The University of the State of New York

The State Education Department
State Review Officer
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No. 24-134

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

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Frank J. Lamonica, Esq., Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which ordered it to fund the costs of respondent's (the parent's) daughter's private special education services. 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 CSE convened on May 1, 2023, determined that the student was eligible for special education as a student with a speech or language impairment, and developed an IESP with a projected implementation date of September 1, 2023 (Parent Ex. B at p. 1). The CSE recommended that the student receive three periods per week of direct, individual special education teacher support services (SETSS), two 30-minute sessions per week of individual

speech-language therapy, one 30-minute session per week of group speech-language therapy, and one 30-minute session per week of individual occupational therapy (OT) (id. at p. 6). At the time, the IESP noted that the student was parentally placed in a nonpublic school (id. at p. 9).

Prior to the time of commencement of services under the IESP, the parent submitted a ten-day notice to the district dated August 21, 2023 (see Parent Ex. C). The notice stated that the parent consented to all of the services recommended in the May 2023 IESP to be implemented by the district (id. at p. 2). However, the parent informed the district that she had no way of implementing those services, despite her "best efforts" to locate providers at the district standard rates (id.). The parent notified the district that she would "have no choice but to implement the IESP on [her] own and seek reimbursement or direct payment from the" district (id.). The parent further indicated that the student would attend a parental placement in a nonpublic religious school for the 2023-24 school year, and the student would receive "their special education program provided on school premises" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated September 7, 2023, the parent alleged that she was "concerned regarding implementation" of the student's May 2023 IESP (Parent Ex. A). According to the parent, she had been unable to locate SETSS and related service providers for the 2023-24 school year and the district failed to implement its own recommendations (id. at p. 2). The parent asserted that without services the student's parental placement was "untenable" and the failure to implement the recommended services was a denial of FAPE for the 2023-24 school year (id.). The parent then noted that she "ha[d] located appropriate services providers independently for the 2023-24 school year" (id.). For relief, the parent requested an order directing the district to fund the providers located by the parent for the 2023-24 school year at a reasonable market rate and that "a bank of compensatory periods of SETSS and related services for the entire 2023-24 school year—or the parts which were not serviced" (id. at p. 3).[1]

B. Impartial Hearing Officer Decision

An impartial hearing convened and concluded on February 26, 2024 (see Tr. pp. 1-25). In a decision dated March 10, 2024, the IHO found that the matter involved implementation only and that the district did not seek to demonstrate that it "made, or even sought to make, the mandated services available to the student during the current school year" and accordingly, the IHO found the district failed to provide the student with the services recommended in the student's IESP for the 2023-24 school year (IHO Decision at p. 2). The IHO then ordered the district to "pay the cost of duly-licensed service providers that the [parent] ha[d] identified or will identify" (id.). The IHO then spent the remaining part of his decision analyzing the rate that would be paid by the district for the ordered services (id. at pp. 2-11). In the end, the IHO indicated the parent had a

[1] The parent also requested that the IHO issue an order of pendency to implement the May 2023 IESP (Parent Ex. A at p. 2). A pendency agreement was submitted with the supplemental documents on appeal and indicated that the parties agreed the student's pendency program arose from the May 2023 IESP (see Pendency Implementation Form).

"legitimate claim on the district to pay the provider [the parent] finds so long as that provider's rate does not exceed the upper limit of the existing market for comparable services" (id. at p. 12). [2]

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in directing the district to pay for the parent's unilaterally obtained services. Specifically, the district argues that the IHO erred by failing to address the appropriateness of the ordered services, as there was no evidence or testimony demonstrating that the parent found providers to deliver services to the student or that any services delivered were appropriate. The district also asserts that the IHO erred in his rate calculation, and ordered "improper relief."

The parent did not file an answer in response to the district's appeal.

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]).[3] "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]).

