The University of the State of New York

The State Education Department
State Review Officer
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No. 23-108

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 New York City Department of Education

Appearances:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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 the decision of an impartial hearing officer (IHO) which granted respondent's (the district's) motion to dismiss the parent's claims. The appeal must be sustained and the matter remanded to the IHO for further administrative proceedings.

II. Overview—Administrative Procedures

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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

Given the undeveloped state of the hearing record in the present matter, a full recitation of facts relating to the student's educational history is not possible but is, in any event, unnecessary due to the procedural posture of the proceeding at this juncture and the limited nature of the appeal.[1]

[1] At the time the IHO dismissed the parent's due process complaint notice without prejudice, no documentary evidence had been admitted into the hearing record.

A. Due Process Complaint Notice

By due process complaint notice dated August 22, 2022, the parent alleged that pursuant to "pendency orders and agreements based on" an unappealed IHO decision in a prior proceeding, the student was mandated to receive 25 hours per week of special education itinerant teacher (SEIT) services in Yiddish, two 30-minute sessions per week of individual speech-language therapy in Yiddish, two 30-minute sessions per week of individual occupational therapy (OT) in English, and two 30-minute sessions per week of individual physical therapy (PT) in English (Aug. 2022 Due Process Compl. Notice at p. 2). The parent further set forth as the presenting problems that the student "did not receive his related services mandate" as "per his automatic right to pendency"; the parent had not been able to locate related services providers; and the district failed to implement the student's pendency program (id.). The parent then requested that the IHO find that the district's failure to implement the pendency program was "a denial of [the student]'s rights" (id.). As relief, the parent requested a finding that the failure of the district to implement the student's pendency program was a denial of a FAPE and an order that the district "fund a bank of compensatory periods of related services for the entire 2020-21 and 2021-22 school years - or the parts of which were not serviced" (id.).

B. Impartial Hearing and Impartial Hearing Officer Decision

According to the transcript, the IHO and a legal assistant from the parent's attorney's law firm appeared on October 25, 2022 (Tr. p. 2). The IHO stated that no one had appeared for the district and asked the legal assistant how she would like to proceed (id.). The legal assistant stated that the matter "involve[d] missed services from the '20/'21 and '21/'22 school year[s], a significant amount of missed hours," and she further requested "a substantive hearing for th[e] case" (id). The IHO offered December 7, 2022, as a date for the impartial hearing and the appearance concluded (Tr. p. 3). The IHO and an attorney for the parent appeared on December 7, 2022 (Tr. p. 6). The IHO stated that no one from the district appeared and asked the parent's attorney how he would like to proceed (id.). The parent's attorney stated that he believed that opening statements and evidence were going to be presented and that he was "prepared to go forward on that end, but given the [d]istrict's absence, if [the IHO] [] prefer[red] a separate date, that [wa]s fine with [the parent] as well" (id.). Initially the IHO advised the parent's attorney that he could enter his evidence into the hearing record; however, when the parent's attorney stated that he had disclosed his evidence two days earlier, the IHO stated that was not acceptable (Tr. pp. 6-7). The IHO then set January 17, 2023 as the new impartial hearing date for "openings and evidence" (Tr. p. 7).

On January 10, 2023, the district filed a motion to dismiss the parent's due process complaint notice in this proceeding (Dist. Mot. To Dismiss).

The parties convened on January 17, 2023, whereupon the parent's attorney requested another impartial hearing date as he had recently received a motion to dismiss from the district (Tr. p. 10). The IHO set a due date for the parent's response to the district's motion to dismiss for February 17, 2023 and set a new date for a hearing on the district's motion for March 3, 2023 (id.).

On January 23, 2023, the parent filed opposition to the district's motion to dismiss (Parent Opp'n to Mot. To Dismiss).

The parties reconvened on March 3, 2023, the district made an argument in support of its motion to dismiss, the parent opted to rely on her opposition papers, and the IHO scheduled an additional impartial hearing date for April 17, 2023 for "openings and evidence" in the event the IHO denied the district's motion to dismiss (Tr. pp. 15-17, 18). When the parties reconvened on April 17, 2023, the parent's attorney indicated that his understanding of the purpose of the hearing date was to discuss the district's motion to dismiss and the parent's response, and further that he intended to rest on his opposition papers (Tr. p. 22). The IHO then asked the parent's attorney to confirm that the parent's due process complaint notice sought "a bank of hours based on a pendency agreement for '20/'21 . . . and '21-'22" and that the parent was not seeking a finding of a denial of a FAPE (Tr. pp. 22-23). The parent's attorney responded that the parent's contention was "that the failure to provide the services mandated under pendency constitute[d] a denial of FAPE, but in the end, [the parent was] just looking for a compensatory bank of hours for the services not provided" (Tr. p. 23). The IHO then asked the district's attorney to confirm the district's position that the parent's request amounted to "an enforcement proceeding," to which the district's attorney agreed (id.). The IHO asked whether there had been determinations made regarding the 2020-21 and 2021-22 school years (id.). The district's attorney stated that the due process complaint notices related to those school years had been withdrawn, and that the last final decision concerning the student had been rendered "several years ago" (id.). Next, the IHO asked if the parent had filed an amended due process complaint notice or if she was "relying on the one from 8/22/22" (Tr. pp. 23-24). The parent's attorney stated that the parent was not filing an amended due process complaint notice (Tr. p. 24). The IHO then indicated that she was going to set another hearing date and told the parent's attorney that she did not know why the parent's attorney "just d[oes]n't file an amended [due process complaint] . . . [he] might want to consider that" (id.). The IHO stated further that she did not believe she had "the authority to just make a decision based on a pendency failure" and she wondered "why this wasn't done differently" (Tr. pp. 24, 25).

The parties reconvened on May 2, 2023, wherein the IHO indicated that she was "wondering what [wa]s the claim" and that it appeared the parent was "asking for an enforcement order" (Tr. p. 28). The parent's attorney responded that the parent was not seeking an enforcement of pendency because an enforcement of the student's pendency services "would not provide the relief that [the parent was] seeking" (Tr. p. 29). The parent's attorney then asserted that the due process complaint notice "c[a]me[] from the fact that there were services that were not covered under pendency" and that even if the IHO enforced pendency "it wouldn't help because pendency covered some of the services, but pendency [wa]s just a piece of paper" (Tr. p. 29). The parent's attorney further alleged that the student did not receive pendency services that the district was required to fund, therefore, he was not seeking enforcement (Tr. pp. 29-30). The parent's attorney also stated that he viewed the student not receiving all of the services he was entitled to as "a very serious denial of FAPE" (Tr. p. 30). The parent appeared to argue that the August 22, 2022 due process complaint notice was filed to recapture the pendency funding lost when the due process complaint notices related to the 2020-21 and 2021-22 school years were withdrawn (Tr. pp. 30-31).

The district's attorney argued that the August 22, 2022 due process complaint notice was not a refiling of prior due process complaint notices because it concerned the 2020-21 and 2021-22 school years and the prior due process complaint notices concerned other school years (Tr. p. 31). The IHO then asked the parent's attorney what relief other than the pendency services was the parent seeking (Tr. p. 32). The parent's attorney responded, "[a] bank of hours . . . there's no

relief in the pendency that we want. None. It's completely different. It's not even like there's some overlap" (id.).

By decision dated May 22, 2023, the IHO granted the district's motion to dismiss the parent's August 22, 2022 due process complaint notice without prejudice (IHO Decision at p. 3). The IHO determined that a denial of a FAPE and pendency were distinct and that a FAPE was the "development [of] an . . . (IEP) that [wa]s reasonably calculated to enable the child to obtain meaningful educational benefits" (id. at p. 2). The IHO found that the parent did "not challenge any specific IEP, the lack thereof, or issues related to the [s]tudent's identification, evaluation or placement insofar as it relate[d] to the [district]'s placement of the [s]tudent in an appropriate program pursuant to an IEP" (id.). The IHO further found that pendency served "as an interim order or injunction for the purposes of stability while a hearing [wa]s being held, but it d[id] not relate to the [district]'s statutory obligations to the [s]tudent to provide FAPE" (id. at pp. 2-3).

The IHO also determined that a finding of a denial of a FAPE in this matter would not be appropriate and stated that the parent could refile a due process complaint notice that alleged "appropriate FAPE violations under the IDEA" for the 2020-21 and 2021-22 school years (IHO Decision at p. 3). The IHO further found that the parent's due process complaint notice sought enforcement of orders which were outside her jurisdiction and sought relief for the district's "failure to implement the services in the [p]endency order, which they were never required to do in the first place" (id.). Based on those grounds, the IHO dismissed the parent's claims for the 2020-21 and 2021-22 school years without prejudice (id.).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO mistakenly considered the parent's claims as a request to enforce pendency services obtained in a prior proceeding for which the IHO improperly determined she lacked subject matter jurisdiction. The parent alleges that she is not seeking enforcement of prior pendency decisions or agreements with the district, rather she requests a bank of compensatory education services for pendency that was not provided by the district during prior proceedings. The parent further argues that the IHO has broad discretion to remedy a denial of a FAPE, and that the IHO had jurisdiction to award the requested bank of compensatory education for missed pendency. As relief, the parent requests reversal of the IHO's decision and an award of 80 hours of compensatory speech-language therapy, 80 hours of compensatory OT, and 80 hours of compensatory PT.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. The district asserts that the IHO correctly determined that the parent was seeking enforcement of prior pendency orders. Next, the district alleges that the parent did not appeal from a specific finding and no relief can be granted. The district further contends that the parent failed to appeal from the IHO's finding that the district was not required to implement the student's pendency services in the first place and that the IHO's finding is now final and binding on the parent.

In a reply to the district's answer, the parent argues that she is not seeking enforcement of prior pendency orders and that the parent seeks a bank of compensatory educational services to remedy missed pendency services. The parent reasserts her request for relief.

V. Applicable Standards

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; 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]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents and 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 (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. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; 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 [OSEP 2007]).

VI. Discussion

At the outset, I must note that the district's motion to dismiss was not included with the certified hearing record submitted to the Office of State Review. After two requests, the district submitted a copy of its motion to dismiss without exhibits. The district's motion to dismiss cited ten exhibits, which contained at least some information and documentation of the procedural history leading up to this proceeding and the student's educational history. According to the IHO's written clarification and the district's certification of the hearing record, the exhibits were not admitted into evidence, and the IHO did not cite to any exhibits in her decision. This was error. The exhibits the district included with its motion to dismiss should have been submitted with the certified hearing record regardless of whether or not they were formally admitted as exhibits in the hearing record. State regulation specifically requires that, in addition to exhibits and the transcript of the proceedings, "any response to the [due process] complaint," "all briefs, arguments or written requests for an order filed by the parties for consideration by the [IHO]," as well as "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" are part of the hearing record (8 NYCRR 200.5[j][5][vi][a], [b], [c], [e]-[f]). The district's motion to dismiss consisted of a memorandum of law and a written request for an order. The certified hearing record in this matter consists solely of transcripts of argument by the attorneys on each of the hearing dates and advocacy papers. None of which constitutes evidence. The parties' arguments are not a reliable source from which to determine the student's pendency, whether the student missed pendency services, or what an appropriate amount of compensatory education would be if services were missed.

Turning to the IHO's substantive findings, the IHO erred in determining that the parent was required to set forth claims in her August 22, 2022 due process complaint notice alleging a denial of a FAPE in order to seek compensatory education for missed pendency services. The gravamen of the parties' dispute is whether the student is entitled to missed pendency services. However, the dearth of any documentary evidence in the hearing record concerning the student's pendency placement or the provision or funding of his pendency by the district constrains me to find that, as further discussed below, the matter must be remanded to the IHO for further proceedings.

Contrary to the IHO's determination, the student's right to pendency is evaluated separately from the substantive claims alleged in the due process complaint notice (see Mackey Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 160-61 [2d Cir. 2004], Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 459 [S.D.N.Y. 2005]).

According to the district's motion to dismiss, the parent filed a due process complaint notice on September 3, 2019, alleging that the district failed to provide the student with a FAPE for the 2019-20 school year, which resulted in an unappealed IHO decision (Dist. Mot. To Dismiss at p. 1).[2, 3] The district further stated in its motion to dismiss that the parent filed due process complaint notices on July 1, 2020, alleging that the district failed to provide the student with a FAPE for the 2020-21 school year, and on September 22, 2021, alleging that the district failed to provide the student with a FAPE for the 2021-22 school year (id. at p. 2). Next, the district's motion to dismiss stated that in the proceeding involving the 2020-21 school year, the parent sought pendency services consistent with the January 14, 2020 unappealed IHO decision issued in the proceeding involving the 2019-20 school year, requesting that the district provide or fund 25 hours per week of special education teacher support services (SETSS) at a rate of $135 per hour; two 30-minute sessions per week of individual speech-language therapy in Yiddish; two 30-minute sessions per week of individual OT in English; and two 30-minute sessions per week of individual PT in English (id. at pp. 1, 2).

The district's motion to dismiss further asserted that in the proceeding involving the 2021-22 school year, the parent again sought pendency services consistent with the January 14, 2020 unappealed IHO decision, requesting that the district provide or fund 25 hours per week of SETSS at a rate of $135 per hour; two 30-minute sessions per week of individual speech-language therapy in Yiddish; two 30-minute sessions per week of individual OT in English; and two 30-minute sessions per week of individual PT in English (Dist. Mot. To Dismiss at pp. 1, 2). According to the district, the IHO in this matter was also appointed as the IHO in the proceeding involving the 2021-22 school year on February 23, 2022 (id. at p. 2). The district further asserted that the IHO in this matter issued an interim order on pendency on March 25, 2022, based on the January 14, 2020 prior unappealed IHO order, which the district did not contest (id. at pp. 2-3).

According to the parent's opposition to the district's motion to dismiss, the IHO's March 25, 2022 interim order on pendency issued in the proceeding involving the 2021-22 school year directed the district to "forthwith provide" related services to the student (Opp'n to Motion to Dismiss at p. 3). The district's motion to dismiss indicated that the proceeding was then withdrawn without prejudice on April 21, 2022 (Dist. Mot. to Dismiss at p. 3).

The parent commenced the instant matter by due process complaint notice dated August 22, 2022 and asserted that the district failed to provide the student with his related services under pendency, that she no longer sought to compel the district to provide the related services, and instead requested a bank of compensatory related services representing missed pendency services that should have been provided during the 2020-21 and 2021-22 school years (Aug. 2022 Due Process Compl. Notice at p. 2; see Opp'n to Motion to Dismiss at pp. 2, 3).

[2] As indicated above, the dates referenced, and the purported content of each document referenced was taken from the parties' advocacy papers. The information was not corroborated by documentary evidence and may be incorrect.

[3] The district's motion to dismiss further indicated that the unappealed IHO decision in the proceeding, involving the 2019-20 school year due process complaint notice, was corrected on January 14, 2020 to change the service language for OT and PT from Yiddish to English (Dist. Mot. To Dismiss at p. 2).

In a recent matter involving a similar procedural history to this proceeding, a parent had filed an amended due process complaint notice dated September 26, 2022, which alleged a denial of a FAPE and sought pendency; the parent subsequently withdrew her substantive claims and requested a pendency hearing, which the IHO denied (see Application of a Student with a Disability, Appeal No. 22-162).

In upholding on appeal the IHO's refusal to conduct a pendency hearing, the SRO found that while the parent's substantive claims were withdrawn without prejudice, the student's right to pendency had automatically attached as of the filing of the due process complaint notice and absent a dispute between the parties about the student's pendency services, there was no need to conduct a pendency hearing (see 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see also Child's Status During Proceedings, 71 Fed. Reg. 46, 710 [2006] ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]). In addition, the SRO determined that although pendency was not addressed by the IHO in that matter and the parent's claims raised in the due process complaint notice were deemed withdrawn without prejudice, the student's right to pendency and the parent's claim for reimbursement for pendency services was still live and could be addressed within the scope of that appeal. The SRO further found, as relevant here, that pendency attached by virtue of the statute for the duration of the administrative due process proceedings and if the district refused to fund services under pendency from the date of the parent's due process complaint notice through the date of the SRO's decision in that matter, the parent could file a new due process complaint notice containing allegations relating to that period of time (see Application of a Student with a Disability, Appeal No. 22-162). That is precisely what the parent has done in this matter, by filing her August 22, 2022 due process complaint notice which contains allegations relating to missed pendency services during the 2020-21 and 2021-22 school year while prior proceedings were pending and seeks compensatory education for those missed pendency services. Accordingly, the IHO erred in dismissing the parent's due process complaint notice.

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

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

In her August 22, 2022 due process complaint notice, the parent sought only district funding for related services missed during the pendency of prior proceedings (Aug. 2022 Due Process Compl. Notice at p. 2; see Tr. p. 32). The parties dispute whether or not the district was required to fund or provide the student's pendency services, with the parent asserting in the due process complaint notice that the district failed to implement the student's pendency services (Aug. 2022 Due Process Compl. Notice at p. 2). The IHO determined that the district was not required to implement the student's pendency services; however, she did not cite to any documentary evidence to support her finding and it is unclear from the IHO's decision if this determination was independent of her other determination regarding enforcement (IHO Decision at p. 3). Additionally, in the district's motion to dismiss, it alternately indicated that it was required to fund the student's pendency services and required to provide or fund them (Dist. Mot. To Dismiss at pp. 1, 2), leaving it an open question as to whether the district was obligated to fund pendency services obtained by the parent or to implement pendency itself, particularly in light of the lack of any clarifying documentation in the hearing record concerning the student's pendency.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

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]).

There is insufficient evidence to establish whether or not the parent had elected to obtain related services from private providers and had relieved the district of any obligation to provide the student's pendency services. On remand, the parties should be allowed an opportunity to present evidence establishing what the student's pendency program consisted of during the prior proceedings and whether the student missed pendency services. If the district has met its obligation, it should be able to establish what services it has funded and what services it has provided during the 2020-21 and 2021-22 school years. Further, if the parent has attempted to arrange for the services but had to go through a process to obtain authorization from the district before the private provider could deliver the services, the parent should be able to document her efforts. There is insufficient evidence in the hearing record to find that this was an instance where the student's pendency placement consisted of services to be selected at the parent's discretion and the parent elected not to schedule the services. Therefore, the IHO did not have sufficient evidence to find that that the district was relieved of its obligation to provide services.

Based on the foregoing, the IHO erred by dismissing the parent's due process complaint notice without prejudice. Accordingly, upon remand, an impartial hearing must proceed and the IHO must determine the student's actual pendency placement, whether the student missed related services he was entitled to under pendency during the 2020-21 and 2021-22 school years; whether there should be a deduction for related services provided or funded by the district during those school years, and after making those factual determinations the IHO should award an appropriate remedy to the parent using the standards discussed above.

VII. Conclusion

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated May 22, 2023, which dismissed the due process complaint notice without prejudice is vacated; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings in accordance with this decision to determine the amount of related services that the student should have received as pendency during the 2020-21 and 2021-22 school years, and to award the parent compensatory education for missed pendency services in the amount determined by the IHO.

Dated: **Albany, New York**
September 7, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER