The University of the State of New York

The State Education Department
State Review Officer
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No. 18-113

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

Appearances:
Brain Injury Rights Group, attorneys for petitioners, by Karl J. Ashanti, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail Eckstein, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining their son's pendency (stay put) placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2018-19 school year. The IHO determined that the student's pendency placement was the International Academy of Hope (iHope), the placement established pursuant to the unappealed decision of an IHO, dated June 6, 2018, and denied the parents' request for a determination that the International Institute for the Brain (iBrain) constituted the student's pendency placement. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B];

34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The hearing record reflects that the student attended iHope for the 2017-18 school year (Parent Ex. B at p. 3).[1] According to the parents, a district CSE convened on June 18, 2018 to develop an IEP for the student for the 2018-19 school year, and recommended a "12:1+(3:1)" special class in a district school (Parent Ex. A at pp. 2-3).

A. Due Process Complaint Notice

In a due process complaint notice dated July 9, 2018, the parents alleged that the district failed to offer the student a free appropriate public education for the 2018-19 school year (Parent Ex. A). As relevant here, the parents asserted the student's right to a pendency placement established pursuant to an unappealed decision of an IHO (id. at pp. 1-2; see Parent Ex. B). The parents requested that pendency be determined to consist of prospective payment for the full cost of the student's tuition at iBrain as well as special transportation accommodations (Parent Ex. A at p. 2).

B. Impartial Hearing Officer Decision

A hearing to determine the student's pendency placement was held August 20, 2018 (Tr. pp. 1-63). At the hearing, the parents asserted that pendency lay in the unappealed decision of an IHO, dated June 6, 2018, which found that tuition reimbursement for the student's unilateral placement at iHope during the 2017-18 school year was appropriate (Tr. pp. 20-22; see Parent Ex. B at pp. 4-6). Further, the parents asserted that the student was currently attending iBrain, which constituted a valid pendency placement because it was substantially similar to iHope (Tr. pp. 20-22; Dist. Ex. 1 at p. 1). The district opposed the request for pendency at iBrain, contending that the parents had not provided details regarding the iHope program funded by the district as a result of the unappealed IHO decision and had thus failed to establish substantial similarity, that the parents had "elected to discontinue" the student's pendency placement at iHope, with the result that "the right to pendency no longer exist[ed]," and that counsel for the parents had a conflict of interest (Tr. pp. 22-24).

By interim decision dated August 27, 2018, the IHO found that "iHope became the [s]tudent's pendency program" when the unappealed June 2018 IHO decision became final (Interim IHO Decision at p. 4). The IHO stated that while she agreed that pendency is in a program, rather than the "bricks and mortar" of a particular location, this was not a "situation in which the student is in the same program (iHope) in a different physical location" (id.). The IHO stated that the parents had unilaterally placed the student in a different school and cited no legal authority for the proposition that parents could transfer a student's pendency to a different unilateral placement (id.). The IHO noted that this matter differed from those situations in which a student "aged out of his or her prior school or because the prior school closed down," and that there was nothing in the hearing record suggesting that the student had aged out of iHope or the school had closed (id. at n. 1). Assuming for the sake of argument that a parent could "unilaterally change a [s]tudent's

[1] Due to the status of this matter as a dispute of a pendency determination, there has been very little documentary evidence entered into the hearing record with respect to the student's educational history (see Parent Exs. A-B; District Exs. 1-2; 4-5).

pendency placement from one unilateral placement to another," the IHO held that the parents had not established that the iBrain program was substantially similar to the iHope program the student was placed in for the 2017-18 school year because there was insufficient information in the hearing record about the iHope program (id. at pp. 4-5). Further, the IHO found that there were differences between the two programs in that iBrain had not provided all of the related services provided to the student at iHope and that iBrain was "not as comprehensive as the iHope program and appear[ed] to lack many of the services that [we]re described as being part of the iHope program" (id. at pp. 5-6). The IHO denied the parents' request for a determination that iBrain was the student's pendency placement (id. at p. 6).