[2] The IHO ordered the district to "generate spreadsheet and providing a copy to the family here, no later than 30 days from the date of this Order, in which each row constitutes a single hour of SETSS for which it has paid or been liable for paying during 2022-23. In each row there must be at least two columns - a non-personally-identifiable unique identifier indicating the student to whom the services were provided, and the rate for the specific hour of services," and then the district was to tally the resulting columns of rates, determine the mean and standard deviation therefrom and provide method to calculate a rate (IHO Decision at pp. 8-10). The IHO provided a hypothetical example for one student that would result in 200 rows of data in the spreadsheet (id. at p. 8). If the district failed to produce the spreadsheet within the deadline or other events occurred, the IHO issued an alternative rate as a consequence that was capped the rate at $300.00 per hour (id. at p. 11). However, if the parties continued to disagree thereafter, the IHO indicated that the parents could return to due process to resume their rate dispute and seek a rate higher than $300.

[3] 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]).

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.).[4] 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 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

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the parental placement in the nonpublic school. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, she –"located appropriate services providers independently for the 2023-24 school year" without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof.[5]

Generally, districts who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent

[4] 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.

[5] The district did not appeal from the IHO's decision that the district failed to provide the student with equitable services for the 2023-24 school year and therefore, that decision is final and binding on both parties and they will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

The parent's request for district funding of privately obtained services must be assessed under this framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[6] In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Turning to the district's allegations that the IHO erred in failing to apply a Burlington/Carter analysis and require the parent to prove the appropriateness of any unilaterally-obtained services, the federal standard for adjudicating a Burlington/Carter type of dispute is instructive.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate,

[6] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case would include any special education services that may have obtained from a private source (Educ. Law § 4404[1][c]).

even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

Turning to the facts in this case, the only description of the student's needs is set forth in the May 2023 IESP (Parent Ex. B). At the time the IESP was developed, the student was four years old and eligible for special education, for the upcoming 2023-24 school year, as a student with a speech or language impairment (id. at p. 1). According to the IESP, the student had difficulty naming colors, applying conceptual information when asked to, reciting the alphabet, and counting past five (id. at pp. 1, 2). She inconsistently recognized her name in written form, recited the days of the week, and demonstrated difficulty retelling simple steps to complete an activity in the correct order (id.). According to the IESP, socially the student was generally well behaved in class, although she cried in response to frustration rather than using words to express

herself, and performed best when a teacher was nearby (id.). The IESP reflected reports that the student had difficulty persevering when disappointed, maintaining eye contact, transitioning between activities, sharing items, and taking turns (id. at p. 2). Physically, the IESP indicated that the student needed to develop age-appropriate skills in the areas of copying complex shapes, using crayons, forming letters correctly, improving motor planning and proprioceptive skills, and remaining on task despite the presence of distractions (id. at p. 3).

Prior to the time for the district to implement the student's IESP services, the parent filed a ten-day notice dated August 21, 2023 stating that she had consented to the student's May 2023 IESP services being implemented by the district, but because she had "no way of implementing these recommendations," she would "implement the IESP on [her] own and seek reimbursement or direct payment from [the district]" (Parent Ex. C at p. 2). Additionally, the parent noted that the student would attend a specified nonpublic school and that her special education program would be provided on the school premises (id.). In her due process complaint notice, dated September 7, 2023, the parent indicated that she had independently located an appropriate service provider to provide services to the student for the 2023-24 school year (Parent Ex. A at p. 2).

On November 7, 2023, the district executed a pendency implementation form indicating that pendency was not contested and consisted of the program recommended in the May 2023 IESP (Nov. 7, 2023 Pendency Implementation Form).

