APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of June, two thousand sixteen.

PRESENT: DENNIS JACOBS,
GUIDO CALABRESI,
REENA RAGGI,
Circuit Judges.

- -X
SHKELQESA DERVISHI, on behalf of T.D.,
Plaintiff-Appellant,

-v.- **15-2798**

STAMFORD BOARD OF EDUCATION,
Defendant-Appellee.
- -X

FOR APPELLANT: Shkelqesa Dervishi, pro se, Stamford, CT.

FOR APPELLEE: Patrick M. Fayhe, Shipman & Goodwin, Hartford, CT.

Appeal from a judgment of the United States District Court for the District of Connecticut (Eginton, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED** in part, **VACATED** in part, and **REMANDED** for further proceedings.

Shkelqesa Dervishi, pro se, appeals from the judgment of the United States District Court for the District of Connecticut (Eginton, J.) affirming an administrative impartial hearing officer's ("IHO") decision denying her Individuals with Disabilities Education Act ("IDEA") claims brought on behalf of her minor autistic son, T.D., against the Stamford Board of Education ("Board"). We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

We review de novo the district court's grant of summary judgment in an IDEA case, recognizing that summary judgment in this context "involves more than looking into disputed issues of fact; rather, it is a pragmatic procedural mechanism for reviewing administrative decisions." M.O. v. N.Y.C. Dep't of Educ., 793 F.3d 236, 243 (2d Cir. 2015) (internal quotation marks and citation omitted). Thus, our de novo review seeks only to independently verify that the administrative record supports the district court's determination that the individualized education program ("IEP") was adequate. M.W. ex rel. S.W. v. N.Y.C. Dept. of Educ., 725 F.3d 131, 138 (2d Cir. 2013).

1. The IDEA's purpose is "to ensure that all children with disabilities have available to them a free appropriate public education" ("FAPE"). 20 U.S.C. § 1400(d)(1)(A). To this end, the IDEA requires that states provide disabled children a "basic floor of opportunity" that is likely to benefit the child. T.K. v. N.Y.C. Dept. of Educ., 810 F.3d 869, 875 (2d Cir. 2016). The IDEA's "principal mechanism" for achieving this is the individualized education program ("IEP"), which is a "written document that must include the child's level of performance, goals for [his] improvement, and a plan about how to achieve that improvement." Id.

If a state fails to provide a FAPE to a disabled child, the parents may elect an alternative placement and seek reimbursement from the state. Doe v. East Lyme Bd. of Educ., 790 F.3d 440, 448 (2d Cir. 2015). Tuition reimbursement entails a three-step inquiry: (i) whether the school district has complied with the IDEA's procedural requirements; (ii) whether the school district has complied with the IDEA's substantive requirements, i.e., whether the IEP is reasonably calculated to enable the child to receive educational benefits; and (iii) whether the parent's alternative placement is "appropriate to the child's needs." Id. at 449 (internal quotation marks omitted). Parents must prevail at all three steps to receive reimbursement. Id.

Procedural errors render an IEP inadequate only if they "impeded the child's right to a [FAPE]"; "significantly impeded the parents' opportunity to participate in the decisionmaking process"; or "caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii). Substantive challenges must demonstrate that an IEP is not "reasonably calculated to enable the child to receive educational benefits." Doe, 790 F.3d at 450 (internal quotation marks and citation omitted). We owe substantial deference to state administrative officers when considering claims of substantive inadequacy. Id.

Dervishi's procedural and substantive challenges to the 2010-2011 IEP fail. The IDEA does not require the parents' presence at planning and placement team ("PPT") meetings; rather, it requires only that the school board give parents the opportunity to participate in the decision about their child's educational placement. Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 193 (2d Cir. 2005). The record shows that the Board gave Dervishi and her husband ample opportunity to so participate: the parents participated in the first two PPT meetings, the Board attempted repeatedly to schedule the next PPT meeting around the parents' summer travel plans, and the parents attended the fifth (and final) PPT meeting where they presented an independent evaluation and suggested alternative placement options. The Board rejected the parents' proposed alternative placement options, and was within its rights to do so: "the parent's right of participation is not a right to 'veto' the agency's proposed IEP." Doe, 790 F.3d at 449.

The 2010-2011 IEP offered T.D. placement at the Roxbury Elementary School, which had a special education program and could provide T.D. with the enhanced staffing, occupational therapy, and speech therapy, all as outlined in his IEP. There is no basis in the record to reject the IHO's determination that this combination of placement and services was substantively appropriate. Because we conclude that the Board provided T.D. with a FAPE for the 2010-2011 school year, we need not consider whether the parents' alternate placements were appropriate. See id.

2. The stay-put provision of the IDEA provides that "during the pendency of any proceedings conducted pursuant to this section . . . the child shall remain in [his] then-current educational placement." 20 U.S.C. § 1415(j). The "then-current educational placement" is typically: (i) "the placement described in the child's most recently implemented IEP"; (ii) "the operative placement actually functioning at the time when the stay put provision of the IDEA was invoked"; or (iii) "the placement at the time of the previously implemented IEP." Mackey ex rel. Thomas M. v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 (2d Cir. 2004) (internal quotation marks and alterations omitted). The purpose of this provision is "to maintain the educational status quo while the parties' dispute is being resolved" and requires that the school district "continue funding whatever educational placement was last agreed upon for the child until the relevant administrative and judicial proceedings are complete." T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 152, 171 (2d Cir. 2014). A school district is responsible for funding educational placement during the pendency of a dispute under the IDEA regardless of whether the case is meritorious or whether the child would otherwise have a substantive right to that placement. Doe, 790 F.3d at 453.

On November 18, 2010, when Dervishi sought administrative review, the placement "actually functioning at the time" was the home program that the school district had agreed to fund for the previous school year. The Board only agreed to fund T.D.'s home program on a temporary basis; but, because "the Board's obligation to fund stay-put placement is rooted in statute, not contract," the parties' intent as to the duration

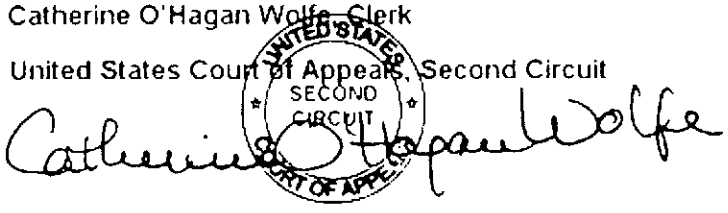
of T.D.'s home program does not alter the Board's reimbursement obligation under the stay-put provision. Id. The district court erred in concluding that the IEP created in August 2010 constituted the current placement for purposes of the stay-put obligation because it was never implemented or agreed to by the parents. In light of the foregoing, we vacate the district court's denial of Dervishi's stay-put claim. On remand, the district court should (i) calculate the total value of the home program, as specified in the settlement agreement, for the period from November 18, 2010 until the dispute over the 2010-2011 IEP is no longer pending, and (ii) order the Board to pay that amount to Dervishi. Id. at 457; Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 484 (2002).

3. Dervishi challenges the dismissal of her claim that the Board breached the parties' 2009 settlement agreement, in which they agreed on a course of action for T.D. for the 2009-2010 school year. While the IHO did not issue a ruling on this claim, factual findings were made that doom Dervishi's claim. The IHO found that the Board followed the procedure the parties created for selecting consultants, timely held PPT meetings, acted reasonably in trying to accommodate the parents, and timely evaluated and assessed T.D. There is no basis in the record to conclude the Board breached the 2009 settlement agreement.

4. To determine whether an IHO is biased, courts consider whether the record shows that the hearing was fair and impartial. See, e.g., E.S. ex rel. B.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 434-35 (S.D.N.Y. 2010). The record is plain: the IHO conducted a fair and impartial hearing.

Accordingly, and finding no merit in Dervishi's other arguments, we hereby **AFFIRM** in part and **VACATE** in part the judgment of the district court, and **REMAND** for further proceedings.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK



APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SHKELQESA DERVISHI	:	
	:	
	:	CIVIL NO. 3:11CV01018(WWE)
v.	:	
	:	
STAMFORD BOARD of EDUCATION	:	
	:	

RECOMMENDED RULING

This is a case brought by plaintiff, pro se, on behalf of her minor autistic son, T.D., against the Stamford Board of Education ("the Board"). On August 4, 2016, the Court of Appeals issued a Summary Order affirming the District Court's judgment, which upheld an administrative hearing officer's decision denying plaintiff's claims. [Doc. #93]. The Court remanded the case for a determination of reimbursement due plaintiff for the home-based education program provided to T.D. during the pendency of judicial review.[1]

Evidentiary hearings were held on March 16, 22, and 29, 2017. In support of her application, plaintiff filed the Affidavit of Shkelqesa Dervishi dated November 21, 2016 with invoices [Doc. #103, Pl. Ex. 4]; and presented the testimony of Shkelqesa Dervishi, Lucinda Ribeiro, and Dr. Stephanie Bader of

[1] On January 12, 2017, Judge Eginton referred this case to the undersigned for a determination regarding the total value of the home-based program as specified in the 2009 Settlement Agreement for the period described above. [Doc. #107].

the Westchester Institute for Human Development. Defendant filed a Brief Regarding the Calculation of Total Value of Home Program [Doc. #100] and a Reply Brief. [Doc. #105]. Dr. Wayne Holland testified on behalf of the Stamford Board of Education. Post-hearing memoranda were filed on May 31, 2017. [Doc. ##141, 142].

FACTUAL BACKGROUND

A. The 2009 Settlement Agreement

On November 6, 2009, the parties entered into a Settlement Agreement which set forth a plan to have independent consultants evaluate T.D. and recommend an appropriate program for special education and related autism services. [Def. Ex. 500]. The parties agreed to be bound by the recommendations of three independent evaluators regarding an appropriate special education program and placement. Id. ¶1; Hearing Officer's ("H.O.) Dec. at 1, Doc. #81 at 43. In August 2010, an Individualized Education Plan ("IEP") for T.D. for the 2010-2011 school year was finalized which met all components recommended by three independent evaluators. [Summary Judgment Ruling Doc. #89 at 2; H.O. Dec. at 1]. The parents rejected the IEP and requested a due process administrative hearing on November 18, 2010, seeking reimbursement for their home-based program and placement of T.D. at the McCarton School. [H.O. Dec. at 1].

During the implementation of this settlement agreement and the development of T.D.'s program, the Board had agreed to fund T.D.'s home-based program. Paragraph 3 of the Agreement states,

> The Board agrees to reimburse the Parents in the amount of $2,500 per week for the cost of speech, occupational therapy and ABA services and autism consulting services[2] provided to the Student from September 2009 through the development and implementation of the Student's IEP (at the January 2010) PPT meeting. It is the parties' agreement that the Student will be transitioned no later than February 2010 unless the Independent Consultants recommend a different time frame provided that the Student must be transitioned from the home-based program during the 2009-2010 school year.

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[2] The term "autism consulting services" was a handwritten addition to paragraph three of the Agreement. [Def. Ex. 500]. The Agreement does not define this term; it was added to the sentence listing the Board's reimbursement obligations. Dr. Holland was asked to provide his understanding of the term "autism consulting services" at the hearing. He testified, "it would be a company or an individual that offers services to families and children that are on the autism spectrum." [Tr. 3/29/17 444:5-11].

> THE COURT: And at the time, do you recall any services that were specifically identified under the rubric, as opposed to ABA services for example?
>
> THE WITNESS: No. No I don't. And I bring to your attention also, your Honor, to the fact that this is under the category of the unilateral placement. So this—the language or the type of service would have been directed to us by the family.

Id. at 444:12-21; Tr. 3/29/17 at 481:12-14 (testifying that the Board reimbursed plaintiff for evaluations of T.D. that she initiated; 563:24-564:25 (testifying that reimbursement for "autism consulting services" was for providers selected by plaintiff."). For example, Dr. Holland testified that Dr. Carol Fiorile's services for report writing would be considered "autism consulting services." Id. at 445:2-19 (referencing Pl. Ex. 1 at 5-6).

> Reimbursement for payment shall be made within forty-five ("45") days of the Board's receipt of documentation of payments (invoices and cancelled check(s)) made by the Parents for related services provided to the Student between September 2009 and the development and implementation of the Student's IEP. The Board will further reimburse the Parents for their provision of transportation of the Student to and from his sessions with service providers from September 2009 through the development and implementation of the Student's IEP based on the applicable IRS mileage rate, upon receipt of documentation of the Student's attendance at these sessions during that period. These payments are being made in full and final settlement of all fees, costs and/or damages for any claims relating to the Student's educational program, including compensatory education, through the 2009-2010 school year including the Extended School Year. In consideration of the above payments the Parents agree that they will not seek reimbursement for any additional costs related to the Student's educational program from the Board in any forum through the 2009-2010 school year, including the 2010 Extended School Year. The above payments are expressly conditioned upon the Parents' continued residence in Stamford and the Student's continued attendance at the program selected by the Independent Consultants during the applicable portion of the 2009-2010 school year.
>
> Id. ¶3.

B. Summary Judgment Ruling dated August 5, 2015

In a final decision and order dated May 13, 2011, the Hearing Officer found that the Board offered T.D. an appropriate IEP for the 2010-2011 school year at a Board school and the Board's actions during the 2010-11 school year "did not constitute procedural violations and did not result in a denial of a free appropriate public education" ("FAPE") to T.D. [H.O. Dec. at 19]. The Hearing Officer also found that

> Because the IEP offers an appropriate program in the [least restrictive environment], the Parents are not entitled to reimbursement for any other placement, including reimbursement for their home program and/or the McCarton School, as the IDEA "does not require [a local educational agency] to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school facility." 34 C.F.R. §300.403(a)(emphasis added).

[H.O. Dec. at 18].

Plaintiff filed this civil action on behalf of T.D. to appeal the hearing officer's May 13, 2011 decision, pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1415, arguing that the 2010-2011 IEP was not appropriate and that defendant breached the 2009 Settlement Agreement; and challenging the denial of stay-put reimbursement for the home-based schooling. Judge Eginton granted the School Board's motion for summary judgment on August 5, 2015. [Doc. #89].

The Court upheld the Hearing Officer's findings that: the Board complied with the IDEA's procedural safeguards; the 2010-2011 IEP was appropriate; and the Board did not breach the 2009 Settlement Agreement. Id. at 12. The Court further found that the 2009 Settlement Agreement "to reimburse for home-based education [did] not constitute the prior placement for purposes of triggering the stay-put obligation" and that the "Board's contractual duty to reimburse for home-based education ceased

after the Parents rejected the independent consultants' recommended IEP for T.D." Id. at 15 (emphasis added). Instead, the Court found that the "IEP approved by the School Board in August 2010 constitute[d] the current placement for purposes of the stay-put obligation." Id.

C. Summary Order dated August 4, 2016

On August 4, 2016, the Appeals Court vacated the District Court's denial of plaintiff's stay-put claim, finding that on November 18, 2010, when plaintiff sought "administrative review" of the 2010-11 IEP, the "placement 'actually functioning at the time' was the home program that the [Board] had agreed to fund for the previous year" under the 2009 Settlement Agreement. [Doc. #93 at 5]. The Appeals Court also found that "the Board provided T.D. with a FAPE for the 2010-2011 school year" and found "no basis in the record to conclude the Board breached the 2009 settlement agreement." Id. at 4-5.

On remand, the Court of Appeals directed this Court to "(i) calculate the total value of the home program, as specified in the settlement agreement, for the period from November 18, 2010 until the dispute over the 2010-2011 IEP is no longer pending, and (ii) order the Board to pay that amount to Dervishi." [Doc. #93 at 5].[3]

[3] The parties agree that the dispute ended with the Appeals Court's issuance of this Summary Order on August 4, 2016. [Doc.

D. Legal Defenses

The Board first argues that reimbursement under the 2009 Settlement Agreement is not warranted because "the Parents refused to enroll the Student in the program selected by the independent consultant." [Doc. #100 at 5]. This argument was squarely addressed on appeal. The Appeals Court vacated the district court's finding on summary judgment that "the School Board's contractual duty to reimburse for home-based education ceased after the Parent's rejected the independent consultants' recommended IEP for T.D." [Doc. #89 at 15]. The Summary Order states,

> On November 18, 2010, when Dervishi sought administrative review, the placement "actually functioning at the time" was the home program that that the school district had agreed to fund for the previous school year. The Board only agreed to fund T.D.'s home program on a temporary basis; but, because "the Board's obligation to fund stay-put placement is rooted in the statute, not contract," the parties' intent as to the duration of T.D.'s home program does not alter the Board's reimbursement obligation under the stay-put provision.

[Doc. #93 at 4-5]. On remand, the Appeals Court ordered this Court to "calculate the total value of the home program, as specified in the settlement agreement." [Doc. #93 at 5]. Accordingly, the Court finds defendant's argument unavailing.

#100 at 4; Doc. #103]. Accordingly, the period for reimbursement under the stay-put provision of the IDEA is November 18, 2010 through August 4, 2016.

Similarly, the Court declines to deny plaintiff reimbursement for time the Board contends is attributable to the parents' "obstructionist and dilatory actions." [Doc. #100 at 6-7]. As set forth by the Appeals Court, "[t]he stay-put provision of the IDEA provides that 'during the pendency of any proceedings conducted pursuant to this section...the child shall remain in [his] then-current educational placement.'" [Doc. #92 at 4 (quoting 20 U.S.C. §1415(j))]. The Appeals Court further directed that "[a] school district is responsible for funding educational placement during the pendency of a dispute under the IDEA regardless of whether the case is meritorious or whether the child would otherwise have a substantive right to that placement." Id. (citing Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 453 (2d Cir. 2015), cert. denied, 136 S. Ct. 2022, 195 L. Ed. 2d 218 (2016), reh'g denied, 136 S. Ct. 2546, 195 L. Ed. 2d 882 (2016)).

FACTUAL FINDINGS

A. Service Providers

As set forth above, the 2009 Settlement Agreement provided for limited home-based services because it anticipated that the Agreement would be effective only until an IEP for the 2010-2011 school year was developed. Plaintiff testified that in October 2010, prior to her filing for a due process hearing, T.D. was

receiving services from Carol Fiorile, Ph.D.; Lucinda Ribeiro; Marilena Baldino; and Communication Clinic of Connecticut, LLC.[4]

1. Home-Based Program as of November 18, 2010

Based on the evidence submitted at the hearing, the Court awards reimbursement in the amount of $30,222.50 for home-based services that were in place on November 18, 2010, when plaintiff requested a due process hearing challenging the 2010-2011 IEP, and subsequently rendered while the due process challenge was pending. Plaintiff met the burden of proof, set forth in the 2009 Settlement Agreement,[5] by presenting invoices for services and proof of payment for this amount. The invoices and proof of payment showed services provided to T.D. in November 2010 by Carol Fiorile, Ph.D., in the amount of $885; from November 18, 2010 through June 24, 2011 by Lucinda Ribeiro in the amount of $21,332,00; from November 23, 2010 through March 8, 2011 by the

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[4]On October 27, 2010, prior to the request for a due process hearing, Dr. Holland emailed plaintiff stating, in part, that "without direction from an IEP meeting recommendation I am not empowered to support your request. Do not send your invoices to us." [Pl. Ex. 31; see also Tr. 3/29/17 at 570:18-19 (Dr. Holland testified, "[w]e did not pay any invoices once the settlement agreement ended."); H.O. Dec. at 18 ("Because the IEP offers an appropriate program in the [least restrictive environment], the Parents are not entitled to reimbursement for any other placement, including reimbursement for their home program and/or the McCarton School....")].

[5] The Board correctly asserts that under the 2009 Settlement Agreement, plaintiff has the burden of presenting "invoices and cancelled checks" to show that services, as defined under the Agreement, were rendered. [Doc #100 at 8].

Communication Clinic of Connecticut, LLC. in the amount of $1,554; and from November 18, 2010 through March 29, 2011 by Marilena Baldino in the amount of $6,451.50.

SUMMARY Service Providers as of November 18, 2010		
Carole Fiorile, Ph.D.	$ 885.00	
Lucinda Ribeiro	$21,332.00	
Communication Clinic of Connecticut, LLC	$ 1,554.00	
Marilena Baldino	$ 6,451.50	
TOTAL		**$30,222.50**

2. Service Providers Hired After November 18, 2010

Plaintiff also seeks reimbursement for therapy from Dr. Stephanie Bader and various YMCA programs in 2015 and 2016. She would be entitled to reimbursement for these services if they are substantially similar to the services being rendered at the time the due process challenge was filed, that is within the scope of the "home program that the [Board] had agreed to fund for the previous year." [Doc. #93 at 5].

a. Stephanie Bader, Ph.D., Westchester Institute Human Development-December 2015-March 2016

Defendant contends this was not a reimbursable service specified in the 2009 Settlement Agreement, so reimbursement should be denied. [Doc. #141 at 9; Tr. 3/29/17 at 437:14-17 (Dr. Holland testifying that at no point did the Board agree to pay for services related to family therapy)].

The Court agrees. Plaintiff testified that when T.D. turned 17 years old, she sought counseling to address his behavioral issues in a total of five sessions, from December 21, 2015 through March 7, 2016. [Pl. Ex. 1 at 12-20]. Plaintiff provided proof of payment for four sessions totaling $740. [Pl. Ex. 1 at 14, 16, 18, 20]. Mrs. Dervishi testified that she participated in the counseling sessions with her son. Plaintiff has not demonstrated that this type of expense was paid by the Board during the 2009-2010 school year and this service is not included in the services listed at paragraph 3 in the 2009 Settlement Agreement. See Tr. 3/16/17 at 96:20-22, 98:16-22; Tr. 3/22/17 at 252:15-18, 253:24-254:4. Dr. Bader testified that she provided family therapy[6] to Mrs. Dervishi and T.D., which

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[6] Dr. Bader explained that

> sometimes terminology is a little bit confusing, but the family therapy billing code is typically the billing code that I use working with the clients that I work with, given that they're usually lower functioning and usually the families have to be involved. The difference of the billings between family therapy and psychotherapy is honestly whether or not the parent or family is actually in the session room, and whether or not we're talking about skills that the family can work with, too.

Tr. 3/22/17 at 254:13-24. She continued, "[s]o was it ABA services in terms of the - home-based programming and teaching academic skills in a certain strategic manner? No, but was it kind of the broader sense of applied behavior analysis in how we affect change and how we can address behavior? Yes." Id. at 256:9-14.

consisted of offering Mrs. Dervishi skills to manage T.D.'s behavioral issues, coaching/teaching compliance with taking directions, completing tasks and addressing difficulties with personal boundaries.[7] Tr. 3/22/17 at 244:21-245:3, 246:6-17, 247:14-20, 250:24-252:11, 253:10-13.

Accordingly, the request for reimbursement of costs for services provided by Dr. Stephanie Bader at Westchester Institute for Human Development in 2015-2016 is DENIED.[8]

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[7] On recross examination, defendant asked,

> Q. Dr. Bader, if I understand your testimony just then, you worked with T.D. and Mrs. Dervishi to provide family therapy. Right?
>
> A. Correct.
>
> Q. And you worked with coaching Mrs. Dervishi on how to provide direction to T.D. is that right?
>
> A. Correct.
>
> Q. And if I heard you correctly, you were training her as a parent on how to deal with a child with a disability, a special education student, for example. Is that correct?
>
> A. Correct.
>
> Q. You weren't training her as a therapist in any way?
>
> A. No.

Tr. 3/22/17 at 259:22-260:12; see also id. at 257:11-258:1.

[8] The Court has considered whether Dr. Bader's services might be reimbursable under the rubric, "autism consulting services." However, based on the record at the hearing, the kind of

b. YMCA Fall 2015-July 2016

Defendant contends this is not a reimbursable service set forth in the 2009 Settlement Agreement and reimbursement should be denied. [Doc. #141 at 10; Tr. 3/29/17 at 438:4-10 (Dr. Holland testifying that at no point did the Board agree to pay for services at the YMCA)].

The Court agrees. Plaintiff testified that the Board did not pay for this expense during the 2009-2010 school year and this service is not included in the listed services at paragraph 3 in the 2009 Settlement Agreement. See Tr. 3/16/17 at 54:16-22, 64:21-25, 94:11-15. Plaintiff offered no evidence that services from the YMCA were paid for by Stamford at any time and no explanation of how they came within the scope of the program described in the Settlement Agreement. Accordingly, the request for reimbursement of costs and the provision of transportation associated with the YMCA programs in 2015-2016 is DENIED.

B. Transportation

Plaintiff seeks reimbursement of transportation expenses at the applicable IRS standard business mileage rate from July 3,

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coaching therapy Dr. Bader described was different from the evaluative and oversight services provided by Dr. Fiorile, for example. Designing an educational program for T.D. and reporting on his progress, as witnesses testified Dr. Fiorile did, seems quite distinct from the family therapy Dr. Bader undertook.

2010 through December 31, 2016, in the amount of $10,419.[9] [Pl. Ex. 2]. To the extent that Mrs. Dervishi seeks reimbursement for her time to transport T.D. to services, the request is denied. [Doc. #142 at 2 (seeking compensation "for the value of my time in performing the transportation function under pendency."); Tr. 3/16/17 at 105:5-108:23 (seeking compensation for time transporting and staying at appointments with providers); Tr. 3/16/17 at 113:12-24 (plaintiff conceding that the 2009 Settlement Agreement does not provide for compensation for her time transporting T.D. to services); see A.S. v. Harrison Township Bd. of Educ., Civil No. 14-147 (NLH/KMW), 2016 WL 1717578, at *5 (D.N.J. Apr. 29, 2016) (declining to award minimum wage for time spent transporting child to school); Ruby v. Jefferson Cty. Bd. of Educ., 122 F. Supp. 3d 1288, 1308 (N.D. Ala. 2015) ("[Plaintiff] is entitled to costs, not wages. The court concludes that Defendant did not deny Plaintiff a FAPE by offering her only the costs associated with transporting L.L. to and from [school], and not the costs that Defendant would have

[9] Plaintiff seeks reimbursement at the IRS standard business mileage rate, as specified in the Settlement Agreement. [Pl. Ex. 2 at 2]. See A.S. v. Harrison Township Bd. of Educ., 2016 WL 1717578, at *6 ("calculat[ing] IDEA mileage reimbursement using the IRS standard business mileage rate at the time the mileage expenses were incurred.")(citing cases). The business mileage rate in: 2010 was 50 cents per mile; 2011 was 51 cents per mile; 2012 was 55.5 cents per mile; 2013 was 56.5 cents per mile; 2014 was 56 cents per mile; 2015 was 57.5 cents per mile; and 2016 was 54 cents per mile. See https://www.irs.gov/uac/newsroom

had to pay an employee in her stead."). Plaintiff is entitled to reimbursement for the actual costs of transportation at the IRS standard business mileage rate.

a. Communication Clinic of Connecticut, LLC

Plaintiff seeks reimbursement for transportation to the Communication Clinic of Connecticut, LLC from November 23, 2010 through March 8, 2011. [Pl. Ex. Pl. Ex. 1 at 50-59]. Roundtrip mileage from T.D.'s home to Communication Clinic of Connecticut, LLC is 36.9 miles.[10] [Pl. Ex. 2 at 6-7]. Plaintiff transported T.D. to Communication Clinic of Connecticut six (6) times in 2010 or 221.4 miles and four (4) times in 2011 or 147.6 miles. [Pl. Ex. 1 at 50-59]. The Court awards reimbursement for 2010 in the amount of $110 [221.4 miles at 50 cents/mile] and for 2011 in the amount of $75.27 [147.6 miles at 51 cents/mile] totaling $185.27.

b. Fairfield Rehabilitation Associates, Inc.

Plaintiff seeks reimbursement for transportation to Fairfield Rehabilitation Associates from March 25, 2011 through December 16, 2013. [Pl. Ex. 2 at 10-64]. Roundtrip mileage from

[10] Communication Clinic of Connecticut, LLC is located at 137 Ethan Allen Highway, Ridgefield, CT. Plaintiff submitted a mileage claim of 18.3 and 18.6, as measured by Google Maps, from T.D.'s residence to Communication Clinic of Connecticut, LLC., or 36.9 miles round trip. [Pl. Ex. 2 at 6-7].

T.D.'s home to Fairfield Rehabilitation Associates is 39.8 miles.[11] [Pl. Ex. 2 at 8-9; Pl. Ex. 39]. Plaintiff transported T.D. to Fairfield Rehabilitation Associates forty-seven (47) times in 2011 [Pl. Ex. 2 at 10-18]; one hundred, forty-two (142) times in 2012 [Pl. Ex. 2 18-47]; and one hundred and eight (108) times in 2013. [Pl. Ex. 2 47-64]. The Court awards reimbursement for 2011 in the amount of $954 [1,870.6 miles at 51 cents/mile]; for 2012 in the amount of $3,136.63 [5,651 miles at 55.5 cents/mile]; and for 2013 in the amount of $2,428.59 [4,298.4 miles at 56.5 cents/mile] totaling $6,519.22.

c. Greenwich Education and Prep., LLC

Plaintiff seeks reimbursement for transportation to services provided at Greenwich Education and Prep., LLC, (also referred to as the Pinnacle School), for twenty (20) days from April 3, 2013 through May 8, 2013.[12] [Pl. Ex. 21 at 1-3; Pl. Ex.

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[11] Fairfield Rehabilitation Associates, Inc. is located at 1931 Black Rock Turnpike, Fairfield, CT. Plaintiff submitted a mileage claim of 19.8 and 20 miles, as measured by Google Maps, from T.D.'s residence to Fairfield Rehabilitation Associates, Inc., or 39.8 miles round trip. [Pl. Ex. 39 at 1].

[12] Plaintiff attended Greenwich Education and Prep., LLC for twenty (20) days on April 3, 8, 9, 10, 11, 15, 16, 17, 18, 22, 23, 24, 25, 29, 30 and May 1, 2, 6, 7, and 8, 2013. [Pl. Ex. 40 at 4]. Plaintiff also testified that she withdrew T.D. from the program on May 8, 2013. [Tr. 3/16/17 at 165:12, 171:2; Tr. 3/22/17 at 277:7-10, 351:7-8, 366:4-5]. There is also an email dated Tuesday, May 14, 2013, from Alisa Dror of Greenwich Education and Prep., LLC, stating that she received an email from Mrs. Dervishi withdrawing T.D. from the school. [Pl. Ex.

40 at 4]. Roundtrip mileage from T.D.'s home to Greenwich Education and Prep., LLC is 7.6 miles.[13] [Pl. Ex. 2 at 8-9; Ex. 40 at 3]. Plaintiff transported T.D. to Greenwich Education and Prep., LLC for services twenty (20) times in 2013 or 152 miles. [Pl. Ex. 21 at 1-3; Pl. Ex. 40 at 4]. The Court awards reimbursement in the amount of $85.88 [152 miles at 56.5 cents/mile].

SUMMARY Transportation Reimbursement		
Communication Clinic of Connecticut, LLC	$ 185.27	
Fairfield Rehabilitation Associates, Inc.	$ 6,519.22	
Greenwich Education and Prep, LLC	$ 85.88	
TOTAL		**$ 6,790.37**

45, 47]. On rebuttal, plaintiff asserted that T.D. attended this program through May 14, 2013. Compare Pl. Ex. 40 at 4 with Doc. #132 at ¶62. Greenwich Education and Prep., LLC services were paid for by the City of Stamford. [Pl. Ex. 21 at 4-6]. Dr. Holland testified that T.D. attended the program through June 20, 2013. Tr. 3/29/17 at 434:15; Def. Ex. 521.

[13] Greenwich Education and Prep., LLC, also referred to as Pinnacle School, is located at 44 Commerce Road, Stamford, CT. Plaintiff submitted a mileage claim of 3.8, as measured by Google Maps, from T.D.'s residence to Greenwich Education and Prep., LLC, or 7.6 miles round trip. [Pl. Ex. 40 at 3].

C. Mrs. Shkelqesa Dervishi

Plaintiff seeks an award of $435,350 for the home-based program she says she provided to T.D. from November 18, 2010 through August 4, 2016. [Pl. Ex. 4, 4A (seeking payment for 7,026 hours at $50-$70 per hour from 2010 through September 2016)]. She contends that she was subsequently forced to discontinue the professional services that were in place at the time she requested due process and provide home-based programming because the Board refused to reimburse her for professional services and she was financially unable to continue to pay the providers.[14]

The Board argues that the 2009 Settlement Agreement only contemplated reimbursement "in the amount of $2,500 per week for the cost of speech, occupational therapy [] ABA services and autism consulting services" that were provided. [Def. Ex. 500 ¶3 (emphasis added)]. Defendant contends that the "home based program" for services was defined in the 2009 Settlement Agreement and it makes no mention of services provided by T.D.'s mother. [Doc. #141 at 11 (citing Tr. 3/16/17 at 111:20-24) ("In fact, the plaintiff conceded that the settlement agreement

[14] Dr. Fiorile did not provide services after November 2010. [Pl. Ex. 1 at 3-6]. Ms. Fera of Communication Clinic of Connecticut, LLC. did not provide services after March 8, 2011. [Pl. Ex. 1 at 59]. Ms. Baldino's last service date was March 29, 2011. [Pl. Ex. 1 at 69]. The last date of service for Ms. Ribeiro is June 24, 2011. [Pl. Ex. 1 at 49].

<u>Mrs. Shkelqesa Dervishi</u>

Plaintiff seeks an award of $435,560 for in home-based program she says she provided to T.D. from November 18, 2010 through August 4, 2014. [Pl. Ex. 1, 4A (seeking payment for 7,026 hours at $50-$70 per hour from 2010 through September 2014)]. She contends that she was subsequently forced to discontinue the professional services that were in place at the time she requested due process and provide home-based programming because the board refused to reimburse her for professional services and she was financially unable to continue to pay the providers.[14]

The Board argues that the 2009 Settlement Agreement <u>only</u> contemplated reimbursement "in the amount of $2,500 per week for the cost of speech, occupational therapy [] ABA services and autism consulting services" that were provided. [Def. Ex. 500 §3 (emphasis added)]. Defendant contends that the "home based program" of services was defined in the 2009 Settlement Agreement and it makes no mention of services provided by T.D.'s mother. [Doc. #141 at 11 (citing Tr. 3/16/15 at 111:20-24) ("In fact, the plaintiff concedes that the settlement agreement

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[14] Dr. Florio did not provide services after November 2010. [Pl. Ex. 1 at 3-6]. Ms. Feraco of Communication Clinic of Connecticut, LLC, did not provide services after March 4, 2011. [Pl. Ex. 1 at 5]. Ms. Baldino's last service date was March 29, 2011. [Pl. Ex. 1 at 6]. The last date of service for Ms. Ribeiro is June 24, 2011. [Pl. Ex. 1 at 4].

contains no provision that the Board would pay for her time for providing services to the Student."); (citing Tr. 3/29/17 at 439 (Dr. Holland testifying, "we will not reimburse unless ordered by the Court for services provided by a parent.")].

The Court finds that Mrs. Dervishi is not entitled to payment for providing her own services to T.D.

1. Qualified Personnel

It is undisputed that Mrs. Dervishi is not "qualified" to provide services as defined by the IDEA and its regulations.[15]

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[15] The IDEA defines "qualified personnel" as
(i) special educators;
(ii) speech-language pathologists and audiologists;
(iii) occupational therapists;
(iv) physical therapists;
(v) psychologists;
(vi) social workers;
(vii) nurses;
(viii) registered dietitians;
(ix) family therapists;
(x) vision specialists, including ophthalmologists and optometrists;
(xi) orientation and mobility specialists; and
(xii) pediatricians and other physicians
20 U.S.C. §1432(4)(F); see 20 U.S.C. §1401(26)(A) ("The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and

She does not hold a degree in education or special education and she is not licensed or certified as a Board Certified Behavior Analyst ("BCBA"), or in the provision of Applied Behavior Analysis ("ABA") services.[16] [Tr. 3/22/17 at 313:13-14 (testifying "I know I'm not, you know, licensed as an ABA therapist[.]"), 334:5-15 (testifying she visited websites, stayed in touch with former service providers, sought assistance from her sister who "had been a special ed teacher in my country working with special needs...."); 334:5-15 (testifying she also visited other school programs), 371:11-374:6 (discussing credentials); see 34 C.F.R. §303.31 ("Qualified personnel means personnel who have met State approved or recognized certification, licensing, registration, or other comparable requirements that apply to the areas in which the individuals are conducting evaluations or assessments or providing early intervention services."); see Conn. Gen. Stat. §10-76ii (as of June 15, 2012, the State requires certification to provide ABA services to special education children)]. Mrs. Dervishi contends that the Board was "aware of [her] qualification [that she]

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includes the early identification and assessment of disabling conditions in children.").

[16] Plaintiff submitted a letter dated April 12, 2017, from The Autism Treatment Center of America, confirming that Mrs. Dervishi attended a thirty-five hour training course, "The Son-Rises Program Start-Up," during the week of September 19 through 24, 2004. [Doc. #132, Ex. 53].

received through the high qualified experts and therapist [she] had home for years as from Dr. Fiori[le]...and Lucy Rib[i]ero...." [Doc. #132 ¶68].

However, Dr. Fiorile did not testify at the hearing and Ms. Ribeiro testified that she did not formally oversee and/or monitor the provision of ABA services by plaintiff after Dr. Fiorile stopped working with T.D. in June 2011. [Tr. 3/22/17 at 187:6-10, 195:9-18 (Ribeiro testifying that the BCBA [Board Certified Behavior Analyst], Dr. Fiorile, provided T.D.'s progress reports to the District); 210:7-16 (Ribeiro testifying that T.D's home-based program was created by Dr. Fiorile); 213:10-19 (Ribeiro testifying that she graphed T.D.'s ABA progress data and during 2010-2011, she "did not know if there was any reporting to the district" because Dr. Fiorile wrote the progress reports); 220:4-10 (Ribeiro testifying that the ABA program was prepared by Dr. Fiorile); 221:11 (Ribeiro testifying that during 2010-11 she worked without supervision); 225:2-16 (Ribeiro testifying that she did not graph T.D.'s ABA programming after June 2011), 239:4-24 (Ribeiro testifying she would not be comfortable with Mrs. Dervishi providing ABA services without supervision)].

Ms. Ribeiro testified that Dr. Fiorile, who is a BCBA, developed the home-based program for T.D. which included programming and supervision through November 2010. See Tr.

3/22/17 at 377:2-3. Thereafter, Ms. Ribeiro and Mrs. Dervishi provided home-based services without any oversight or supervision of the programming. Dr. Fiorile's last invoice is dated November 2010 and Ms. Ribeiro's last invoice is dated June 24, 2011. [Pl. Ex. 1 at 3-6; 21-49].

Ms. Ribeiro provided no further services, programming, support or supervision after June 2011.[17] [Tr. 3/22/17 at 222:21-25, 223:5-8, 224:8-225:1]. Mrs. Dervishi has not shown that T.D. received any oversight from a BCBA or ABA therapist or other education professional after June 2011.[18] See Tr. 3/22/17 at

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[17] Plaintiff also asserted that she was "supervised and got feedback" from Dr. Bader. However, Mrs. Dervishi and T.D. met with Dr. Bader on only five occasions in the context of family therapy to address her son's behavioral problems. [Tr. 3/16/17 at 10:11-15, 48:20-21, 48:25-49:1; Pl. Ex. 1 at 12-13, 15, 17, 19]. Dr. Bader's testimony does not support plaintiff's contention that the home-based services she provided to her son were supervised by the doctor. Tr. 3/22/17 at 257:11-258:1 (Dr. Bader testifying, "I would say I had trained you to be a mother of a child with special needs. I mean, children with special needs require parents to take on a little bit of a different role in terms of using every opportunity as a learning opportunity. So I didn't specifically train you to be, like, a therapist to be able to do, like, home-based [therapy] services. But I worked with you so that you could work with your son to build up his skills."), 260:10-12 ("You weren't training her as a therapist in any way? No.").

Similarly, plaintiff provided no evidence that after November 2010 Dr. Fiorile provided consulting services, developed ABA programming, certified that T.D. mastered ABA programs, or communicated with the Board. [Tr. 3/16/17 at 24:19-25:2; 35:8-12].

[18] In contrast, in Bucks County Dept. of Mental Health/Mental Retardation v. Commonwealth of Pa., 379 F.3d 61, 63 (3d Cir. 2004), the mother seeking reimbursement was trained by a Lovaas-

335:8-12 (plaintiff testified that "in order to develop an ABA program we need a BCBA to be a member of the PPT. We need an ABA to be a member of the PPT, or a social work [who] can read a psychologist evaluation at a PPT.").

It is also undisputed that Dr. Fiorile, Lucinda Ribeiro, Communication Clinic of Connecticut, LLC, and Marilena Baldino are "qualified providers" under 20 U.S.C. §1432(4)(F); 34 C.F.R. §303.31. Here, the Board offered T.D. a FAPE for the 2010-2011 school year. When plaintiff challenged the 2010-2011 IEP, the pendency services in place were being obtained from these

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trained therapist to provide in-home therapy to her child. Since the therapist was not available to provide as many hours with the child as needed, she trained the mother in the methodology to provide additional hours per week. Evidence of the mother's training included testimony from the Early Intervention Coordinator at Bucks County, specific examples of training exercises the mother executed with her child, and affidavits from therapists confirming that the mother was acting as a Lovaas therapist, not as a mother, when working with the child. Id. Importantly, the Lovaas-trained therapist continued to work with the child during the entire period of reimbursement and provided oversight. See Id. at n.3. The holding in Bucks County is narrow. The Third Circuit Court of Appeals held "that under the particular circumstances of this case, where a trained service provider is not available and the parent stepped in to learn and perform the duties of a trained service provider, reimbursing the parent for her time spent in providing therapy is 'appropriate' relief." Id. at 63.

It is further noted that Bucks County also argued that the Lovaas therapist was not qualified to train the mother and the therapist did not develop a written curriculum to document the program or create daily logs or records to document the child's successes. The Court rejected this argument as a challenge to the appropriateness of the Lovaas training which had already been adjudicated by the lower court and Bucks County failed to appeal those findings. Id. at n.8.

qualified providers, not Mrs. Dervishi. Mrs. Dervishi, who is not a "qualified provider" under the IDEA, is not entitled to payment for services she substituted for those that had been offered by qualified providers under the Settlement Agreement.

Nor should the Board be required to pay costs incurred by the parents' decision to discontinue the qualified private services that were in place under the Settlement Agreement. Here, although the services covered by the settlement agreement were limited (because it was expected to be of short duration), the parents' decision to keep T.D. out of school while they sought due process expanded only the duration of the services, not their scope.

> [P]arents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated §1415[(j)].[19]

School Comm. of the Town of Burlington, Mass. v. Dept. of Educ., 471 U.S. 359, 373-74 (1985); see T.M. ex rel. A.M. v. Cornwall Cent. School Dist., 752 F.3d 145, 172 (2d Cir. 2014)(finding

[19] Section 1415(j) states that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child . . . ." 20 U.S.C. §1415(j).

that the School District satisfied its duties under 20 U.S.C. §1415(j) by reimbursing the "parents for the amount they spent on [the child's] pendency services in the 2010-2011 year, and by offering to provide the required pendency services directly from that point onwards. When T.M.'s parents rejected Cornwall's offer to provide pendency services directly for the 2011-12 year, they took responsibility for the cost of obtaining those services from private providers.").

The record shows that none of the professionals who evaluated T.D. recommended a home-based program provided by his parents. [Pl. Ex. 56 (2012 language and speech evaluation by Josephine K. Chen, M.S., CCC, recommending "intensive clinical intervention" in an educational setting.); Pl. Ex. 32 (August 2013 psychoeducational evaluation by Dr. Erik Mayville recommending a full-day, 12-month ABA-based educational program, including a residential program if acceptable to the family. "A BCBA should ensure that the program is supported at all times by technical expertise in ABA.")].

Although plaintiff contends that "[t]he family provided the same program and services to T.D. till the pendency was over," the record shows that qualified services with Dr. Fiorile, Lucinda Ribeiro, Communication Clinic of Connecticut, LLC and Marilena Baldino, were discontinued in 2011 and no qualified education specialist was supervising T.D.'s program thereafter.

[Doc. #132 ¶8]. The Court cannot find that Mrs. Dervishi provided the "same program and services" as the professionals did during the pendency stay-put. Plaintiff's equivalency argument is not supported by the record.

Plaintiff's reliance on Bucks County Dept. of Mental Health/Mental Retardation v. Commonwealth of Pa. in support of her claim for reimbursement is distinguishable on its facts.[20] 379 F.3d 61 (3d. Cir. 2004). In Bucks County, the school district refused to provide Lovaas, an ABA therapy, to the child in question. The parents of the student paid to provide Lovass therapy. Id. at 63. Because the Lovaas-trained therapist was not able to spend as many hours with the child as needed, and because the parent was unable to find another person trained in the Lovaas method, the parent was trained in the method and coached by the therapist to provide additional therapeutic hours. Id. The Commonwealth Court of Pennsylvania determined that the individualized family service plan ("IFSP") was not appropriate and it also determined that the private training was

[20] Plaintiff provided additional cases for the Court's consideration on March 15, 2017. Student X v. New York City Dept. of Educ., No. 07-CV-2316 (NGG)(RER), 2008 WL 4890440 (E.D.N.Y. Oct. 30, 2008); Hurry v. Jones, 734 F.2d 879 (1st Cir. 1984); M.R. v. Ridley School District, 744 F.3d 112 (3d Cir. 2014); R.E. v. New York City Dept. of Educ., 694 F.3d 167 (2d Cir. 2012); Frank G. v. Board of Educ. of Hyde Park, 459 F.3d 356 (2d Cir. 2006); Board of Educ. of the Pawling Central School Dist. v. Schutz, 290 F.3d 476 (2d Cir. 2002).

appropriate. Id. at 67. Bucks County did not appeal the decision. Id. A hearing officer awarded the parents both their out-of-pocket expenses and money for their time and effort. Id. at 64-65.

The Third Circuit affirmed the hearing officer's award, noting that, "[r]eimbursing parents for the time and services necessary for their child when there has been an IDEA violation, is not unheard of." Id. at 69 (emphasis added). In approving reimbursement to the parent, the Court found that there was "ample evidence in the record to support the conclusion that [the mother] stepped into the shoes of a therapist" and the Hearing Officer found that the mother was a "trial training provider." Id. at 73 and 63 (finding that the therapist trained and coached the mother in one-on-one workshops; the mother read and learned discrete training teaching guidelines and books on the Lovaas methodology; the "Early Intervention Coordinator at Bucks County testified at the due process hearing that, in her opinion, [the mother] was qualified to train [the child]"; the mother testified to specific examples of training exercises she executed when training her child; and the child's "therapists provided affidavits confirming that [the mother] was acting as a Lovaas therapist, not as a mother, when she was working with [her child]."). As such, the Court "was required to defer to this finding unless it could point to contrary nontestimonial

extrinsic evidence." Id. at 73. The Appeals Court found there was no "contrary nontestimonial extrinsic evidence in the record" to "compel a different finding." Id.

> Importantly, the IDEA's "'stay-put rule,'
>
> serves "in essence, as an automatic preliminary injunction," Drinker [by Drinker v. Colonial School Dist., 78 F.3d [859,] 864 [(3d Cir. 1996)], reflecting Congress's conclusion that a child with a disability is best served by maintaining her educational status quo until the disagreement over her IEP is resolved, Pardini v. Allegheny Interm. Unit, 420 F.3d 181, 190 (3d Cir. 2005); Drinker, 78 F.3d at 864. "'Once a court ascertains the student's current educational placement, the movants are entitled to an order [maintaining that placement] without satisfaction of the usual prerequisites to injunctive relief.' " Drinker, 78 F.3d at 864 (quoting Woods v. N.J. Dep't of Educ., No. 93-5123, 20 Indiv. Disabilities Educ. L. Rep. (LRP Publications) 439, 440 (3d Cir. Sept. 17, 1993)); see also Pardini, 420 F.3d at 188 ("Congress has already balanced the competing harms as well as the competing equities"); Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982) ("The statute substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors ....").

M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 (3d Cir. 2014). Here, the Court of Appeals found that T.D.'s "then-current educational placement" when Dervishi sought a due process hearing was the home-based service program in place under the 2009 Settlement Agreement.

In Bucks County, the "reimbursement" remedy was based upon the determination that the individualized family service plan ("IFSP") was "not 'appropriate' because [the child] was not

making meaningful progress toward her IFSP goals" and that the parent's private Lovass therapy was appropriate. Id. 379 F.3d at 67; see also, School Comm. of the Town of Burlington, Mass. v. Dept. of Educ. of Mass., 471 U.S. 359, 370 (1985)(holding that reimbursing parents for expenses incurred from placing their child in private school is "appropriate" relief when a court has found that the public school placement was inappropriate and that the parents' private placement was appropriate). Notably in each of the cases cited by the Court in Bucks County in support of reimbursement to parents for time and services, there was a finding of an IDEA violation. 379 F.3d at 69 (citing Hurry v. Jones, 734 F.2d 879 (1984)[21]; Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1182 (S.D.N.Y. 1992)("The value of contributed parental services may be considered as damages only when those efforts were made in providing services to which the child was entitled as a matter of law.")).

[21] C.f. A.S. v. Harrison Twp. Bd. of Educ., No. 14-147 (NLH/KMW), 2016 WL 1717578, at *5 (D.N.J. Apr. 29, 2016), reconsideration denied, No. 14-147 (NLH/KMW), 2016 WL 4414781 (D.N.J. Aug. 18, 2016)(In distinguishing Hurry, 734 F.2d at 881, the Court in A.S. noted that "due to the child's disability and weight, the school bus was unable to transport the student. The issue the court considered was whether the parents were entitled to reimbursement for transportation where the student's disability required a special type of transportation to school." (emphasis added).

This case is vastly different. Here, the Appeals Court determined that the Board provided a FAPE for the 2010-2011 school year and declined to "consider whether the parents' alternate placements were appropriate." [Doc. #93 at 4]. Further, the Appeals Court held there was "no basis in the record to conclude the Board breached the 2009 settlement agreement." [Doc. #93 at 5]. Because the Court of Appeals found no IDEA violation or breach of the 2009 Settlement Agreement, there are no grounds for this Court to fashion additional relief here. See Burlington, 471 U.S. at 370-71 ("Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."); Ruby v. Jefferson Cty. Bd. of Educ., 122 F. Supp. 3d 1288, 1309 (N.D. Ala. 2015) ("Plaintiff is entitled to costs, not wages. The court concludes that Defendant did not deny Plaintiff a FAPE by offering her only the costs associated with transporting L.L. to and from [school], and not the cost that Defendant would have had to pay an employee in her stead.").

During the pendency of this case, both before the Hearing Officer and District Court, no decision or ruling contradicted the defendant's position that the Board had no obligation to pay pendency services because plaintiff violated the explicit terms of the Settlement Agreement which "expressly conditioned [the

parents right to reimbursement] upon...the Student's continued attendance at the program selected by the Independent Consultants during the applicable portion of the 2009-10 school year." Id. This did not relieve the Board of the obligation to pay. The Court of Appeals held that "the parties' intent as to the duration of T.D.'s home program [did] not alter the Board's reimbursement obligation under the stay-put provision." [Doc. #93 at 4-5]. As set forth later in this opinion, equitable relief in the form of compensatory education may be available to remedy the Board's failure to provide pendency services during the stay-put. But the hearing record is devoid of evidence that plaintiff sought either reimbursement for expenses during the stay-put period or a court order requiring the Board to provide services.

Moreover, although the "Board's obligation to fund stay-put placement is rooted in statute, not contract," the Court is tasked with calculating the "total value of the home program, as specified in the [2009] settlement agreement" for the period of November 18, 2010 through August 4, 2016. [Doc. #93 at 4-5 (emphasis added)]. The 2009 Settlement Agreement specified limited services then being delivered by qualified providers. Nor is the Court persuaded by plaintiff's argument that she was forced to provide home-based services for her son because she

was unable to pay qualified providers.[22] [Tr. 3/29/17 at 608:15-17]. Plaintiff failed to demonstrate that she sought

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[22] At several points during the pendency of plaintiff's appeal of the 2010-2011 IEP, the Board resumed discussions with plaintiff and/or her attorney to find an appropriate educational placement for T.D. See Pl. Ex. 42 (February 19, 2013 letter from plaintiff's attorney to Dr. Holland); Pl. Ex. 35 (emails dating from November 14, 2014 through December 18, 2015, from Janice Dixon, M.S.W., DDS Case Manager at the Department of Developmental Services to Mrs. Dervishi and Dr. Holland among others]. Dr. Holland also testified that at times during the pendency of this appeal, the Board's staff was not allowed access to evaluate T.D. [Tr. 3/29/17 at 558:25-559:2].

On or about April 3, 2013, T.D. was placed at the Pinnacle School for speech and ABA services. [Pl. Ex. 21; Tr. 3/29/17 at 429:10-12]. Dr. Holland testified,

> The parents may disagree with what I'm about to say, but I was concerned that this young man was not receiving services. I was concerned that he was not in the program. And I led the district to continue to look for other programs that the parents might accept. Pinnacle, being a program within the boundaries of Greenwich gave us an opportunity to provide services while we continued to look for services. And so we supported [it] financially.

[Tr. 3/29/17 428:20-429:4]. Dr. Holland denied that the placement was made unilaterally. He testified that "[i]n fact, it is in response to [plaintiff's] attorney's request to provide services at the Greenwich Ed[.] Group, which is Pinnacle while placement at CCD is - while we are awaiting that." [Tr. 3/29/17 512:19-25]. Mrs. Dervishi testified that she never agreed to the program offered by the Board at the Pinnacle School and she never signed the agreement to change T.D.'s IEP without convening a PPT meeting. [Tr. 3/29/17 at 510:4-11, 599:8-13; Def. Ex. 503]. In an email to Mrs. Dervishi dated April 13, 2013, Dr. Holland stated,

> You indicated that we have not had an [IEP] meeting. I had at your former attorney's request to arrange service at Greenwich education group while we await your son's [Connecticut Center for Child Development

reimbursement from the Board during the stay-put period after November 18, 2010, by providing the Board with invoices and proof of payment.[23] [Tr. 3/22/17 at 284:17-285:14; Tr. 3/29/17 at 440:13-441:2]. Nor has she made any showing that qualified

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("CCCD")] placement. You did not sign[] an agreement that we sent your former attorney and you now are no longer represented by him. I ask you now a yes or no question. Do you want me to cancel the contract with Greenwich Ed. group, as you did not give your written approval?

[Pl. Ex. 44; Tr. 3/29/17 at 533:20-534:1]. Although the parties dispute the precise date Mrs. Dervishi withdrew T.D. from the Pinnacle School, it was sometime in May/June 2013. [Pl. Ex. 21, 40 at 3-4, 45, 46, 47; Tr. 3/16/17 at 165:12; 171:2; Tr. 3/22/17 at 277:7-10; Tr. 3/29/17 at 525:3-8; 541:1-2].

[23] Under the 2009 Settlement Agreement, the obligation to reimburse is triggered when plaintiff produced "documentation of payments (invoices and cancelled checks(s))" for related services provided to T.D. [Def. Ex. 500 ¶3]. Dr. Holland, however, testified that even if the Board were presented with the proper documentation during the stay-put the Board would not "reimburse unless ordered by the Court for services provided by a parent." [Tr. 3/29/17 at 439:8-9; see Pl. Ex. 31 (On October 27, 2010, prior to the request for due process, Dr. Holland emailed plaintiff stating, in part, that "without direction from an IEP meeting recommendation I am not empowered to support your request. Do not send your invoices to us."); Tr. 3/29/17 at 570:18-19 (Dr. Holland testified "[w]e did not pay any invoices once the settlement agreement ended."); id. at 573:3-5 (Dr. Holland was asked, "Did you provide services from 2011?" He responded, "If it was after the settlement agreement, no."); id. at 605:2-6 (Dr. Holland testifying that he did not know if he was ever rejected invoices after due process was filed "but I will go on record that if I had invoices submitted to me after the date of the settlement agreement, yes, I would have returned them."); id. at 612:16-23 (When asked why the Board did not pay Mrs. Dervishi for her work with T.D. Dr. Holland responded, "First, you're not a certified service provider. Second, I don't recall receiving any bill from you requesting us to pay you for your service.")].

providers were unavailable, as in Bucks County. Plaintiff has not offered any legal authority that would require a Board to pay a parent for educating her child at home when professional services were available in the community from qualified providers and a FAPE was offered by the Board.

Nor is this case similar to the situation in Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 (2d Cir. 2015). In Doe, it was "undisputed that the Board refused to pay for the services described in that IEP during the pendency of administrative and judicial proceedings" and that the "Board thus violated the stay-put provision." Id. at 453. This Court cannot find that Mrs. Dervishi's decision to discontinue the services being provided by Dr. Fiorile, Lucinda Ribeiro, Marilena Baldino and Felicia Fera at the Communication Clinic of Connecticut, LLC, to provide home-based services to T.D. was appropriate or compensable.

In Board of Educ. of the Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 484 (2d Cir. 2002), a case relied on by plaintiff, the hearing officer awarded, and the State Review Officer affirmed, the payment of private school tuition during the stay-put pendency period. The Court found this "constituted a change in Kevin's current educational placement for purposes of the pendent placement provisions." Id. The Court added that the District's fear that it would have to reimburse the parents

perennially for their child's private education was misplaced. The Court stated that its conclusion did not mean that the District must fund the child's tuition for the remainder of his education, "but rather that, until a new placement is established by either an actual agreement between the parents and the District, or by an administrative decision upholding the District's proposed placement which the [parents] choose not to appeal, or by a court, the District remains financially responsible." Id.; see M.R. v. Ridley Sch. Dist., 744 F.3d at 119 ("[A]n administrative ruling validating the parents' decision to move their child from an IEP-specified public school to a private school will, in essence, make the child's enrollment at the private school her 'then-current educational placement' for purposes of the stay-put rule. Having been endorsed by the State, the move to private school is no longer the parents' unilateral action, and the child is entitled to 'stay-put' at the private school for the duration of the dispute resolution proceedings.")(citation omitted)). Here there has been no agreement between the parents and the Board, or an administrative or judicial ruling endorsing Mrs. Dervishi's provision of home-based services as a change to T.D.'s pendency placement.

Clearly an order to reimburse tuition for private school education is distinguishable from Mrs. Dervishi's reimbursement

claim. Because the Court of Appeals concluded that "the Board provided T.D. with a FAPE for the 2010-2011 school year," it declined "to consider whether the parents' alternative placements were appropriate."[24] [Doc. #93 at 2]. Based on this finding, this Court also declines to consider the same.

Accordingly, plaintiff's request for reimbursement for providing home-based services to T.D. is DENIED.

2. Compensatory Relief

Finally, plaintiff's request for "an award of compensatory relief" for "defendant's failure to abide by the automatic and unconditional pendency entitlement" for over six years is denied to the extent Mrs. Dervishi is seeking payment for home-based schooling that she provided to her son.[25] [Doc. #103 ¶4]. Plaintiff contends that because the Board failed to pay $2,500 per week for pendency services "from November 18, 2010 to August

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[24] Both Judge Eginton and the Hearing Officer found the 2010-2011 IEP offered to T.D. was appropriate and did not violate the IDEA.

[25] Plaintiff argues

> Instead of taking responsib[ility] for stay-put services that denied for years that caused extremely serious damages to T.D., the district is questioning and refusing to reimburse or value my work based on the invoices I have presented. I'm asking the court to pay me for the time I spent as my son's therapist, not to pay me for the time I spent with my son as his mother.

[Doc. #132 ¶74].

4, 2016 (a total of 298 weeks)," this Court's discretionary reimbursement award may be up to $745,000 or $2,500 x 298 weeks. Id. ¶20. "The IDEA does not provide for compensatory money damages." Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 152 (N.D.N.Y. 1997), aff'd, 181 F.3d 84 (2d Cir. 1999), and aff'd, 208 F.3d 204 (2d Cir. 2000). "The purpose of the IDEA is to provide educational services, not compensation for personal injury, and a damages remedy—as contrasted with reimbursement of expenses—is fundamentally inconsistent with this goal." Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 486 (2d Cir. 2002).

> [T]he Supreme Court has emphasized that IDEA relief depends on equitable considerations. Accordingly, compensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting appropriate relief. More specifically, as the Fourth Circuit has explained, [c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student.

Reid ex rel. Reid v. D.C., 401 F.3d 516, 523 (D.C. Cir. 2005) (internal citations and quotation marks omitted). Plaintiff's "hour-for-hour formula in effect treats compensatory education as a form of damages—a charge on school districts equal to expenditures they should have made previously." Id. This approach overlooks the Court's equity jurisdiction "to do equity and to mold each decree to the necessities of the particular

case. Flexibility rather than rigidity has distinguished it." Id. at 524 (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)).

Accordingly, to the extent plaintiff seeks an award of compensatory money damages, her claim is DENIED.

D. Prospective Compensatory Education

"There is, however, another remedy: compensatory education." Doe v. E. Lyme Bd. of Educ., 790 F.3d at 456. "Under the theory of "'compensatory education,' courts and hearing officers may award 'educational services...to be provided prospectively to compensate for a past deficient program.'" Reid ex rel. Reid, 401 F.3d at 522 (quoting G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003)); Somoza v New York City Dept. of Educ., 538 F3d 106, 109 n.2 (2d Cir. 2008) ("'Compensatory education' is prospective equitable relief, requiring a school district to fund education beyond the expiration of a child's eligibility as a remedy for any earlier deprivations in the child's education.") (citing Burr v. Sobol, 888 F.2d 258 (2d Cir. 1989)). "[W]hen an educational agency has violated the stay-put provision, compensatory education may-and generally should-be awarded to make up for any appreciable difference between the full value of stay-put services owed and the (reimbursable) services the parent actually obtained." Doe, 790 F.3d at 456-57.

The Court in Doe, recognized that if

> the parent cannot afford to finance any or all stay-put services, the Board would get to pay less than what it should have, or nothing-and, more important, less than what was needed for the child's benefit. Moreover, such an arrangement would make the stay-put obligation contingent on the means of a child's family-a legally irrelevant variable.

Id. at 456 (citing E.M. v. New York City Dep't of Educ., 758 F.3d 442, 452 (2d Cir. 2014) ("The IDEA promises a free appropriate education to disabled children without regard to their families' financial status."); Miener By & Through Miener v. State of Mo., 800 F.2d 749, 753 (8th Cir. 1986)("We are confident that Congress did not intend the child's entitlement to a free education to turn upon her parent's ability to 'front' its costs.")).

"Because the obligations imposed by the IDEA generally terminate when a child reaches the age of 21, compensatory education 'is unavailable to a claimant over the age of twenty-one in the absence of gross procedural violations.'" Doe, 740 F.3d at 456, n.15 (quoting Garro v. State of Conn., 23 F.3d 734, 737 (2d Cir. 1994); Mrs. C. v. Wheaton, 916 F.2d 69, 75 (2d Cir. 1990)); Wegner, 979 F. Supp. at 151 ("The Second Circuit... allows for compensatory education for a child over twenty-one years where there has been a gross violation of the IDEA.") (citation omitted).

> But even where gross violations occur, there is no obligation under the IDEA to provide a child with compensatory education equal to the length of time he or she was denied an appropriate education because compensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting "appropriate relief."

Wegner, 979 F. Supp. at 151 (internal citation and quotation marks omitted). In Student X v. New York City Dept. of Educ., the Court found that "Defendant's violation of the statutory pendency provision was a gross violation." No. 07-CV-2316(NGG)(RER), 2008 WL 4890440, at *25 (E.D.N.Y. Oct. 30, 2008) (citing cases); see Burr by Burr v. Ambach, 863 F.2d 1071, 1075-76 (2d Cir. 1988) (finding a gross violation in the undue delay to hold a hearing and issue a hearing officer's decision resulting in a denial of "an appropriate education during pendency of the proceedings, the precise unfortunate result that the 'stay-put' provision was designed to prevent."); Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 206-07 (1982)("[A] court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?").

It is important to note that this case differs from the compensatory education cases cited above. First, the 2009

Settlement Agreement did not purport to be a FAPE or an agreed-to IEP. Rather, the Agreement was a unilateral placement funded by the Board for a limited duration until the parties could agree to an IEP for the 2010-2011 school year. [Def. Ex. 500 ¶6 ("The Parties understand and acknowledge that the Board is making the payments described above solely as an accommodation to the Parents and in order to avoid the costs of protracted litigation.")]. The Hearing Officer found that "[b]ecause the [2010-2011] IEP offer[ed] an appropriate program in the LRE, the Parents were not entitled to reimbursement for any other placement, including reimbursement for their home program and/or the McCarton School...." [Doc. #81 at 60]. In August 2015, Judge Eginton found that the "Board's contractual duty to reimburse for home-based education ceased after the Parents rejected the independent consultants' 2010-2011 IEP which constituted the current placement for purposes of the stay-put provision. [Doc. #81 at 15]. In August 2016, the Appeals Court found that the Settlement Agreement did not alter the Board's obligation to fund T.D.'s educational placement during the pendency of the dispute and remanded the case to calculate reimbursement. [Doc. #93 at 4-5]. As stated, the Hearing Officer, District Court and Appeals Court all found that the Board offered T.D. a FAPE for the 2010-2011 school year. See Doc. #81, 93.

The evidence shows that T.D.'s parents did not seek reimbursement from the Board under the 2009 Settlement Agreement after due process was initiated on November 18, 2010. The Board would have been obligated to pay if the parents submitted the supporting documentation to process the reimbursement payments. Although the Board's witness candidly conceded that the Board would have declined to do so after the expiration of the Settlement Agreement, this would have provided plaintiff with an opportunity to petition the court for reimbursement.

In fashioning equitable relief, the Court must consider the parents' conduct in the context of the situation at the time they filed for due process. The Board had ceased payments under the Settlement Agreement prior to November 18, 2010, because the Dervishis had not complied with the Agreement. See Reid, 401 F.3d at 524 (internal citations and quotation marks omitted)("[C]ourts have recognized that in setting the award, equity may sometimes require consideration of the parties' conduct, such as when the school system reasonably requires some time to respond to a complex problem, or when parents' refusal to accept special education delays the child's receipt of appropriate services.").

Even if plaintiff could show a gross violation of the stay-put provision, a court can choose not to award compensatory education if there are no educational deficiencies to be made

up.[26] See Phillips v. Dist. of Columbia, 736 F. Supp. 2d 240, 247 (D.D.C. 2010) ("[I]t may be conceivable that no compensatory education is required for the [violation of a stay-put provision] either because it would not help or because [the student] has flourished in his current placement....") (citations and internal quotation marks omitted). Awarding compensatory education when there is no discernible lost progress and a student is on track academically is unnecessary because that would be akin to awarding damages which the IDEA does not allow. A.S. v. Harrison Twp. Ed. of Educ., Civil No. 14-147 (NLH/KMW), 2016 WL 1717578, at *4 (D.N.J. Apr. 29, 2016), reconsideration denied, No. 14-147 (NLH/KMW), 2016 WL 4414781 (D.N.J. Aug. 18, 2016) (finding that the student was "on the right educational path and did not require restoration."). "This means that the plaintiff has the burden of proposing a well-articulated [compensatory education] plan that reflects the student's current education abilities and needs and is supported by the record." Phillips, 736 F. Supp. 2d at 248 (citation and quotation marks omitted).

[26] Both the Hearing Officer and Judge Eginton found that "[t]he Board did not commit any procedural violations which resulted in a denial of FAPE during the 2010-11 school year." [Doc. #81 Ex. 1 at 19; Doc. #89 at 9 (ruling on summary judgment, Judge Eginton agreed with the Hearing Officer that "the Parents had been provided with a meaningful opportunity to participate in the development of the IEP.")].

To be fair, Mrs. Dervishi, pro se, has not requested compensatory education. Throughout these proceedings, Mrs. Dervishi has maintained that the home-based services that she solely provided after June 2011 were appropriate, that she followed the ABA programming and that T.D. met the set educational milestones and progressed. See Tr. 3/29/17 at 599:19-22 ("The services I provided were more, you know, T.D. can benefit and was making good progress at this time with the program I provided than you know, was offered for T.D."). This position was taken in her effort to receive reimbursement for the services she said she provided to her son, which she contended were as good as the services delivered by the private qualified providers. See Doc. #103 ¶13 ("The stipulation of settlement did not require us to conform to a particular program to recover the $2,500.00 in funding per week. So long as the pendency services fell under the enumerated categories, we could receive funding for $2,500.00 weekly."); ¶20 ("To the extent that Stamford failed to provide the $2,500 pendency benefit from November 18, 2010 to August 4, 2016 (A total of 298 weeks), this Court's pendency 'funding' discretion extends to $745,000, i.e. $2,500 x 298 weeks...we respectfully ask this Court to award the full amount of its pendency funding discretion or, in the alternative, such lesser amount as this Court believes is warranted under the circumstances."); ¶27 (The Board "fails to

take into account that it was left up to my husband and I, as T.D.'s parents, to determine the program mix for T.D., as long as it contained ABA, OT, ST or ABA consulting...The Stamford district left the programming up to us, and they were required to pay the $2,500 per week to fund these services."); ¶29 ("[T]he Second Circuit's remand order makes clear that we did not lose the right to ($2,500 per week) funding under pendency; an automatic and unconditional right." (emphasis in original)).

Plaintiff has not presented evidence or conceded that T.D. regressed during the pendency stay-put period of November 18, 2010 through August 4, 2016, even though, as Judge Eginton found in his summary judgment ruling, "[t]he evidence at the [due process] hearing indicated that the home-based education program has resulted in regression of T.D.'s skills and that his problematic behaviors had increased." [Doc. #89 at 11; see Doc. #81 at 11 (In May 2011, the Hearing Officer found that T.D. "continues to receive his education at his home program, which consists of one to one services in his bedroom. His lead home therapist [Ms. Ribeiro] testified that the Student is regressing in this program.")].

An August 1, 2013 Psychoeducational Evaluation from Dr. Erik A. Mayville states

> [T.D.] has been without the benefit of a formal, full-time educational program for several years. Through his overall level of intellectual functioning appears

> relatively unchanged, it is highly likely that he is not able to demonstrate the full range of academic, communication, and social interaction skills that he once did. Partial results of the Vineland-II may offer some support of skill loss in social coping skills, receptive communication, and personal daily living skills. It is expected that intensive, evidence-based instruction relevant to adolescents with ASDs will help [T.D.] recover previously learned skills and to learn new repertoires.

[Pl. Ex. 32 at 17; see also Pl. Ex. 42 at 2 (February 14, 2013 letter from Dr. Nancy O'Hara stating that T.D. "has had a significant increase in aggression, agitation and out-of-control behaviors" and recommending home bound tutoring with at least 20 hours of behavioral therapy weekly)].

Plaintiff testified that in 2012, the Board reported Mrs. Dervishi to the Department of Children and Families for educational neglect with referral to the Juvenile Court. [Tr. 3/16/17 at 146:5-9, see also Tr. 3/16/17 at 151:17-22 (plaintiff testifying that T.D. started "terrible behavior..."[h]e left the house. Many times he ran in the street. We called the police to find him."); 156:14-17 (plaintiff recounting two incidents when T.D. attempted to open the car door while she was driving in Manhattan); Pl. Ex. 42 at 2 (letter dated February 14, 2013 from Dr. Nancy O'Hara stating in part that T.D. "had a significant increase in aggression, agitation and out-of-control behaviors."); Pl. Ex. 42 at 3 (letter dated February 14, 2013 from Dr. Haydee Laneman stating in part that it was "impossible

to retrieve" an intravenous blood draw due to T.D.'s behavior during the procedure)]. On rebuttal, plaintiff argued that "the district has caused extremely serious damages to the child and huge gap that will make him to be dependent from others all his life when he has the ability and capacity to be independent adult."[27] [Doc. #132 ¶85]. However, the only remedy plaintiff sought was reimbursement for the time she provided home-based services to T.D. during the stay-put pendency.

No compensatory educational plan was proposed, and no current evidence was presented-such as academic reports, teacher evaluations, or parent testimony addressing educational deficiencies attributable to the failure to provide covered services pursuant to the stay-put 2009 Settlement Agreement. T.D. has now been enrolled at a private school in New York City since September 2016, being educated there with the support of the Board of Education. "[A] compensatory award fashioned by the [Court] must be the result of a 'fact-specific' inquiry that is '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.'" Phillips, 736 F. Supp. 2d at 248 (emphasis in original) (quoting

[27] Plaintiff also stated that during T.D.'s brief attendance at the Greenwich Education and Prep., LLC, he "did not learn anything, but only regressed and misbehaved." [Doc. #132 ¶46].

Reid, 401 F.3d at 524)); Doe, 790 F.3d at 457 ("[W]e leave to the district court whether compensatory education should be limited to the kinds of services specified in the amended 2008-2009 IEP, or encompass analogous educational services appropriate to the Student's current needs."). Plaintiff testified that that the parties agreed to an IEP for the 2016-2017 school year. Since September 2016, T.D. has been attending a private school in New York City from 8:45 AM to 5:00 PM and receiving intensive ABA programing for five hours per day. [Tr. 3/16/17 at 153:20-25, 156:10-14].

Without any evidence of discernible lost progress or a proposed compensatory education plan, there is no record on which to award any compensatory education for services that were not sought, not provided and may not be needed at this time. Phillips, 736 F.2d at 248 ("[t]he Court must be wary of mechanical calculations because a reasonable calculation of a compensatory award must be qualitative, fact-intensive, and above all tailored to the unique needs of the disabled student.")(citation and internal quotation marks omitted).

That said, this Court recognizes that given the potential availability of an equitable remedy for compensatory education, if T.D. can meet the evidentiary burden, his entitlement to this award should not depend on his parents' capacity to front the costs for pendency services. Once it is established that a child

is entitled to pendency stay-put services, the Court should provide the parties with additional time to supplement the record if there is insufficient evidence to support an award for compensatory education. See Phillips, 736 F.2d at 248 ("a Hearing Officer may provide the parties additional time to supplement the record if she believes there is insufficient evidence to support a specific award.")(citations and internal quotation marks omitted).

This Court's limited charge from the Court of Appeals was to "(i) calculate the total value of the home program, as specified in the settlement agreement, for the period from November 18, 2010 until the dispute over the 2010-2011 IEP is no longer pending, and (ii) order the Board to pay that amount to Dervishi." [Doc. #93 at 5]. That has been done; plaintiff is entitled to reimbursement in the total amount of $37,012.87.

If in light of this determination and T.D.'s progress at this current school placement, Mrs. Dervishi believes that the Board's failure to fund the pendency program has caused damage that can be ameliorated by compensatory services she should be given an opportunity first to seek it from the Board or, alternatively, to make that showing, preferably to a Hearing Officer whose expertise would assist in fashioning compensatory education tailored to his individual needs as the IDEA requires.

To be sure, it is conceivable that no compensatory education is required for the denial of pendency services because any alleged deficiencies suffered by T.D. have been mitigated, or totally alleviated, by his current private school placement. Given the Appeals Court's finding that the Board was responsible for funding T.D.'s existing educational placement during the pendency of the dispute, from November 18, 2010 through August 4, 2016, and evidence in the record[28] that T.D. may have suffered a setback in his educational development as a result of the unavailability of pendency funding, the Court concludes that plaintiff should not be precluded from seeking, and proffering evidence necessary to support, an award of compensatory education for T.D.

To award equitable relief in the form of compensatory education, the law will require a record of lost progress and/or

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[28] Throughout these proceedings, Mrs. Dervishi has steadfastly argued that she provided ABA services as good as those rendered by professional qualified providers. By taking this position, she has eschewed any evidence or argument that, during the stay-put pendency period, T.D. experienced developmental and/or educational regression or lost progress. This raises the question whether Mrs. Dervishi's pro se advocacy for reimbursement precluded her from seeking prospective compensatory education because it conflicted with the value she placed on her services.

An alternative path is available. Plaintiff may simultaneously argue for prospective relief in the form of compensatory education to remedy any deprivations in T.D.'s education without waiving her right to continue to litigate on appeal for reimbursement, if she chooses. Or she may seek appointment of counsel to argue for compensatory education.

evidence to support such an award. Rowley, 458 U.S. at 207 ("The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child."); N.R. ex rel. B.R. v. San Ramon Valley Unified Sch. Dist., No. C 06-1987 MHP, 2007 WL 216323, at *7 (N.D. Cal. Jan. 25, 2007)("[The parent] is not entitled to his choice of service providers. [] The Act requires only that the service provider be able to meet his needs."). There is no evidence as to T.D.'s current needs in this record.

"[T]he record in an IDEA case is supposed to be made not in the district court but primarily at the administrative level[.]" Reid, 401 F.3d at 527. The choice of methodology in providing special education services is the prerogative of the school district. See Rowley, 458 U.S. at 208. Should agreement not be possible, a Hearing Officer could develop a record with the information needed to determine and correct T.D.'s educational deficits, if any, and to fashion an appropriate award of compensatory education based on Stamford's failure to provide T.D. with the pendency stay-put services that were specified in the Settlement Agreement, i.e. speech, occupational therapy, ABA services and autism consulting services. Def. Ex. 500 ¶3.

CONCLUSION

For the reasons stated, defendant is ordered to reimburse plaintiff for stay-put services in the amount of $30,222.50 and stay-put transportation expenses in the amount of $6,790.37 together with interest at the rate set forth in 28 U.S.C. §1961(a) calculated from the date the Court of Appeals' Summary Order dated August 6, 2016. Streck v. Bd. of Educ. of the E. Greenbush Central School Dist., 408 F. App'x 411, 414-15 (2d Cir. 2010).

This is a recommended ruling. Any objections to this recommended ruling must be filed with the Clerk of the Court within fourteen (14) days of the receipt of this order. See 28 U.S.C. §636(b)(1); Fed. R. Civ. P. 6(a) & 72; Rule 72.2 of the Local Rules for United States Magistrate Judges, United States District Court for the District of Connecticut; Impala v. United States Dept. of Justice, 690 Fed. App'x 32 (2d Cir. 2016)(summary order)(failure to file timely objection to Magistrate Judge's recommended ruling will preclude further appeal to Second Circuit); cf. Small v. Sec'y of Health and Human Servs., 892 F.2d 15, 16 (2d Cir. 1989)(failure to file timely objection to Magistrate Judge's recommended ruling may

preclude further appeal to Second Circuit).

Dated at Bridgeport, this 19th day of April 2018.

/s/
HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMENDED SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of March, two thousand twenty-one.

PRESENT:

DENNIS JACOBS,
JOSEPH F. BIANCO,
MICHAEL H. PARK,
Circuit Judges.

Shkelqesa Dervishi, on behalf of T.D.,

Plaintiff-Appellant,

v. 18-2745-cv

Department of Special Education,
in Stamford Public School, Stamford
Board of Education,

Defendants-Appellees.

FOR PLAINTIFF-APPELLANT: DEBORAH G. STEVENSON, Deborah G. Stevenson Law, LLC, Southbury, CT, *counsel for* Shkelqesa Dervishi (*on the brief*), Stamford, CT.

FOR DEFENDANTS-APPELLEES: RICHARD J. BUTURLA, Berchem Moses PC, Milford, CT.

Appeal from an order of the United States District Court for the District of Connecticut (Eginton, *J.*; Fitzsimmons, *M.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED** in part and **VACATED** and **REMANDED** in part.

Appellant Shkelqesa Dervishi, *pro se*, sued the Stamford Board of Education ("the Board") individually and on behalf of her autistic son, T.D., claiming that he was denied a free and appropriate public education ("FAPE") required by the Individuals with Disabilities Education Act ("IDEA"). The district court ruled against her on the merits and a prior panel of this Court affirmed the decision with one exception: We remanded because, under the "stay-put" provision of the IDEA, 20 U.S.C. § 1415(j), Dervishi was entitled to reimbursement for the home-based education program T.D. received while the parties' dispute was pending. *See Dervishi v. Stamford Bd. of Educ.*, 653 F. App'x 55 (2d Cir. 2016). The Board had agreed to reimburse Dervishi for certain expenses of that program in a settlement agreement. Therefore, we directed that "[o]n remand, the district court should (i) calculate the total value of the home program, as specified in the settlement agreement, for the period from November 18, 2010 until the dispute over the 2010–2011 IEP is no longer pending, and (ii) order the Board to pay that amount to Dervishi." *Id.* at 58.

On remand, pursuant to a referral by the district court, the magistrate judge held an evidentiary hearing to determine the amount the Board owed to Dervishi under the terms of the settlement agreement, and Dervishi also requested compensatory education for the first time. The

magistrate judge issued a Recommended Ruling, which contained factual findings and recommended granting Dervishi's requests for reimbursement for services that were in place when the dispute began and for mileage traveled to transport T.D. to those services, but denying Dervishi's requests for reimbursement for therapy received in 2015 and 2016, YMCA classes, payment for her own time working with T.D. and transporting him to services, and compensatory education. The district court adopted the magistrate judge's Recommended Ruling, and Dervishi appealed. In July 2020, we denied Dervishi's request for an injunction granting immediate compensatory education and requested briefing on whether she was permitted to represent her child in this proceeding.[1] We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

The district court proceedings on remand consisted of an evidentiary hearing. Accordingly, as with a bench trial, "we review the district court's findings of fact for clear error and its conclusions of law *de novo*. Mixed questions of law and fact are also reviewed *de novo*." *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 165 (2d Cir. 2020); *accord Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985). Under this standard, we review *de novo* the district court's "legal conclusions with respect to its interpretation of the terms of a settlement agreement." *Omega Eng'g, Inc. v. Omega, S.A.*, 432 F.3d 437, 443 (2d Cir. 2005).

[1] The issue of whether Dervishi is permitted to appear *pro se* on behalf of her child in this appeal has been rendered moot by Dervishi having retained counsel on October 21, 2020. Moreover, counsel for Dervishi clarified at oral argument that, although Dervishi is challenging the district court's denial of Dervishi's requests for certain reimbursements after the remand, she is not challenging any ruling on compensatory education, which she has not as yet requested.

Based on our review of the record and relevant case authority, we conclude that the district court properly construed the terms of the settlement agreement and did not err in calculating the amount owed to Dervishi, with the exception of Dr. Stephanie Bader's services. In the parties' settlement agreement, the Board agreed to reimburse Dervishi and her husband for the following costs related to T.D's home-based program: (a) "$2,500 per week for the cost of speech, occupational therapy[,] . . . [Applied Behavioral Analysis ("ABA")] services, and autism consulting services provided to [T.D.]" as evidenced in "documentation of payments" made by T.D.'s parents; and (b) "their provision of transportation of [T.D.] to and from his sessions with service providers . . . based on the applicable IRS mileage rate." Record on Appeal ("ROA") doc. 30 at 13. The term "autism consulting services" was not defined, but Dr. Wayne Holland, the Director of Special Education Services for Stamford public schools who signed the agreement on behalf of the Board, testified that "it would be a company or an individual that offers services to families and children that are on the autism spectrum." ROA doc. 138 at 38. He further testified that, under the agreement, "the type of service would have been directed . . . by [T.D.'s] family," that "the parents were given a lot of latitude to help design the services," and that some of Dr. Carol Fiorile's services qualified as autism consulting services. *Id.* at 17, 38. The parties' testimony established that Dr. Fiorile was a Board-Certified Behavior Analyst ("BCBA") who directed and supervised the home-based program at the time the dispute began; she did not work with T.D. one-on-one but rather observed and supervised the ABA therapists working with T.D. and Dervishi to ensure T.D. was progressing in the home-based program she designed. Dervishi testified that she sought Dr. Bader's help with T.D.'s autism-related behavioral issues because Dr. Fiorile was not available. Dr. Bader, who is also a BCBA, testified that she provided services to both T.D. and

his mother that addressed his autism-related behavioral issues, and the parties do not dispute that she was qualified to do so. She worked with T.D. on his behavioral issues both directly and by observing Dervishi work with him and offering advice to her. Trial testimony also demonstrated that Dervishi's inclusion in the therapy was not unique to Dr. Bader's work; T.D.'s services at the Communication Clinic of Connecticut, which were covered by the settlement agreement, were also directed to the family. Assessment of the evidence as a whole clearly supports a finding that Dr. Bader's services were substantially similar to services the Board agreed to cover in the settlement agreement and fell squarely within the Board's understanding of "autism consulting services." Accordingly, the district court erred in denying this request as unrelated "family therapy," and Dervishi is entitled to be reimbursed $740 for what she paid for those services.

The district court correctly denied Dervishi's other requests. Dervishi argued that she should be reimbursed over $400,000 for 7,000 hours she spent providing T.D. with "ABA services," relying on *Bucks County Department of Mental Health/Mental Retardation v. Pennsylvania*, 379 F.3d 61 (3d Cir. 2004). In the settlement agreement, the Board agreed to reimburse the parents only for transportation expenses "based on the applicable IRS mileage rate," not for their time or other work. ROA doc. 30 at 13. The Board also agreed to reimburse the parents for "ABA services" in the settlement agreement. Based on the parties' testimony and the home-based program in place at the time this dispute began, it is clear that "ABA services" referenced ABA therapy and related work by qualified professionals. Dervishi's testimony also plainly established that she was not a qualified provider of ABA therapy. Her formal education was in accounting and finance, and her only "training" as a therapist consisted of observing T.D.'s therapists and working with T.D. under their observation, and attending a single course designed

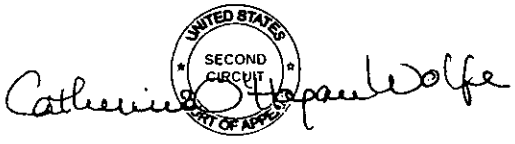
for parents in 2004. Thus, the terms of the settlement agreement clearly precluded reimbursement for any services Dervishi provided herself. Her reliance on *Bucks County* is unavailing because, in that case, the court was crafting an equitable remedy for an IDEA violation where the school board refused to provide services, and the mother had shown that a trained service provider was not available. 379 F.3d at 63. Here, however, the school board did not refuse to provide services within the reimbursement period, Dervishi's claims that there was an IDEA violation have already been rejected by this Court, and the only reimbursement Dervishi is entitled to was that agreed upon in the settlement agreement.

Finally, Dervishi's own testimony about the YMCA classes established that those services were provided by children. Accordingly, the YMCA classes also did not fall within the scope of "ABA services."

* * *

We have considered all of Dervishi's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **VACATED** and **REMANDED** with regard to reimbursement for Dr. Bader's services, and **AFFIRMED** in all other respects.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of March, two thousand twenty-one.

Shkelqesa Dervishi, on behalf of T.D.,

Plaintiff - Appellant,

v.

Department of Special Education, in Stamford Public School, Stamford Board of Education,

Defendants - Appellees.

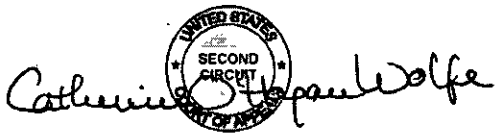
ORDER

Docket No: 18-2745

Appellant, Shkelqesa Dervishi, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX D

Exhibit A

SETTLEMENT AGREEMENT

WHEREAS, [redacted] (the "Student") is a Student who requires special education and related services; and

WHEREAS, the Stamford Board of Education (the "Board") is responsible for providing an appropriate program for the Student if the Student wishes to receive his education through the Board; and

WHEREAS, the Board offered services to the Student and, acting through its Planning and Placement Team, believes that it met its obligations under state and federal law to the Student; and

WHEREAS, the Student's Parents ("Parents") commenced a due process hearing alleging that the Board did not have an appropriate program for the Student; and

WHEREAS, the Parents and the Board, in an effort to cooperate to resolve their differences, agree to the following:

1. The parties agree that the Board shall retain a mutually-acceptable Independent Consultants to the Student's program starting as soon as is practicable in November and December 2009 and January 2010. The parties have agreed to Dr. Bridget Taylor of the Alpine Learning Group of New Jersey to conduct a psychological and educational evaluation, including: standardized educational assessment, psychological (cognitive) assessment, behavioral, social development, educational history, ABA, and an ABLLS, of the Student no later than January 15, 2010 and to be available for a Planning and Placement Team meeting in January 15, 2010 to discuss the Student's IEP, subject to Ms. Taylor's availability to complete this evaluation in the timeframe described as well as the Board's confirmation with Ms. Taylor that she has successfully worked with public school districts in the transition of students with autism to their local public schools, including the development of goals and objectives for the IEPs for such students. Should Ms. Taylor not be available or should she not have the experience transitioning students to Board public schools, the Parents agree to submit to the Board a list of five (5) consultants with the qualifications and experience (including experience transitioning students with autism to their public schools) required to fulfill the responsibilities set forth herein. The Board will select one evaluator from this list of 5 qualified evaluators. Ms. Taylor (or the other qualified evaluator selected from the Parents' list) shall be retained to conduct an educational and psychological evaluation of the Student and to issue a report which shall be reviewed at a PPT meeting no later than January 15, 2010; this individual shall also be asked to make recommendations for the Student's IEP, including the Student's Present Levels of Educational Performance, Goals and Objectives, and Service Hours. The Board shall also retain the Center for Special Needs to conduct a speech and language evaluation and occupational therapy evaluation of the Student and to attend the PPT to be held no later than January 15, 2010 to report on the results of those evaluations and to participate with the PPT in

P-7
pg 1 of 4

EXHIBIT

making recommendations for the Student's IEP, including the Student's Present Levels of Educational Performance, Goals and Objectives, and Service Hours. The Independent Consultants shall also be asked to make recommendations as to the transition of the Student from his home-based program. The Parents agree to make the Student available to the Independent Consultants for such evaluations. The Board and the Parents agree to adopt the recommendations of the Independent Consultants as to the Student's program and placement, including recommendations as to the transition of the Student.

2. The Board agrees to provide transportation services to or reimburse the Parents for mileage for the Parents' transportation of the Student to and from the placement recommended by the Independent Consultants during the portion of the 2009-2010 school year that he attends this program.

with autism consulting services

3. The Parents wish to continue their unilateral placement of the Student in a home-based program until the Student is transitioned under this Agreement. The Board agrees to reimburse the Parents in the amount of $2,500 per week for the cost of speech, occupational therapy and ABA services provided to the Student from September 2009 through the development and implementation of the Student's IEP (at the September 2009 PPT meeting). It is the parties' agreement that the Student will be transitioned no later than February 2010 unless the Independent Consultants recommend a different timeframe, provided that the Student must be transitioned from the home-based program during the 2009-2010 school year. Reimbursement for payment shall be made within forty-five ("45") days of the Board's receipt of documentation of payments (invoices and cancelled check(s)) made by the Parents for related services provided to the Student between September 2009 and the development and implementation of the Student's IEP. The Board will further reimburse the Parents for their provision of transportation of the Student to and from his sessions with service providers from September 2009 through the development and implementation of the Student's IEP based on the applicable IRS mileage rate, upon receipt of documentation of the Student's attendance at these sessions during that period. These payments are being made in full and final settlement of all fees, costs and/or damages for any claims relating to the Student's educational program, including compensatory education, through the 2009-2010 school year including the Extended School Year. In consideration of the above payments the Parents agree that they will not seek reimbursement for any additional costs related to the Student's educational program from the Board in any forum through the 2009-2010 school year, including the 2010 Extended School Year. The above payments are expressly conditioned upon the Parents' continued residence in Stamford and the Student's continued attendance at the program selected by the Independent Consultants during the applicable portion of the 2009-2010 school year.

Should the Parents receive an invoice for legal services from Mayerson & Associates for work performed by an attorney licensed to practice law in the State of Connecticut in connection with the due process hearing (Case # 10-0111) the Board agrees to reimburse the Parents for such fees in an amount not to exceed $4,500, which reimbursement shall be paid

P-7
Pg 2 of 4

directly to Mayerson & Associates within thirty-five (45) days of the Board's receipt of such invoice.

4. The Parents agree that a PPT meeting will be held no later than January 15, 2010, to plan the Student's transition to these program recommended by the Independent Consultants, with such transition to occur in January and/or February 2009. At this PPT meeting the team will develop the Student's IEP in consultation with the Independent Consultants. The Parents agree to cooperate with the Board in providing access to the Student's educational records, to provide updated information about the Student's academic progress and to permit Board Staff and the Independent Consultants the opportunity to observe and evaluate the Student and contact his service providers.

5. In exchange for the above, tthe Parents will request that the due process request be dismissed *with prejudice* because all issues and claims raised in the due process hearing will have been fully and finally resolved.

6. The Parents understand and acknowledge that the Board is making the payments described above solely as an accommodation to the Parents and in order to avoid the costs of protracted litigation. The parties agree that they are entering into this Agreement voluntarily and that neither party is a prevailing party.

7. This Agreement resolves and settles all claims which have been made or which could have been made by the Parents, known or unknown, against the Board, its agents and employees, arising out of or in connection with the Student's educational program, including any claims of entitlement to a free appropriate public educational program through the date of this Agreement. It is specifically intended that this Agreement is a waiver of any claim, known or unknown, which the Parents or Student may have against the Board pursuant to Conn. Gen. Stat. §10-76. et seq., The Individuals With Disabilities Education Act, as amended, Section 504 of the Rehabilitation Act, The Americans with Disabilities Act, 42 U.S.C. Section 1983 and The Family Education Rights and Privacy Act through the date of this Agreement.

8. The Parents acknowledge that they have been encouraged to and have had full opportunity to discuss this Agreement, and the terms and conditions hereof, with any person they deem appropriate, including an attorney experienced in this area of the law, prior to signing this Agreement. The Parents represent and warrant that they are entering into this Agreement voluntarily and knowingly, with as full and complete understanding of the terms and conditions of this Agreement.

9. Nothing herein shall be considered to be an admission or acknowledgment by the Board that it did not at all times have an appropriate program within the Stamford Public Schools to meet the Student's educational needs, nor an admission by the Parents that services provided were appropriate.

P-7
Rec'd

10. The Parents agree that all aspects of this Agreement shall be kept confidential except insofar as is necessary to enforce the aggreement. The parties acknowledge that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. The Parents expressly understand and acknowledge that they shall not disclose to anyone any and all aspects of this Agreement, including, but not limited to, the fact that the Board is providing payment(s) to the Parents. Should the Parents, individually or collectively, violate this strict confidentiality clause, the Parents understand and acknowledge that the Parents shall be required to return to the Board the entire payment(s) and the Board may commence a civil action against the Parents to recover such payment.

11. The parties acknowledge that this Agreement is legally binding upon the parties and enforceable in any State court of competent jurisdiction or in a district court of the United States.

IN WITNESS WHEREOF, the parties have sett their hands this 6th day of November, 2009.

STAMFORD PUBLIC SCHOOLS

Wayne Holman Date
Director of Special Education Services

PARENTS

Ftedin Dervishi 11/6/09
Date
Father

Shkelqese K. Dervishi 11-6-09
Shkelqese K. Dervishi Date
Mother

Witness

Witness

P-7

Bd. Ex.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Shkelqesa Dervishi on behalf of her Handicap minor child T.D. Plaintiff,	:	CIVIL ACTION NO 3:11-CV-1018-(WWE)
v.	:	
Stamford Board of Education, Defendant	:	November 21, 2016

AFFIDAVIT AND RESPONSE OF SHKELQESA DERVISHI IN SUPPORT OF SECOND CIRCUIT "PENDENCY" REMAND ADJUDICATION

STATE OF NEW YORK }
} ss.
COUNTY OF NEW YORK }

Shkelqesa Dervishi, being duly sworn, deposes and says:

1. I am the named plaintiff and mother of T.D. and respectfully submit this affidavit (a) in support of plaintiffs' application to this Court for an adjudication of the automatic and unconditional pendency related "funding" relief to which plaintiffs are entitled pursuant to the Second Circuit's August 4, 2016 remand mandate and (b) in opposition to defendant, the Stamford Board of Education's brief that unfairly attempts to deprive us of *any* pendency funding relief.[1]

2. I readily acknowledge and accept the fact that plaintiffs did not prevail on the merits at any level. Plaintiffs also acknowledge that this remand was not directed by the Second Circuit in order to relitigate any aspect of the case on the merits. This remand was ordered solely to quantify and direct the scope of the automatic and unconditional pendency relief our family is entitled to recover from defendant Stamford under the Second Circuit's remand order, and other

[1] Significantly, defendant does not admit to any pendency obligation, in any amount. Nevertheless, I invite Stamford to contact me to discuss the prospect of settling and compromising the outstanding pendency issue.

instructive authorities. The Second Circuit's ruling regarding Stamford's "obligation to fund" pendency is now "law of the case":

> "The Board only agreed to fund T.D.'s home program on a temporary basis; but, because "the Board's obligation to **fund** stay-put placement is rooted in statute, not contract," the parties' intent as to the duration of T.D.'s home program does not alter the Board's reimbursement obligation under the [20 U.S.C. § 1415(j)] Stay-put provision."

(Emphasis added)

3. As I shall now show, our family paid out or incurred debt aggregating in excess of $45,000 (Exhibit A) as well as $10,419.19 in transportation costs at the IRS rate (Exhibit B) to the extent not already covered by insurance) in an effort to provide the pendency services that our son was entitled to receive (ABA, Speech, Occupational Therapy and Autism Consulting Services). Stamford, however, never funded these services, thereby preventing our family from recirculating what little funds we then had to continue to pay for our son's pendency services. As a result, as T.D.'s mother, I was forced to directly provide a portion of T.D.'s ABA services after receiving training in Applied Behavioral Analysis (ABA) from Lucinda Ribeiro, an ABA therapist and New York State Certified Special Education Teacher, and from Dr. Carol Fiorile, BCBA-D, who holds a Ph.D. in ABA as well as a *doctoral* level board certification in ABA. (See Exhibit C). Both Ms. Ribeiro and Dr. Fiorile were hand picked and compensated by Stamford so there should be no question as to their expertise.

4. As I shall now show, and as the Second Circuit has already explained and ruled, T.D.'s statutory pendency entitlement did not come to an end in 2010, as Stamford contends. In addition, while we certainly hope to recover and be "reimbursed" for the monies we have paid out of pocket, we also are asking the Court to provide additional "funding" relief to allow us to finally pay our still unpaid invoices and to provide an award of compensatory relief that we

believe is warranted given defendant's failure to abide by the automatic and unconditional pendency entitlement, for a period of almost six years. Otherwise, Stamford will have been unjustly enriched by our son T.D. being unjustly denied his pendency entitlements and services that he clearly would have fully received had the Stamford school district provided that funding all along. This Court is empowered to award appropriate relief without a hearing, but if the Court believes that a hearing (or a mediation) is needed or warranted, plaintiffs are ready to proceed as the Court may direct.

The Statutory Right of "Pendency"

5. The IDEA statute requires that a student remain in his or her last agreed-upon program during judicial proceedings. It is the school district's statutory responsibility to maintain a student's pendency placement. 20 U.S.C. § 1415(j) provides:

> [D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

6. In contrast to *Burlington/Carter* reimbursement relief (which must be won after first meeting a three-prong evidentiary test "on the merits"), pendency relief is considered an automatic and unconditional injunction. *See, e.g., Honig v. Doe*, 484 U.S. 305 (1988), *T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145 (2d Cir. 2014), *Student X v. N.Y.C. Dep't of Educ.*, 2008 WL 4890440 (E.D.N.Y Oct. 30, 2008), *N.Y.C. Dep't of Educ. v. S.S.*, No. 09 Civ. 810 (CM) 2010 U.S. Dist. LEXIS 25133 at *38 (S.D.N.Y. Mar. 17, 2010). Pendency has the effect of an *automatic* and unconditional injunction, which is applied without regard to such factors as irreparable harm, likelihood of success on the merits, the conduct of the parties, or a balancing of

the hardships. *Zvi v. Ambach,* 694 F.2d 904 (2d Cir. 1982); see also 20 U.S.C. § 1415(j); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996) (holding that the pendency/stay-put provision "represents Congress' policy choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved").

7. The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability. *Honig.* However, in stark contrast to some of Stamford's arguments, fulfilling pendency does not mean that a student must be in or remain in or transfer to a particular school site or location. *Concerned Parents & Citizens for the Continuing Educ. Of Malcolm X. v. N.Y. City Bd. Of Educ.*, 629 F.2d 751 (2d Cir. 1980). The statutory pendency entitlement is *service*-oriented, rather than placement oriented. The U.S. Dept. of Educ. Office of Special Education Program ("OSEP") has opined that a student's then-current placement would "generally be taken to mean current *special education and related services* provided in accordance with child's most recent [IEP]" *Letter to Baugh*, 211 IDELR 481 (OSEP 1987) (emphasis added.)

8. As I had previously argued, and as the Second Circuit has now ruled, T.D.'s stay-put "funding" entitlement ($2,500 per week) is based upon the parties' November 6, 2009 stipulation (Exhibit D). The stipulation of settlement, executed on November 6, 2009, expressly provides for a $2,500 per week"pendency funding" amount:

- The Board agrees to reimburse the Parents in the amount of $2,500 per week for the cost of speech, occupational therapy and ABA services and autism consulting services provided to the Student from September 2009 through the development and implementation of the Student's IEP (at the January, 2010 PPT meeting). [It is the parties' agreement that the Student will be transitioned no later than February 2010 unless the Independent Consultants recommend a different time frame, provided that the

Student must be transitioned from the home-based program during the 2009-2010 school year.][2]

- Reimbursement for payment shall be made within forty-five (45) days of the Board's receipt of documentation of payments (invoices and cancelled check(s)) made by the parents for related services provided to the student between September 2009 and the implementation of the Student's IEP.

- The Board will further reimburse the Parents for their provision of transportation of the Student to and from his sessions with providers from September 2009 through the development and implementation of the Student's IEP based on the applicable IRS mileage rate, upon receipt of documentation of the Student's attendance at these sessions during that period.

- These payments are being made in full and final settlement of all fees, costs and/or damages for any claim relating to the Student's educational program, including compensatory education, through the 2009-2010 school year including the extended school year.

9. Stamford, at pages 5-7 of its brief, argues that the core pendency entitlement, i.e. $2,500 funding per week, is limited in time and that, in addition, plaintiffs' conduct frustrated the intent of the parties regarding the anticipated transition of T.D. to Stamford's proposed program. Plaintiffs respectfully beg to differ. In light of the Second Circuit's Decision, it already is the law of this case that:

> "The Board only agreed to fund T.D.'s home program on a temporary basis; but, because "the Board's obligation to fund stay-put placement is rooted in statute, not contract," the parties' intent as to the duration of T.D.'s home program does not alter the Board's reimbursement obligation under the [statutory] Stay-put provision."

10. The Second Circuit certainly made adverse findings against us, holding that the hearing officer had made findings that had doomed our underlying claims. These matters, however, went to the merits of our case. Stamford is conflating the three prong

[2] The Second Circuit held that any "contractual" intent to terminate the pendency funding benefit by a certain date or event is not controlling because the pendency right is "rooted in statute" rather than in contract.

Burlington/Carter test for reimbursement (on the merits) with the automatic and unconditional statutory right of pendency.

11. We clearly lost our case on the merits. We thus have no entitlement to any relief except to the extent that such relief arises out of T.D.'s automatic and unconditional statutory pendency entitlements. The existence of and need to ascertain the scope of such relief is why the Second Circuit directed this remand.

To Accord T.D. the Pendency "Funding" Relief to Which T.D. is Entitled And Prevent a Windfall For Stamford, Plaintiffs Should Not Be Penalized For Being Unable to Fully Afford to Continue to Fund Private Providers for T.D.'s Home Program Or For Providing Direct ABA Services To T.D.

12. At page 11 and 12, Stamford advances the argument that we unilaterally "changed" T.D.'s program during the time frame of pendency and, as such, plaintiffs should be denied pendency funding relief altogether. Plaintiffs would urge, however, that Stamford is unfairly attempting to convert the unconditional pendency entitlement to one that is saddled with conditions. Stamford's "change" argument is thus irrelevant.

13. The stipulation of settlement did not require us to conform to a particular program to recover the $2,500.00 in funding per week. So long as the pendency services fell under the enumerated categories, we could receive funding for $2,500.00 weekly. This is yet another example of Stamford's overreaching to try to convert an unconditional right into a conditional right. We are confident that this Court will see through such overreaching.

14. Danger invites rescue. Due to the district's continued failure to fund T.D.'s home program and our limited financial resources, I had no alternative but to seek ABA training and provide T.D. with some ABA services myself. T.D. could not be without support and services, which the district was fully aware of. When an appropriate placement was not offered and

provided, I had no other recourse but to provide T.D. some of the services myself. I simply could not afford to continue to pay for his home provider team.

15. The Second Circuit has found that this kind of situation to be unjust in *Doe v. East Lyme Bd. Of Educ.*, 790 F.3d 440 (2d Cir. 2015). The Court ruled that the right to stay-put (pendency) is not means tested:

> On the other hand, if the parent cannot afford to finance all or any services, the agency gets to pay less than what it should have, or nothing—and, more importantly, less than what was needed for the child's benefit. Moreover, such an arrangement would make the stay-put obligation contingent on the means of a child's family – a legally irrelevant variable.

790 F.3d at 456. Stamford is trying to have its cake and eat it too. Had we had ongoing pendency funding from Stamford, we would have had the means to continue with T.D.'s private providers and I would not have had serve as my son's service provider.

16. Stamford thus fails to account for the value of any of my time providing ABA services to T.D. following the training that I had received. Because of Stamford's failure to provide for pendency funding, I took on the role of being T.D.'s primary service provider for years. (Exhibit E) Given the intensity of the services that were needed, I have valued my time at $50-$70 per hour (far less than what a BCBA would have charged). I respectfully ask this Court to award me a "reasonable amount" for my services based on the precedent of the cases described below.

17. A private service for a student is not required to meet the same stringent public school requirements for "qualified personnel" where, as here, there has been a failure to provide home services. *Bucks Cty. Dep't of Mental Health/Mental Retardation v. Pennsylvania*, 379 F.3d 61, 70 (3d Cir. 2004); *See also Hurry v. Jones*, 734 F.2d 879 (1st Cir. 1984). In *Bucks*, more than a decade ago, a parent just like me was awarded compensation for the therapeutic services she

had directly provided to her daughter at the (then) rate of $22 per hour. Due to the pendency failure by the Stamford school district, I "stepped into the shoes of a therapist, ultimately acting over and above what is expected of parents under IDEA." *Bucks* at 73. *See also Hurry v. Jones*, 734 F.2d 879 (1st Cir. 1984).

18. The Second Circuit repeatedly focused on pendency "funding." Pendency funding here should thus not be strictly limited to "reimbursement" relief. This Court has broad discretion under 20 U.S.C. § 1415 to award "appropriate" pendency relief, which may include not only reimbursement and compensatory education, but also direct funding of those services for which we have invoices. *See Connors v. Mills*, 34 F. Supp. 2d 795 (N.D.N.Y. 1998). My request also follows the reasoning of the Second Circuit in *Doe*, as it is contrary to logic and public policy, not to mention manifestly unfair and meanspirited, to argue that when a parent is unable to afford to *prepay* for pendency services, they are then denied the right to pendency funding.

19. To the extent that the Stamford school district is arguing that plaintiffs should be denied reimbursement or other funding relief because plaintiffs failed to fulfill a "reimbursement model," we submit our supporting invoices and payment for the program (Exhibit A), and respectfully urge this court to follow the *Bucks, Hurry* and *Doe* Courts and grant us funding for the additional pendency services I provided directly and compensatory services for the services that T.D. was entitled to but I was financially not able to provide.

20. To the extent that Stamford failed to provide the $2,500 pendency benefit from November 18, 2010 to August 4, 2016 (a total of 298 weeks), this Court's pendency "funding" discretion extends to $745,000, i.e. $2,500 x 298 weeks. If this remand proceeding cannot be settled and compromised amicably by the parties (which is our hope), we respectfully ask this

Court to award the full amount of its pendency funding discretion or, in the alternative, such lesser amount as this Court believes is warranted under the circumstances.

Stamford Is Improperly Attempting to Make Conditional What is an Automatic and Unconditional Right

21. Stamford continues to attack and deny its stay-put obligations by trying to cast blame on plaintiffs for any delay. Stamford urges that plaintiffs prevented the development of the IEP and failed to meet other conditions of the settlement. The Second Circuit's remand order effectively disallows this argument. Pendency was invoked when we filed our demand for due process, and it did not end until August 4, 2016 when the Second Circuit's mandate issued.

22. Stamford attempts to limit funding under our son's automatic and unconditional right by imposing the following conditions:

a. "To the extent that the total value of the home program was increased by the Parents' obstructionist and dilatory actions, the Board should not be burdened with such costs." (Doc. 100 at p. 6)

b. "Extended School Year periods ("ESY") should not be included in the Court's total value of the home program as specified in the Settlement Agreement. This is because ESY's were not contained or addressed anywhere in the Settlement Agreement." (Doc. 100 at p. 8)

c. Reimbursement should be denied for a ten-week period where the School District provided "community based services." (Doc. 100 at p. 9)

d. "Periods in which the Student was not enrolled in the Board's school system or was home schooled should also be excluded from the Court's calculation for reimbursement." (Doc. 100 at p. 11)

23. Plaintiffs beg to differ with Stamford, not because we wish to be argumentative, but because the Second Circuit's remand and ruling constitutes the "law of this case" that estops Stamford from making any argument that T.D.'s statutory pendency right was limited by the parties' alleged contractual intent. The Second Circuit expressly stated:

> "The Board only agreed to **fund** T.D.'s home program on a temporary basis; but, because "the Board's obligation to fund stay-

> put placement is rooted in statute, not contract," the parties' intent as to the duration of T.D.'s home program does not alter the Board's reimbursement obligation under the Stay-put provision."

(emphasis added) Moreover, T.D. was never withdrawn from the Stamford system. He has been an active and registered Stamford student throughout.

24. Given the Second Circuit's ruling and the unconditional right to pendency, it is error for Stamford to make the argument that the pendency was somehow limited or excused by actions that, at best, went ultimately to the *merits* of the case. If Stamford had an issue with the remand order, Stamford should have tried to appeal that ruling to the United States Supreme Court (an opportunity that has apparently long since passed).

25. Pendency is an automatic and unconditional right and continues until the end of the proceeding. Pendency is not allowed to take a summer vacation. *See T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145 (2d Cir. 2014). The very idea that a severely autistic child would not be entitled to summer programming is simply unthinkable. Once again, Stamford is trying to evade its obligation to fund T.D.'s stay-put program, but as the Second Circuit ruled, there are no contractual, intent related limitations. The established time frame for pendency funding is thus November 18, 2010 to and including August 4, 2016.

26. There is nothing that would suspend the performance of the funding terms of the settlement agreement during the period of April 2013 to June 18, 2013. More importantly, as a matter of law, the parties' express intention in the agreement is not controlling and the $2,500 funding benefit continues uninterrupted through 2016.

27. The Stamford school district fails to take into account that it was left up to my husband and I, as T.D.'s parents, to determine the program mix for T.D, as long as it contained ABA, OT, ST or ABA consulting. We did not have the same requirement to meet curriculum standards that would be required "on the merits" in a school setting. The Stamford district left

the programming up to us, and they were required to pay the $2,500 per week to fund these services. We did the best we could.

28. Stamford continues to urge that the kinds of conditions that must be proven to secure *Burlington/Carter* reimbursement relief on the merits should be applied to pendency relief that, in actuality, is automatic and unconditional and is not saddled with contractual conditions having to do with the parties' contractual intent.

Conclusion

29. We are not here seeking to relitigate the fact that the Second Circuit ruled against us on the merits and that as part of the merits analysis, all three judicial forums found that that we were in some way blameworthy for certain of our acts and omissions. While this has formed the basis for why we lost the case, the Second Circuit's remand order makes clear that we did not lose the right to ($2500 per week) funding under pendency; an automatic and unconditional right.

Shkelqesa Dervishi

Shkelqesa Dervishi

Sworn to before me this
21st day of November, 2016

Notary Public

MAURICIO J. BERTONE JR.
Notary Public, State of New York
No. 01BE6309117
Qualified in Rockland County
Commission Expires August 4, 2018

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Shkelqesa Dervishi on behalf of her Handicap minor child T.D. Plaintiff,	:	CIVIL ACTION NO 3:11-CV-1018-(WWE)
v.	:	
Stamford Board of Education, Defendant	:	May 18, 2017

PLAINTIFF'S POST-REMAND MEMORANDUM OF LAW

This memorandum of law and the affidavits previously filed by me are respectfully submitted on behalf of my minor disabled son, T.D., in support of our application to ascertain, fix and recover from defendant "...the value of the home-based services that were the stay-put [pendency] educational program for the plaintiff at the time that due process commenced in November of 2010...through the conclusion of the court of appeals proceedings." (3/16/17 Tr. Pp. 3-4)

Pendency is an automatic and unconditional entitlement. 20 U.S.C. §1415 (j); *Honig v. Doe*, 484 U.S. 305 (1988); *T.M. ex rel. A.M. v. Cornwall Central Sch. Dist.*, 752 F.3d 145 (2d Cir. 2014). As the Second Circuit ruled in directing this remand: "On remand, the district court should (i) calculate the total *value* of the home program, as specified in the settlement agreement, for the period from November 18, 2010 until the dispute over the 2010-2011 IEP is no longer pending, and (ii) order the Board to pay that amount to [plaintiff]." (See Second Circuit's August 4, 2016 Summary Order).

The Second Circuit's directive is simple and clear – calculate the value of the home program and order defendant to pay that amount to plaintiff. The Second Circuit did not direct this Court and the parties to explore or recognize any offsets based upon defendant's "blame the

victim" approach—an approach designed to give defendant a windfall and evade the Second Circuit's directives. To the extent that this Court gives any consideration to defendant's unfounded attempt to turn an automatic and unconditional right into a conditional right, my Rebuttal Affidavit and testimony at the remand hearing respond to defendant's relentless personal attacks.

As pendency is an automatic and unconditional right, and as the Second Circuit delineated the scope of the remand to fix and pay the value of T.D.'s pendency program, this Court should ignore as unfounded and irrelevant defendant's repeated attempts to portray me as uncooperative or unreasonable. This Court should deny defendant the windfall that it seeks and fairly compensate me for the value of T.D.'s pendency program. Period.

As I urged on the first day of hearing, the relevant time period is approximately 298 weeks and those weeks should be multiplied by the value of T.D.'s home program (as specified in the settlement agreement), given that defendant refused to fund the pendency program or reimburse plaintiff for such costs. (3/16/17 Tr. P. 7) By and refusing failing to repay these monies to me, I was prevented from recirculating what little money I had to fund T.D.'s services. (Id. At p. 8) For this reason, I had no choice but to "step in" to provide some of T.D.'s pendency services directly. (Id. At 8-9). I had training and did so under supervision. (Id. at p. 10) In this connection, to the extent that I performed direct pendency services, I requests that I be compensated at the rate of at least $50 per hour i.e. "far less than what a therapist would have charged." (Id. at p. 11) I also should be compensated for the value of my time in performing the transportation function under pendency. (Id. at p. 12)

Accordingly, as discussed below and as the evidence at the remand hearing demonstrated, the "value" of T.D.'s stay-put services should be calculated and credited to me not only for the

value of the actual funds that I advanced, but also for the reasonable value of the pendency related services directly performed and provided by me where, as here, I did not have the financial resources to *fully* pay for T.D.'s pendency services.

There is legal authority for this Court to award such relief where, as here, a parent has advanced funds and performed services that, by all rights and statutory entitlements (20 U.S.C. Sec. 1415(j)) the local school district should have itself advanced and performed. *Student X. v. New York City Dep't of Educ.*, 2008 U.S. Dist. LEXIS 88163, 2008 WL 4890440 (E.D.N.Y. Oct. 30, 2008); *Hurry v. Jones*, 734 F.2d 879 (1st Cir. 1984); *Bucks County Dept. of Mental Health/Mental Retardation v. Commonwealth of Pennsylvania and Barbara DeMora*, 379 F.3d 61(3d Cir. 2003).

The Testimony Given By Plaintiff At The Remand Hearing

At the hearing, I identified and explained the service invoices admitted into evidence as Exhibit 1. (Id at pp. 28-29) Defendant refused to pay. (Id. at p. 29) I testified about the various services that were rendered, and my own role. I testified that I paid out $43,563 as against the service invoices. (Id. at p. 65) I also broke down the requested transportation relief. (Exhibit 2)(Id. at p. 66) I am requesting a total of $10,419 for discharging the transportation function. (Id. at 69-73) Exhibit 23 is my recitation of work I directly performed for my son. (Id. at 107) I urge that the settlement agreement is not controlling on the issue of whether I am entitled to be compensated for my time in performing "stay put" work. I also explained that I did not submit our invoices to defendant because Dr. Holland rejected any responsibility for payment and explicitly instructed me not to do so. (Id. at 116) (See also 3/22/17 Tr. at 284) As this Court will note, Dr. Holland did not refute my testimony on this point, not even at the final March 29 hearing.

I explained my justification in rejecting defendant's August 2010 IEP. (Id. at 79) I also identified Exhibit 6 (canceled checks). I also explained that T.D. was acting "out of control" in the house and refused to go to school. (Id. at 125) I thus explained how T.D. came to have a home and community based program, and my ongoing saga of difficulties with the defendant. I also explained that defendant had filed a DCF complaint against me, a complaint that did not result in a finding of neglect. (Id. at 146) I submit that the DCF complaint was unfounded and retaliatory.

I testified as to T.D.'s educational program at the not-for-profit Keswell School. (Id. at 153-55) I also spoke of the tutoring program at Pinnacle School and the time I spent working with T.D. in a therapeutic fashion.

On March 22, 2017, I presented testimony from T.D.'s providers (including training of plaintiff and their supervision of plaintiff's direct provision of services and the rendering of invoices), as follows: Lucinda Ribeiro (3/22/17 Tr. Pp. 184-242), Dr. Stephanie Bader (Id. at pp. 242-260)

At the March 22 hearing, I testified that I hold a bachelor's degree in accounting and finance. (Id. at p. 268) When T.D. was diagnosed with autism, I was close to completing a master's program. (Id.) I explained at the remand hearing how I computed the service hours I provided to T.D. (under supervision) for which I am requesting compensation, and the minimum hourly rate being sought. (Tr. p. 325-336)(Exhibit 4a and 4b)

At the March 29 hearing, I cross-examined Dr. Wayne Holland and offered rebuttal testimony. Despite the unconditional nature of the pendency entitlement, Dr. Holland attempted to evade that right and turn it into a conditional entitlement by attempting to portray me as uncooperative and unreasonable. He also attacked my training and qualifications to provide

some of the ABA support to my son. (Tr. 612) As Dr. Holland admitted, Stamford will not pay a dime for the services that I provided unless directed to do so by this Court. (Tr. at 439) Dr. Holland also admitted that if he had received invoices after the date of the settlement agreement he would have "returned them." (Tr. 605) (See Exhibits 1 and 6)

Stamford changed T.D.'s placement during the stay put. (Tr. 543) I lost my employment and transportation became a big problem. (Tr. 544) I requested the stay put services. (Tr. 577-78) See also Exhibit 34. (Tr. 579-80) Dr. Holland, we submit, misstated the facts. (Tr. 613) See Exhibit 35. Tr. 636-39. See also my rebuttal affidavit (in lieu of my in-court rebuttal of Dr. Holland). (Tr. 655)

ARGUMENT

THIS COURT IS EMPOWERED TO COMPENSATE ME FOR RENDERING TRANSPORTATION AND THERAPEUTIC SERVICES TO T.D. THAT ARE WITHIN THE SCOPE OF T.D.'S STAY-PUT "PENDENCY" PROGRAM

As I noted during my opening statement at the remand, there is legal authority to support my claim that this Court should award plaintiff compensation (in addition to reimbursement relief---See Exhibits 1 and 6)) for the transportation and therapeutic services that I provided under supervision.

For example, in *Hurry v. Jones*, 734 F.2d 879 (1st Cir. 1984), the court held that parents who were performing a transportation function that the school district should have performed were entitled to reasonable compensation for their time and effort over and above their reimbursable transportation-related expenses. The court affirmed an award of $4600. Here too, I fulfilled a transportation function that defendant should have fulfilled.

Similarly, in the *DeMora* case, cited earlier, the Third Circuit held that where a parent "stepped in" to provide the duties of a trained service provider, reimbursing the parent for her

time spent in providing therapy constituted appropriate relief. In *DeMora*, involving hourly rates from the 1990's, Ms. DeMora's time was reimbursed at the rate of $22 per hour. Here too, I fulfilled a therapeutic function that defendant should have provided and I did so under training and supervision. Here, more than a decade after the *DeMora* case was decided, I seek an hourly rate of $50 and recognize that this Court has broad discretion to fix a different rate for my time to prevent defendant from obtaining a windfall and to do justice.

CONCLUSION

This Court should award me the total "value" of T.D.'s pendency program by granting appropriate reimbursement relief and paying me for the reasonable value of my time in performing the transportation function and providing therapy services to T.D.

Dated: May 31, 2017

Respectfully Submitted,

Shkelqesa Dervishi

APPENDIX G

Autism Treatment Center of America®
HOME OF THE SON-RISE PROGRAM®

April 12, 2017

To Whom It May Concern,

This letter confirms that Keda Dervishi attended our in-depth weeklong training course, The Son-Rise Program® Start-Up, during the week of September 19 – 24, 2004.

Since 1983, The Son-Rise Program at the Autism Treatment Center of America® has served as a training center to teach parents and professionals to develop home-based programs for children with special needs. The Son-Rise Program has two purposes: to individually design a program for a child with special needs and to train parents to develop and supervise an intensive home-based program that addresses the individual needs of each child. All parents and professionals receive extensive training in our methodology, enabling them to develop a program that is suited to their child's particular needs, no matter the child's diagnosis, age or skill level. We work with children and adults of all ages and each program is designed accordingly.

During The Son-Rise Program Start-Up, parents receive approximately thirty-five hours of training. This training is comprehensive and is the foundation upon which parents set up and run a home-based Son-Rise Program. Parents attend this program without their children and take classes with other parents and child-care professionals. This training gives parents the tools and understanding of The Son-Rise Program to help their child in areas such as language acquisition, extended attention span and behavioral challenges, as well as academic skills such as reading and writing. Additionally, parents are taught to recruit and train a support team in order to have additional help in running a Son-Rise Program for their child.

Enclosed you will find the schedule and outline of classes that Keda attended.

If you have further questions concerning this matter please call me at (413) 229-2100. Any support you give to the continuation of this program will be of great benefit to the entire Dervishi family.

Sincerely,

Wendy LaRocque

Wendy LaRocque
Program Enrollment Department Supervisor
The Autism Treatment Center of America®

[redacted]

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