IV. Appeal for State-Level Review

The parents appeal from the IHO's interim decision, asserting that the district is obligated to fund the cost of the student's attendance at iBrain pursuant to pendency. Initially, the parents assert that the IHO should recuse herself from further participation in this matter because she cannot be fair and impartial. The parents assert that the IHO erred in finding that the parents were not allowed to transfer the student from one nonpublic school to another for the purposes of pendency, even if the two placements are substantially similar. The parents also assert that the IHO erred in finding that iHope and iBrain were not substantially similar. Relatedly, the parents assert that because the issue of whether iHope and iBrain are substantially similar has been contested in multiple impartial hearings involving other students and been resolved in the favor of parents in several of those matters, it would be inefficient to continue relitigating the same issue and therefore the district should be precluded from contesting the substantial similarity between iHope and iBrain in this matter.

In an answer, the district denies the parents' allegations and argues that there is no right to pendency when a parent unilaterally removes a student from a pendency placement and chooses instead to enroll the student in a different school. The district also argues that iBrain cannot be considered the student's pendency placement because the parents failed to establish substantial similarity between the iHope and iBrain programs. The district asserts that the parents' collateral estoppel argument is without merit because preclusion from litigating a legal or factual issue already decided requires that the issue that was already decided must be identical, and here the details of each student's pendency placement are unique. Lastly, the district asserts that there is no basis for recusal of the IHO because the hearing record does not contain any indication that the IHO was not impartial, or reveal any conduct creating an appearance of impropriety or prejudice.[2]

In a reply, the parents respond to the assertions made in the district's answer.

[2] In a footnote, the district asserts that the parents' failed to comply with practice requirements, by, among other things, failing to provide a clear and concise statement of the issues for review (8 NYCRR 279.8[c][2]). As this argument is raised only in a footnote, it must be considered waived at this stage of the proceedings (see, e.g., United States v. Quinones, 317 F.3d 86, 90 [2d Cir. 2003] [arguments raised only in footnotes are insufficient to preserve an argument for review on appeal], citing United States v. Restrepo, 986 F.2d 1462, 1463 [2d Cir. 1993]). Moreover, the request for review provided enough detail to allow the district to answer and therefore I decline, as a matter within my discretion, to dismiss the request for review on these grounds given that the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that the district suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 18-015).

V. Applicable Standards

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same

service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

VI. Discussion

A. IHO Bias and Request for Recusal

The parents contend that the IHO cannot be fair and impartial. They assert that the IHO should have recused herself, and should hereinafter be ordered recused from this matter, because the IHO has "gone to great lengths to deny [the student] pendency at iBrain" and has created "new, albeit invalid, law for the explicit purpose of erecting her own personal legal hurdle" for parents and has denied pendency at iBrain for students in other matters.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

I find the parents' claim of bias to border on frivolous. The hearing record suggests that the IHO generally exhibited patience in conducting the hearing and interacting with the parties, allowed the parties to fully assert their respective arguments with respect to the student's pendency, and allowed the parents to elicit testimony from their chosen witness to establish substantial similarity between iHope and iBrain (see Tr. pp. 1-60). Further, the IHO had a rational basis—regardless of whether she was correct—in determining that a parent may not unilaterally transfer a student's pendency to a different nonpublic school without a showing that the original placement is unavailable as a pendency placement and cannot provide the program to which the student is entitled. Thus, to the extent that the parents disagree with the conclusions reached by the IHO, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's

impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994]; Application of a Student with a Disability, Appeal No. 13-083).

B. Collateral Estoppel

The parents contend that the district should be precluded from contesting the substantial similarity of iBrain to iHope because it has done so in numerous matters wherein the pendency of a student attending iBrain has been at issue and has not appealed rulings in favor of parents in several of those matters. Initially, because the parents did not raise the issue of preclusion at the impartial hearing, they are barred from asserting it for the first time on appeal (Austin v. Fischer, 453 Fed. pp'x 80, 82-83 [2d Cir. Dec. 23, 2011]; see R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "require[es] parties to raise all issues at the lowest administrative level" and that "a party's failure to raise an argument during administrative proceedings generally results in a waiver of that argument"]). Furthermore, it is unclear whether the parents are asserting that preclusion applies on the basis of res judicata (claim preclusion) or the related doctrine of collateral estoppel (issue preclusion). However, even assuming this claim was not waived, and regardless of the theory on which the parents rely, they have not established that the district should be precluded from continuing to litigate the issue of whether the student's program at iHope was substantially similar to his program at iBrain.

The doctrine of res judicata "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B. v. Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *4 [S.D.N.Y. Jan. 13, 2012]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19, 2006]). Res judicata applies when: "(1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding" (K.B., 2012 WL 234392, at *4; see Grenon, 2006 WL 3751450, at *6). Claims that could have been raised are described as "issues that emerge from the same 'nucleus of operative fact' as any claim actually asserted in" the prior proceeding (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013], quoting Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86, 90 [2d Cir. 1997]). The doctrine of collateral estoppel "precludes parties from litigating a legal or factual issue already decided in an earlier proceeding" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19, 2006] [internal quotations omitted]). To establish that a claim is collaterally estopped, a party must show that:

> (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits

(Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Boguslavsky v. Kaplan, 159 F.3d 715, 720 [2d Cir. 1998]).

In this instance, the parents cannot establish the elements of either test for a number of reasons. Initially, both doctrines require a ruling on the merits in a prior proceeding. In support

of their claim, the parents submit as additional evidence three interim decisions on pendency issued by IHOs in other proceedings involving other students. Each decision reflects that the parents in those matters filed a due process complaint notice on or around the same date as the due process complaint notice was filed in this matter (Supp. Ex. BB at pp. 1, 10, 14). Only one of the decisions on pendency was dated and it was issued on October 3, 2018, over one month after the decision on pendency was issued in this matter (id. at pp. 3, 10, 14).[3] Accordingly, based on the additional evidence provided by the parents, there is no indication that a determination had been made in another proceeding at the time of the IHO's Decision on pendency.

In addition, the parents' argument is without merit because, as the district points out, the pendency placement of each individual student will not be an "identical issue" to that of another student. Among other unique facts, each student's pendency placement will stem from individual circumstances, such as a different IHO decision establishing a distinct pendency placement. For example, the parents submit as additional evidence IHO decisions on pendency relating to proceedings involving other students which do not establish the same educational placement for purposes of pendency. One student's program at iBrain included instruction in a 6:1+1 special class, occupational therapy (OT) four times per week, physical therapy (PT) five times per week, speech-language therapy five times per week, and parent counseling and training once per month; in addition, while the student had received vision therapy three times per week at iHope, he was "not yet" receiving vision therapy at iBrain (Supp. Ex. BB at p. 2). The second student's program—as described by the interim decision on pendency—was less clear, indicating that iBrain included both 8:1+1 and 6:1+1 special classes but not identifying the ratio of the student's classroom placement, and reflecting that the student's program consisted of OT three hours per week, PT five hours per week, speech-language therapy five hours per week, vision therapy three hours per week, and parent counseling and training one hour per month, as well as the services of a paraprofessional (id. at pp. 8-10). However, the IHO's decision contains no specific information regarding the student's program at iHope (id.). The third decision contains no details regarding the student's placement at either iHope or iBrain (id. at p. 14). In this proceeding, the student's program at iBrain consists of individual OT five hours per week, individual PT five hours per week, and individual speech-language therapy five hours per week, and is recommended to receive vision therapy three hours per week (Tr. p. 38-39). Accordingly, the additional evidence submitted by the parents reflects that the program provided to students at iBrain consists of varying amounts of services and precludes a determination that iHope and iBrain are substantially similar as a matter of law.[4]

[3] In addition, although one of the undated decisions indicates that it was issued prior to August 10, 2018 (Supp. Ex. BB at p. 13 n.1), there is no indication in the hearing record that this decision was provided to the IHO in this matter.

[4] To the extent the parents assert that it is "inefficient to keep relitigating this same issue," they provide no basis to conclude that the IHO decisions favoring their position should have preclusive effect, rather than IHO decisions on the same issue in favor of the district's position. The parents are reminded that, to the extent they find it inefficient to bring this issue through the impartial hearing process, the IDEA's exhaustion requirement does not apply to pendency claims (Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199-200 [2d Cir. 2002]; see E. Lyme, 790 F.3d at 455 [noting that "[a]pplying the exhaustion requirement to stay-put claims would create a loop of marathon proceedings, since each new round of administrative proceedings would itself be subject to a fresh round of judicial review"]).

C. Pendency

The parties agree that the student's educational placement for purposes of pendency is based on an unappealed IHO Decision dated June 6, 2018 (see Parent Ex. B). The IHO who presided over that hearing determined that the student was denied a FAPE for the 2017-18 school year, that iHope was an appropriate placement, and that equitable considerations weighed in favor of the parents; the IHO ordered the district to fund the cost of the student's tuition and related services at iHope for the 2017-18 school year and directed the CSE to reconvene and "draft an IEP that incorporates all items of the iHope proposed IEP dated March 22, 2017" (id. at pp. 3-7). In their due process complaint notice, the parents requested that pendency be prospective payment for the student's full tuition at a different nonpublic school, iBrain, (including academics, therapies, and a 1:1 professional during the school day) as well as special transportation accommodations (including a limited travel time of 60 minutes, a wheel-chair accessible vehicle, air conditioning, a flexible schedule, and a paraprofessional) (Parent Ex. A at p. 2).[5]

It is well settled that the pendency provision does not dictate that a student must remain in a particular site or location, or receive services from a particular provider; rather, "it guarantees only the same general level and type of services that the disabled child was receiving" (T.M., 752 F.3d at 171, citing Concerned Parents, 629 F.2d at 756; see G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *6 [S.D.N.Y. Jan. 31, 2012]; Child's Status During Proceedings, 71 Fed. Reg. 46,709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]).

Separate from a student's educational placement is the selection of the site where services will be provided. Generally, the Second Circuit has held that the selection of a public school site for providing special education and related services is an administrative decision within the discretion of a district (R.E. v. New York City Dep't of Educ., 694 F.3d 167 191-92 [2d Cir. 2012]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). Similarly, in assessing whether the parent's selection of private service providers was reimbursable as part of the student's educational program under pendency, the Second Circuit noted that "[i]t is up to the school district to decide how to provide that educational program, at least as long as the decision is made in good faith" (T.M., 752 F.3d at 171).

[5] Although there is no information in the hearing record regarding transportation, as limited travel time was alleged to be a part of the student's educational placement, it should be noted that a change in the location of a school may impact the district's ability to provide something like limited travel time and may be considered as a factor in determining whether a change in location amounts to a change in educational placement (see DeLeon v. Susquehanna Community Sch. Dist., 747 F.2d 149, 154 [3d Cir. 1984] [although minor changes to method or schedule of transportation did not result in a change in educational placement, the Court acknowledged that under some circumstances, changes in transportation may have a significant enough effect on a student's learning experience to be considered a change in educational placement]; M.K. v. Roselle Park Bd. of Educ., 2006 WL 3193915, at *14-*15 [D.N.J. Oct. 31, 2006] [finding that the difference in travel time made programs "significantly dissimilar" from each other]).

However, where a school district has been paying for tuition at a nonpublic school pursuant to pendency as the student's current educational placement, "it must continue to do so until the moment when the child's educational placement changes" (E. Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 599 [S.D.N.Y. 2011], aff'd sub nom. R.E., 694 F.3d 167 [2d Cir. 2012]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *6 [S.D.N.Y. Mar. 17, 2010]). Parents can successfully secure stay put protection if they obtain an administrative or judicial ruling that validates their decision to move a student from an IEP-specified public school setting to a nonpublic school that they unilaterally selected without the district's input and this placement becomes the "then-current educational placement" for purposes of the stay-put rule, so long a proceeding is pending (Schutz, 290 F.3d at 483 [noting that "once the parents' challenge succeeds, . . . consent to the private placement is implied by law" and the funding of the private placement becomes the responsibility of the school district pursuant to stay put]).[6]

The question then remains under what circumstances would a parent be permitted to change the site for the provision of special education and related services while maintaining the student's educational placement, including the district's obligation to fund the cost of tuition.

As indicated by the IHO, neither party has submitted legal authority specifically addressing this question (see Interim IHO Decision at p. 4). On appeal, the parents have pointed to decisions from the Office of State Review which have assessed whether two nonpublic schools are "substantially and materially the same" in determining whether the stay-put rule applies to a parent's decision to move a student from one nonpublic school to another nonpublic school (see Application of a Student with a Disability, Appeal No. 16-020; Application of a Student with a Disability, Appeal No. 12-098). While the parents are correct that SROs have applied this standard in the past, those decisions did not explicitly adopt the standard for parental transfers of a student from one nonpublic school to another (id.). Rather, those decisions applied the "substantially and materially the same" standard as it was the standard being argued by the parties and found that pendency could not be at the new school absent a finding of substantial similarity (id.). In this matter, after noting that the parents did not cite legal authority allowing for the transfer of pendency to a new unilateral placement and further noting that the parents have not provided any explanation as to why the student was moved from iHope to iBrain, the IHO still applied the "substantially and materially the same" standard and found that the schools were not substantially similar (Interim IHO Decision at pp. 4-6).

In her interim decision on pendency, the IHO made two alternative findings. First, she found that there was insufficient evidence in the hearing record to establish the details of the 2017-18 iHope program that was established as pendency via the unappealed June 2018 IHO decision (Interim IHO Decision at pp. 4-5). She noted that the iHope program was not described in detail in the unappealed decision, that there was no copy of the 2017-18 iHope IEP in the hearing record, and that iBrain's director of special education lacked actual knowledge of the student's 2017-18 program at iHope or how it was implemented (id.). Second, she found that there was a basis for finding that the two programs were not substantially similar, in that it was unclear if parent

[6] At least one Court has determined that pendency at a nonpublic school is the school itself, finding that the IHO in that matter erred in finding that "the child's pendency was his program, rather than the Cooke Center . . . A program is not a 'place' where educational services are rendered. A school is a place" (S.S., 2010 WL 983719, at *6 n.1).

counseling and training had been provided and that no vision therapy was provided to the student "for the entire summer" (id. at p. 5).

On appeal, the parents contend that the IHO erred in finding that there was insufficient information in the hearing record to establish substantial similarity, and erred in finding that iBrain was not substantially similar to iHope.

Whether a student's educational placement has been maintained under the meaning of the pendency provision depends on whether the educational program is "substantially and materially the same" as the student's educational program for the prior school year (Letter to Fisher, 21 IDELR 992 [OSEP 1994]; see Application of a Student with a Disability, Appeal No. 16-020).

The United States Department of Education's Office of Special Education Programs has identified a number of factors that must be considered in determining whether a move from one location to another constitutes a change in educational placement, including: whether the educational program in the student's IEP has been revised; whether the student will be educated with nondisabled peers to the same extent; whether the student will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement is the same option on the continuum of alternative placements (Letter to Fisher, 21 IDELR 992 [OSEP 1994]).

However, it is unclear whether the same factors would apply in assessing changes in school selection initiated by a parent considering the purpose of the pendency provision (see J.F. v. Byram Tp. Bd. of Educ., 629 Fed. Appx. 235, 237 [3d Cir. 2015]), which is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig, 484 U.S. at 323 [emphasis in original]; Evans, 921 F. Supp. at 1187; Bd. of Educ. v. Ambach, 612 F. Supp. at 233). The Second Circuit's interpretation of educational placement was also based, in part, on policy considerations regarding the administrative discretion of local educational agencies in implementing educational programs (Concerned Parents, 629 F.2d at 756 ["we conclude that the term 'educational placement' refers only to the general educational program in which the handicapped child is placed and not to all the various adjustments in that program that the educational agency, in the traditional exercise of its discretion, may determine to be necessary"] [emphasis added]).

The nature of the student's educational placement being based on the June 2018 IHO decision directing tuition reimbursement for the student at iHope further complicates what factors to apply in assessing whether the change in schools from iHope to iBrain resulted in a change in educational placement, as it is impossible from the hearing record to tell "whether the educational program in the student's IEP has been revised." While a nonpublic school is not required to develop an IEP or a written plan (Carter, 510 U.S. 7 [the nonpublic school selected by the parent need not employ certified special education teachers or have its own IEP for the student to be considered appropriate]), in order to determine whether two programs are substantially similar, an attempt must first be made to identify what constitutes the student's educational program. State regulation defines a change in program as "a change in any one of the components" of an IEP, which includes, among other things, the size of the special class in which a student is recommended to receive services, supplementary aides and services and program modifications, supports for

school personnel, the extent to which parents will receive parent counseling and training, any needed assistive technology devices or services, and the anticipated frequency, duration, and location of recommended programs and services, as well as testing accommodations, the extent to which the student will participate in classes with nondisabled peers, transition planning, and 12-month services (8 NYCRR 200.1[g]; 200.4[d][2][a], [b][2]).

The hearing record includes a detailed description of the program and services available at iHope, but it is not specific to the student, and contains only a sample schedule with respect to related services (see Dist. Ex. 4 at pp. 1-10). It does not specify the student-teacher ratio(s) offered at the school and notes that the related services mandates, duration and frequency for each student attending the program will be provided per an "iHope IEP" developed for each student (id. at p. 5). The iHope program description identified related services available by department and included speech-language services, assistive technology, hearing education services, conductive education services, OT, PT, vision education services, parent counseling and training, health and nursing services, social worker services, and specially designed vocational educational and career development (id. at pp. 5-7).

The June 6, 2018 IHO decision contains an abbreviated description of why the 2017-18 program provided to the student at iHope was an appropriate unilateral placement for tuition reimbursement purposes, which reads in its entirety as follows:

> The uncontroverted testimony and evidence offered demonstrate that iHope provides an intensive education designed to serve the student's intellectual and physical needs. For example, he has an extended school day, extended related services sessions to accommodate his need for two-person transfer, and rest breaks built into his related service sessions. He is taught using the direct one-on-one instruction model that includes pacing, frequent opportunity to respond, feedback, and reinforcement to maintain student engagement and ensure learning. The record contains ample evidence that the student has made progress since enrollment at iHope.

(Parent Ex. B at p. 6).[7]

The testimony and questioning from iBrain's special education coordinator elicited the following details about the student's program at iBrain (Tr. pp. 35-55). iBrain provides a 12-month program (Tr. p. 38). The school day is an extended school day beginning at 8:30 a.m. and ending at 5:00 p.m. (id.). The student is currently placed in a 6:1+1 class at iBrain (id.). He receives "push-in" and "pull-out" services for his therapies (id. at pp. 38-39). He receives individual PT five times weekly, individual OT five times weekly, and individual speech-language therapy five times weekly (Tr. p. 39). The special education coordinator testified that the student would be receiving individual vision therapy three times weekly, after a vision therapist is added to the staff, "starting in September" (id.). The student also receives assistive technology services once weekly for 60 minutes and parent training and counseling once monthly for 60 minutes (Tr. pp. 40-41).

[7] The decision also noted that the student was in a 12-month program (Parent Ex. B at p. 3).

The special education coordinator stated that she was "very familiar" with the educational program that was provided to students at iHope and that she could not think of any differences between iHope and iBrain's program (Tr. pp. 41-43).[8] The special education coordinator was questioned further about her basis for knowledge of the 2017-18 program provided at iHope and the 2018-19 program being provided at iBrain, and repeated that there were "no differences" (Tr. pp. 48-50). Asked to compare the program provided at iBrain to what was described about iHope's 2017-18 program as described in the unappealed IHO decision dated June 6, 2018, the special education coordinator stated that he was receiving those services at iBrain as well, stating as follows:

> So [the student] is receiving all of his services as a 60-minute mandate, which does allow for the additional time for a two-person transfer. He has a one-to-one paraprofessional . . . making sure that you have the necessary staff at all times for the two-person transfers. The 60 minutes also incorporates time for him to take the necessary rest breaks . . . He is receiving direct instruction services one-on-one with the teacher, using the techniques such as you described, including the use of reinforcements, an extended (indiscernible) time, in order to make sure that he is given every opportunity that he needs to make progress towards his educational goal.

(Tr. pp. 51-52).

I find that there is insufficient information about some important details with respect to the program provided to the student at iHope during the 2017-18 school year to make a reasonable determination as to whether the transfer of the student to iBrain constituted a change in educational placement or is a substantially similar placement.

Specifically, there is no objective information in the hearing record concerning the student-to-teacher ratio of the iHope program provided to the student, a relevant factor in determining substantial similarity, as set forth above. Moreover, the hearing record does not specify the exact amount or frequency of related services provided to the student at iHope during the 2017-18 school year. Although the hearing record provides more information about the student's program at iBrain, the hearing record does not include any information regarding hearing education services, conductive education services, health and nursing services, social worker services, or specially designed vocational educational and career development, all services identified in the iHope program description (see Dist. Ex. 4 at pp. 5-7). Without more specific objective information regarding the educational program provided to the student at iHope, which constitutes the student's educational placement for the purposes of pendency, the special education coordinator's testimony that there were no differences between the two programs is conclusory and insufficient.

[8] The transcript is unclear about the exact language used here, and there are several notations reading "(indiscernible)" during this portion of the testimony (see Tr. pp. 39-46). The IHO asked the witness to slow down and repeat herself on several occasions, stated at one point that she could not understand the witness, and inquired unsuccessfully about switching to a "landline" (Tr. pp. 40-45).

Accordingly, the parents' request that the district be required to fund the costs of the student's attendance at iBrain and provide special transportation during the pendency of this matter is denied.

As a final note, this is not a situation where the student does not have a pendency placement. The parties agree that the unappealed June 2018 IHO decision set the student's pendency placement at iHope as implemented during the 2017-18 school year. The parents chose to move the student to iBrain prior to the start of the 2018-19 school year and prior to filing the due process complaint notice in this matter; however, they have not provided any explanation as to why they decided to move the student from one school to another. While such an explanation is not relevant to the above determination regarding whether the two schools are substantially similar, it could be relevant to determining whether the "substantially and materially the same" standard should apply to the parents' decision to switch schools (see Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 61 [D.N.H. 1999] [holding that when a student had aged out of a particular program and the district had not identified a placement comparable to the student's then-current educational placement, the nonpublic school selected by parents became the student's pendency placement because it was substantially similar to the student's prior placement]).

VII. Conclusion

While parents may, under certain circumstances, maintain pendency in a different nonpublic school if it is substantially similar to the original pendency placement, the hearing record in this matter does not support such a finding.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 9, 2018

STEVEN KROLAK
STATE REVIEW OFFICER