At the impartial hearing, as part of its opening/closing statement, the district argued that the parent had the burden of proving the appropriateness of any unilaterally obtained services delivered to the student and that the hearing record did not include evidence of a contract for services, progress reports, or even the name of the provider (Tr. p. 11). Neither counsel for the parent nor the IHO addressed this part of the district's argument and instead focused entirely on the rate for services (Tr. pp. 12-24). In the parent's opening/closing statement, counsel for the parent moved straight from arguing that the district had "a burden to implement these services" to a discussion of rates (Tr. p. 18). Counsel or the parent did not identify who was providing the student services or whether the student was actually receiving any privately obtained services (see Tr. pp. 17-20). Accordingly, there was no discussion as to whether or not the student received services, or is currently receiving services, during the 2023-24 school year (Tr. pp. 1-24). Additionally, the only documentary evidence submitted into the hearing record was the September 7, 2023 due process complaint notice, the May 2023 IESP, the August 21, 2023 ten-day notice, submitted by the parent, as well as an October 2023 report regarding rates and a November 2023 letter submitted by the district (Parent Exs. A-C; Dist. Exs. 1-2). Accordingly, there is no documentary or testimonial evidence showing whether or not the student received or is receiving any services during the 2023-24 school year (Tr. pp. 1-24; Parent Exs. A-C; Dist. Exs. 1-2). Based on this lack of evidence, the district's assertion that the parent failed to prove the appropriateness of any unilaterally obtained services is supported. The hearing record does not set forth the name of a provider who delivered services, his or her qualifications or experience, or a statement of where or when the services were purportedly delivered. Neither the provider nor any person with knowledge of services being delivered to the student testified at the impartial hearing. There is no documentation that any services were delivered to the student. There is no progress report, service records, or even invoices. As there is no information in the hearing record regarding what services the student was or is receiving and who provided those services, the parent failed to meet her burden that the unilaterally obtained services were appropriate and the IHO erred in directing the

district "pay the cost of duly-licensed service providers that the [parent] ha[d] identified or will identify."

Notwithstanding the above, the timing of the filing of the parent's 10-day notice and due process complaint notice in this matter warrants further discussion. Specifically, the parent agreed to the district's recommended special education programming for the student and only raised an issue with the district's implementation of the May 2023 IESP (Parent Exs. A; C). However, the parent raised this issue prior to the date the May 2023 IESP was to be implemented—the May 2023 IESP had an implementation date of September 1, 2023, yet the parent filed her 10-day notice on August 21, 2023 (Parent Exs. B at p. 1; C). The parent then followed up on her 10-day notice by filing her due process complaint notice on September 7, 2023 (Parent Ex. A). Along with the due process complaint notice, the parent included a proposed pendency implementation form (id. at pp. 4-5). The district then agreed to pendency by signing off on the parent's proposed pendency implementation form on November 7, 2023 (Nov. 7, 2023 Pendency Implementation Form).

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, 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]).

In this instance, the parties agreed to pendency and there has been no request for enforcement of the parties' pendency agreement. More specifically, there is no indication in the hearing record showing that the district has refused to pay for any services owed under pendency, or that the student was at risk of losing her placement due to the district's failure to pay. As the Second Circuit has indicated recently, school districts may implement basic budgetary oversight measures when funding pendency placements and sprinting to obtain injunctive orders is not permissible because parents are not entitled to payments with such immediacy that it would frustrate the fiscal policies of participating states (Mendez v. Banks, 65 F.4th 56, 63 [2d Cir. 2023]; Landsman v. Banks, 2023 WL 4867399, at *3 [S.D.N.Y. July 31, 2023]). At the same time, when the district has failed to implement pendency with respect to a pendency implementation agreement or contract, parents have not been shy about seeking enforcement in a court of competent jurisdiction when the district has delayed in meeting its agreed upon pendency obligations (M.F. v. New York City Dep't of Educ., 2024 WL 729208, at *2 [S.D.N.Y. Feb. 22, 2024]).

Overall, due to the timing of this proceeding, wherein the parent asserted a failure to implement services prior to the implementation date for those services, combined with the district's obligations under pendency continuing from the filing of the due process complaint notice at the start of the school year up until the date of this decision, a more appropriate course of action would have been to consider whether the student in fact received any special education or related services during the course of the 2023-24 school year and then awarded the student compensatory education

for any missed services. Nevertheless, regardless of the outcome of this proceeding—which seeks district funding of services privately obtained by or to be privately obtained by the parent—the district is responsible for delivering the agreed upon services to the student during the 2023-24 school year either pursuant to pendency or by implementing the May 2023 IESP, or whatever the student's current educational programming may be under the dual enrollment statute, after the conclusion of the proceedings.

VII. Conclusion

Having found that the parent did not sustain her burden of demonstrating the appropriateness of any unilaterally obtained services, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support the parent's request for relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated March 10, 2024, is modified by reversing those portions which ordered the district to fund the costs of the services obtained or to be obtained by the parent for the 2023-24 school year.

Dated: **Albany, New York**
May 16, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER