated September 24, 2024. Under the circumstances presented, for ease of reference and in order to rely on the most accurate information available, the additional evidence is accepted and will be referenced as part of the parents' request for review (Req. for Rev. Exs. A; B).

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[8] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[9] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual

[8] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[9] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion - Pendency and Compensatory Educational Services

The parents assert on appeal that the hearing record reflects that the December 2022 interim decision regarding pendency was in effect for the entirety of the 2022-23 school year. The parents allege that the hearing record reflects how many hours of pendency services the student was entitled to receive during the 2022-23 school year and how many were missed. The parents further argue that the hearing record supports awarding compensatory services at "enhanced provider rates." The district argues that the parents are not entitled to compensatory education for pendency services and further argues that if services are awarded it should not be at the parents' requested rates but at a "prevailing rate" in accordance with the pendency decision.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[10] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]).

The December 2022 interim decision regarding pendency directed that the student's placement during the pendency of that proceeding consisted of 40 hours per week of individual SEIT services, seven hours per week of enhanced OT, two hours per week of parent counseling

[10] 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).

and training, two hours per week of BCBA services, three 45-minute sessions per week of individual OT, three 45-minte sessions per week of individual PT, and four 30-minute sessions per week of individual speech-language therapy, "all on a 12 month basis by providers at prevailing rates, retroactive to filing" (Parent Ex. E).[11]

The pendency services in that proceeding were to be effective from the parents' filing of their due process complaint notice through the end of the proceeding in September 2024, thus the May 17, 2022 due process complaint and the final decision in that matter show that the student's entitlement to a pendency placement was in effect for the entirety of the 2022-23 school year (Req. for Rev. Exs. A; B; Parent Ex. E). Additionally, even without the parents' additional evidence submitted on appeal, contrary to IHO III's determination that the parents failed to prove when the December 2022 interim decision regarding pendency was in effect, the parent testified that the December 2022 IHO decision established the student's pendency services during the prior proceeding and was in effect for the entire 2022-23 school year (Parent Ex. U ¶7). The district could have contested the parent's testimony establishing that pendency was in effect for the entirety of the 2022-23 school year but to date does not appear to have done so (see Tr. pp. 11-135; Oct. 16, 2024 Tr. pp. 1-38). Although it would have been better record development practice to have offered, requested or otherwise placed IHO II's final decision in evidence during the hearing, I note that the final decision by IHO II was not issued until days before the hearing began before IHO III. Whether based on the testimony before IHO III, or the additional evidence accepted on

[11] There is no evidence that the student is benefiting from what the program he received as pendency during the 2022-23 school year, which equaled over 60 hours per week of special education and related services. While the parents frame the failure to deliver pendency services as one related to a FAPE, it is not. While the student's right to pendency is governed by IDEA and the due process procedures the entitlement to pendency is like an automatic injunction that occurs by operation of law and does not necessarily mean that the programming is appropriate or beneficial for the student. 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"]). It is clear that this proceeding is no longer about the "appropriate" aspects of a FAPE. The due process complaint notice indicates that the student was parentally placed in a nonpublic, religious school. For special education supports, the 40 hours of SEIT alone exceeds the hours of a regular school week, calling into question why, as a practical educational matter, the student is attending a nonpublic school at all or how any IESP could be meaningfully designed to deliver that level of services to a student without delivering the services in the public school, with only incidental participation in activities of the nonpublic school. However, the merits of this case are not before me, having been subsumed by issues relating to pendency and there has been no request for a determination of the appropriateness of the educational program that the student has been receiving since the 2018-19 school year (see Parent Ex. A at pp. 4-5). The student, now a teenager, is currently still attending a program pursuant to pendency, during this proceeding (Application of a Student with a Disability, Appeal No. 24-628), that was developed through litigation when the student was approximately seven years of age (see Parent Exs. A at p. 4; F at pp. 2-3). Additionally, the hearing record does not indicate whether the student has been evaluated in recent years. Accordingly, the continued appropriateness of the programming and education that the student is receiving remains an outstanding question and, if the student has not been recently evaluated by the district, the district is encouraged to do so to determine, together with the parents, an appropriate special education program and services to address the student's needs going forward. Should the parties return to this forum with another pendency implementation dispute consisting of the same preschool programming, an SRO may consider the long course of the parties' proceedings and the parties' failure to cooperatively engage in the statutory CSE process in a meaningful way and consider imposing other solutions as equitable relief to move parties from what appear to be intractable, unproductive, and repetitive disputes in due process.

appeal, IHO III's determination that the parents failed to establish the end date for the pendency services for the 2022-23 school year must be overturned.

Initially, to the extent that the parents did obtain services for the student, during the 2022-23 school year, and now seek to receive funding from the district for costs of those services, that claim is not in the appropriate forum as it is related to enforcement of IHO II's pendency determination. The parent asserts that the district has yet to pay all of the invoices from the student's providers for the 2022-23 school year and requested an order directing the district to pay (Parent Ex. U ¶¶ 24, 30, 35). However, the parents' request for funding for the services delivered to the student during the 2022-23 school year is based on relief associated with enforcement of IHO II's December 2022 interim decision regarding pendency, albeit relief that the parent obtained through self-help (Parent Ex. E). It is well settled that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]). Accordingly, to the extent that the parent's underlying claims relate to enforcement of the IHO's decision, such claims are outside the jurisdiction of this administrative process.

Still at issue is whether the parents were entitled to compensatory education for pendency services not delivered to the student during the 2022-23 school year as part of the prior proceeding before IHO II.

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 (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015] [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]).

The district asserts that it should not be responsible for delivering the student's pendency program because the parents "had taken it upon themselves to secure the pendency services directly" and the district's "only responsibility was to provide funding at prevailing rates" (Answer ¶8). However, in this instance, review of IHO II's December 2022 interim decision regarding pendency does not specifically indicate that the parents took on the responsibility for arranging for the student's services nor does it identify a specific provider to deliver the student's services (Parent Ex. E). Accordingly, this is not the case where the district was absolved from implementing the student's pendency program, other than funding, as argued by the district.

Here, the parents presented evidence, which the district failed to rebut, that the student did not receive all his services pursuant to the pendency order. The hearing record reflects that the student was entitled to an award of compensatory education based on a 42-week basis, as a 12-month program consists of 42 weeks.[12] The student's mother testified that the student "received a total of 1,270.50 hours of 1:1 SEIT services during the 2022-2023 school year" but that the student should have received a total of 1,680 hours of SEIT services, based on a computation of 40 hours per week times 42 weeks (Parent Ex. U ¶ 20). Therefore, the student was owed the difference between 1,680 hours and 1,270.5 hours of SEIT services for a total of 409.5 hours (id. ¶ 22).

Regarding the student's enhanced OT for the 2022-23 school year, the student's mother testified that the student received 73.25 hours of enhanced OT but should have received 294 hours "7 hours per week x 42 weeks" under pendency (Parent Ex. U ¶ 26). The parents asserted that the student was entitled to an "award [of] the difference between the 294 hours of Enhanced OT that [the student] should have received and the 73.25 hours of Enhanced OT that [the student] actually received during the 2022-2023 school year, or 220.75 hours of compensatory enhanced OT services" (id. ¶ 28). The student's mother affirmed that the student received his full amount of regular OT services during the 2022-23 school year so no compensatory regular OT was requested (id. ¶ 38).

The student's mother asserted that the student should have received 168 30-minute sessions of speech-language therapy "(4 sessions per week x 42 weeks)" for the 2022-23 school year, but only received 119 sessions (Parent Ex. U ¶ 31). The parents argued that the student should be "award[ed] the difference between 168 sessions of 1:1 speech therapy that [the student] should have received and the 119 sessions that [the student] actually received during the 2022-2023 school year, or 49 sessions of Compensatory Speech Therapy" (id. ¶ 33).

In her affidavit, the student's mother testified that the student "received a total of 104 sessions of PT during the 2022-2023 school year out of the 126 (3 per week x 42 weeks) that he should have received in pendency" (Parent Ex. U ¶ 36). The parents requested that the student be awarded the difference between 126 sessions and 104 sessions for a total of 22 sessions of compensatory PT services (id. ¶ 37).

As noted above, pendency has the effect of an automatic injunction (Zvi D., 694 F.2d at 906). Accordingly, the district was obligated in this instance to deliver the student's pendency services during the course of the proceeding and through the current appeal, unless the parties agreed otherwise. Having failed to take any steps during the process of the hearing to challenge the student's pendency placement or to develop the hearing record with regard to pendency services delivered to the student, and having specifically agreed to pendency services for the student based on an unappealed IHO decision, the district is, under the law, responsible for the implementation of pendency. The district was required to implement pendency services from the date of the due process complaint notice relative to the student's 2022-23 school year, May 17, 2022, through the date of IHO II's September 2024 final decision. Therefore, under pendency, the district was required to deliver services to the student pursuant to IHO II's pendency decision, failed to do so,

[12] The estimate of a 42-week school year is based on the 180 instructional days in a 10-month school year, plus an additional 30 days during the 12-month portion of the school year that occurs over a summer, typically during a six-week program (see Educ. Law § 3604[7]; 8 NYCRR 200.1[eee]).

and therefore the district is ordered to provide the student with the following services as compensatory services to make up for missed services the student did not receive for the 2022-23 school year: 409.5 hours of compensatory SEIT; 220.75 hours of compensatory enhanced OT services; and 22 sessions of compensatory PT services.

Although the parents are entitled to compensatory services for the student to make up for the district's failure to deliver the student's pendency services during the 2022-23 school year, it does not follow that the parents should receive an order directing the district to fund compensatory services arranged for by the parents. Generally, "[i]t is up to the school district to decide how to provide that educational program, at least as long as the decision is made in good faith" (T.M., 752 F.3d at 171, citing Concerned Parents, 629 F.2d at 756). Accordingly, the district will be directed to provide the student with the awarded compensatory services unless the parties agree otherwise.

VII. Conclusion

Based on the foregoing, the hearing record reflects that IHO II's December 2022 interim decision regarding pendency was in effect for the entirety of the student's 2022-23 school year. The hearing record further establishes that the student did not receive all of the services he was entitled to under IHO II's pendency decision for the 2022-23 school year. Accordingly, the district shall be required to deliver compensatory services to make up for the missed services.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that IHO III's decision, dated, November 15, 2024, is modified by reversing those portions which found that there was insufficient information in the hearing record to find that IHO II's December 2022 interim decision regarding pendency was not in effect for the entirety of the student's 2022-23 school year; and

IT IS FURTHER ORDERED that the district shall deliver 409.5 hours of compensatory SEIT services; 220.75 hours of compensatory OT services; and 22 sessions of compensatory PT services.

Dated: **Albany, New York**
August 8, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER