The University of the State of New York

The State Education Department
State Review Officer
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No. 18-114

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

Appearances:
Brain Injury Rights Group, attorneys for petitioner, by Moshe Indig, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals, 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) which determined her daughter's pendency 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 at the International Academy of Hope (iHope) pursuant to the decision of an IHO, dated May 17, 2018, and denied the parent's request for pendency at the International Institute for the Brain (iBrain). 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

Due to the nature of this interlocutory appeal, a full recitation of the student's educational history is not necessary. Briefly, the student was the subject of a prior impartial hearing, which was decided on May 17, 2018 (see Parent Ex. C). For the 2017-18 school year, the student had been unilaterally placed at iHOPE (see id. at p. 3). In relevant part, the May 2018 IHO decision, which was not appealed, ordered the district to "reimburse the [p]arent and/or directly pay the cost

[] of the student's tuition, 1:1 paraprofessional and related services at the private school for the 2017-2018 [school] year" (id. at p. 9). Although the hearing record does not specify when, at some point the parent enrolled the student at iBrain for the 2018-19 school year (see Tr. pp. 49-50; Parent Ex. A at p. 2).

The parent filed a due process complaint notice dated July 9, 2018, in which she alleged that the district failed to offer the student a FAPE for the 2018-19 school year and requested an interim order on pendency requiring the district to pay for the student's tuition and related services at iBrain, including special transportation accommodations (Parent Ex. A at pp. 1-2).

A. Pendency Hearing and Decision

On July 30 and August 13, 2018, the IHO held a hearing on pendency (Tr. pp. 1-84). In a decision dated August 28, 2018, the IHO first determined that there was no dispute that the student's educational placement for the purposes of pendency was the May 17, 2018 unappealed IHO decision, which ordered the district to fund the student's placement and program at iHope (IHO Decision at p. 4). The IHO then determined that the parties agreed that the sole issue to be addressed was "whether or not the [s]tudent's program at iBrain [wa]s 'substantially similar' to her prior program at iHope such that iBrain can be deemed to be the [s]tudent's current pendency program" (id.).

The IHO found that the hearing record lacked sufficient information about the student's actual iHope program for the 2017-18 school year for the parent to meet her burden that the iHope and iBrain programs were substantially similar (IHO Decision at p. 4). Specifically, the IHO noted that neither the iBrain IEP nor the iHope IEP were included in the hearing record, and as such, she could not compare the two programs by reviewing the IEPs (id.). The IHO also found that while the unappealed May 2018 IHO decision set forth certain aspects of the student's iHope program, it did not set forth enough information about the actual program (the frequency of related services, etc.) to make a determination as to whether the iBrain program was substantially similar, and that the mere fact that the same types of services were provided did not make the programs substantially similar (id. at pp. 4-5).

With respect to the parent's assertion that the programs were "identical," the IHO found that as of the filing of the due process complaint notice and the first day of the pendency hearing, iBrain did not have the staff necessary to provide the services that the student received at iHope, and, at that time, iBrain did not provide parent counseling and training or vision therapy. (IHO Decision at p. 5). Furthermore, the IHO found that "[e]ven as of the date of the second pendency hearing (by which time the summer portion of the extended school year had ended), the [s]tudent was still not receiving vision therapy" (id.). The IHO also noted that the assistive technology department and the parent training and counseling program at iBrain were still in the process of being formed as of July 2018, it did not appear parent counseling and training was provided during the summer, and iBrain “was still a work in progress” in July 2018 because it was not yet fully staffed and functioning at that time (id.). Additionally, the IHO determined that the program at

iBrain was not as comprehensive as the program at iHope and lacked many of the services described as being a part of the iHope program (id.).[1]

The IHO determined that, based on the evidence and testimony in front of her, iBrain and iHope were not substantially similar, and that iBrain was not the student's pendency placement (IHO Decision at p. 6).

B. Events Post Dating the Hearing

In a September 28, 2018, email, the parent requested that the IHO recuse herself from the case to avoid the appearance of personal or professional interest, and due to the appearance of bias (see Request for Review Supp. Ex. AA). In a September 30, 2018, email, the IHO denied the request (id.).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in denying her request for pendency at iBrain. The parent also appeals from the IHO's denial of the parent's request for recusal.[2] As an additional procedural matter, the parent asserts that the district should be precluded from challenging the similarity of the two schools based on the doctrines of collateral estoppel or defense preclusion. The parent submits as additional evidence IHO decisions for hearings involving other students, which have found iHope and iBrain to be substantially similar and have awarded those other students' pendency at iBrain (Req. for Rev. Ex. DD).

The parent asserts that the IHO erred in finding that iHope and iBrain were not substantially similar. Initially, the parent contends that the IHO erred in finding that the hearing record did not contain sufficient information regarding the student's program at iHope for the 2017-18 school year, and the parent submits the 2017-18 iHope IEP as additional evidence. The parent further contends that the IHO erred in finding that the two schools were not substantially similar due to a lack of vision services and parent counseling and training. The parent asserts that although the student had not received vision services at iBrain as of the time of the hearing, she "would be receiving such services." The parent further contends that iBrain hired a social worker to provide parent counseling and training to the student and that it could have been provided in accordance with a mandate for one session of parent counseling and training per month. The parent further contends that the IHO erred in finding the testimony of the witness from iBrain lacked credibility

[1] The IHO also noted that she was "troubled" by the conflicting testimony presented by the parent's sole witness regarding the services provided at iBrain (IHO Decision at pp. 5-6).

[2] According to State regulation, "[a]ppeals from an impartial hearing officer's ruling, decision, or failure or refusal to decide an issue *prior to or during a hearing* shall not be permitted, with the exception of a pendency determination made pursuant to subdivision 4 of section 4404 of the Education Law" (8 NYCRR 279.10[d]). To the extent that the IHO's denial of the parent's request for recusal was made after the pendency hearing but prior to the impartial hearing, and concerns the IHO's ability to conduct the impartial hearing, this portion of the parent's appeal, as explained in more detail below, is not appropriately before me and will not be decided upon. Should the parent so choose, she retains the ability to appeal the IHO's denial of the recusal request after the IHO makes a final determination on the merits of the issues arising out of the impartial hearing (id.).

due to a conflict in her description of services offered by iBrain. The parent asserts that the testimony reflected that the witness explained that the student will have vision services in the future and did not indicate she was currently receiving vision services.

For relief, the parent requests an order directing the district to pay for the student's full tuition at iBrain (including the services of a 1:1 paraprofessional) as well as special transportation accommodations, including limited travel time, under 60-minutes, and a paraprofessional.[3]

In an answer, the district admits and denies the allegations contained in the request for review, argues for upholding the IHO's decision that iHope and iBrain were not substantially similar, and asserts that the student has no right to pendency because the parent "unilaterally discontinued the services constituting the [s]tudent's pendency placement" by removing the student from iHope and enrolling her in the parent's preferred placement at iBrain.

In a reply to the district's answer, the parent asserts that the SRO should not consider the district's argument that the parent cannot transfer the student from one private school to another, regardless of whether the schools are substantially similar, as it was not addressed at any point in the IHO's decision and it was not raised in the parent's request for review. The parent further asserts that if the district believed that the IHO failed to address an issue relevant to pendency, it should have raised that issue as part of a cross-appeal.

V. Applicable Standards

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

[3] In a footnote, the parent also requests as an alternative remedy, that the district be ordered to pay for (1) all of the student's related services; (2) the 1:l paraprofessional services; (3) special transportation accommodations, and (4) any other services that overlap between iHope and iBrain.

the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

VI. Discussion

A. Initial Matters

1. Additional Evidence

The parent includes four exhibits with her request for review (Req. for Rev. Exs. AA-DD). Generally, documentary evidence not presented at a hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp.

2d 467, 488-89 [S.D.N.Y. 2013] [holding that an SRO is only obligated to seek additional evidence if, without such evidence, the SRO is unable to render a decision]). The district does not object to the introduction of the evidence, and in fact, cites to each of the exhibits in its answer. However, inclusion of additional evidence is a determination that rests solely within the discretion of the SRO (see 8 NYCRR 279.10[b]; L.K., 932 F. Supp. 2d at 488-89).

The document attached to the request for review as Exhibit AA is a series of emails between the IHO and the parent, dated September 28, 2018 – October 1, 2018, wherein the parent informed the IHO of her intent to appeal the pendency order and requested that the IHO recuse herself from the "upcoming impartial hearing" concerning the substance of the parent's due process complaint notice. In response, the IHO declined to recuse. The request for recusal was based largely upon the parent's disagreement with the pendency order currently on appeal, and her claim that the IHO had, in a prior case with a different student attending iHope, denied that student pendency at iBrain. This document is considered for the limited purpose of addressing the procedural adequacy of the parent's appeal of her request for the IHO's recusal as discussed further below.

The document attached to the request for review as Exhibit BB, which purports to be the student's proposed IEP created by iHOPE staff in March 2017, was first and foremost, available to the parent for inclusion into the hearing record, but the parent did not attempt to place the document into the hearing record (see Tr. pp. 1-92). Further, in line with the decision herein, the document is not necessary to render a decision in this matter. As such, I exercise my discretion and decline to consider this evidence on appeal.

The document attached to the request for review as Exhibit CC, is an affidavit of the special education coordinator at iBrain who testified during the hearing. The affidavit provides information concerning the program and services at iBrain for the 2018-19 school year, which the witness had testified to during the pendency hearing (see Tr. p. 49). The affidavit also purports to identify the specific services and program that the student received at iHOPE for the 2017-18 school year. While the parent objects to the IHO's decision that the witness could not testify regarding the student's program at iHope for the 2017-18 school year because the witness did not have first-hand knowledge of it (see Tr. p. 48), the information contained in the affidavit does not directly link the affiant with the specific knowledge of the student's program beyond a general statement that the affiant was a part-time IEP coordinator at iHope at the time the student's March 2017 iHope IEP was developed and for the summer portion of the 2017-18 school year. There is no direct statement that the affiant oversaw or coordinated the student's program or participated in the development of the proposed March 2017 iHope IEP. Accordingly, the affidavit does not specifically address the IHO's finding and cannot be used to identify the student's program at iHope for the 2017-18 school year. The evidence is not necessary to render a decision, and as such, I exercise my discretion and decline to consider this evidence on appeal.

The document attached to the request for review as Exhibit DD, purports to show that other IHOs have found the iHope and iBrain programs to be similar in matters before them regarding other students, and the parent suggests that the district should be collaterally estopped from arguing that in this case, the programs are not substantially similar for this student.[4] Initially, because the

[4] The doctrine of collateral estoppel "precludes parties from litigating a legal or factual issue already decided in

parent did not raise the issue of estoppel at the impartial hearing, she is barred from asserting it for the first time on appeal (Austin v. Fischer, 453 Fed. App'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"]). Additionally, the premise of the parent's argument is without merit, as each student's program is factually distinct and the similarity of each student's program must be assessed independently (see Application of a Student with a Disability, Appeal No. 18-116; Application of a Student with a Disability, Appeal No. 18-113. Accordingly, the exhibit is not necessary to render a decision, and I decline to consider this evidence on appeal.

2. Scope of Review

The parent appeals from the IHO's denial of the parent's request for recusal. As noted above, State regulations governing the practice of appeals for students with disabilities limit appeals from an IHO's interim determination to those involving pendency (stay-put) disputes (8 NYCRR 279.10[d]; see Educ. Law § 4404[4]). In an email dated September 30, 2018, the IHO denied the parent's request that the IHO recuse herself (see Req. for Rev. Ex. AA at pp. 1-2). To the extent that the parent appeals from the IHO's decision on the parent's motion for the IHO to recuse herself, State regulation does not allow for an interlocutory appeal on issues other than pendency disputes, and that portion of the parent's appeal must be dismissed as premature (see Application of a Student with a Disability, Appeal No. 11-138). State regulation also provides that a "party may seek review of any interim ruling, decision, or failure or refusal to decide an issue" in an appeal from an IHO's final determination (8 NYCRR 279.10[d]). Thus, if necessary, the parent may appeal from the IHO's September 28, 2018 interim decision on recusal after the IHO closes the hearing record and issues her final determination on all the remaining issues in the proceeding.

B. Pendency

The parent appeals, asserting that the IHO erred in denying her request for pendency at iBrain. The parent asserts that the IHO erred when she found that the student's current educational program at iBrain was not substantially similar to the student's 2017-18 educational program at iHope. The IHO based her decision in part on a determination that the hearing record lacked sufficient information about the two programs, and also on the lack of vision services or parent counseling and training at iBrain (IHO Decision at pp. 4-6).

As determined by the IHO, and agreed to by the parties, the student's educational placement for the pendency of this proceeding is based on an unappealed May 17, 2018 IHO decision (IHO

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an earlier proceeding" [emphasis added] (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19, 2006]). However, there is no evidence that any of the three purported IHO decisions contained in Exhibit DDD were issued prior to the pendency decision at issue. To wit, the first document is signed and dated October 3, 2018, over a month after the IHO in this case rendered her pendency decision and, as such, the doctrine of collateral estoppel must fail. The second document is signed, but undated, also rendering the doctrine of collateral estoppel inapplicable. Finally, the third document is unsigned and undated, similarly rendering the doctrine of collateral estoppel inapplicable.

Decision at p. 4). The May 2018 IHO decision ordered the district to fund the cost of the student's tuition, 1:1 paraprofessional, and related services at iHope for the 2017-2018 school year (see Parent Ex. C).

I first note that the IHO made a determination that both parties agreed that the sole issue before her was whether the student's current program at iBrain was "substantially similar" to her prior program at iHope such that pendency could be at iBrain (IHO Decision at p. 4). This determination was not part of an appeal or cross-appeal, and as such, is final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Accordingly, the sole substantive issue presented for review is whether the hearing record supports the parent's contention that iHope and iBrain were substantially similar.

A review of the hearing record shows that the IHO was correct in finding that it did not include sufficient evidence to establish that the two programs were substantially similar.

Generally, the May 2018 IHO decision establishing pendency indicated that iHope provided a 12-month program for children with brain-based injuries or disorders (Parent Ex. C at p. 8). With respect to the student's program, the decision indicated that the student required one-to-one attention at all times and was assigned a full time 1:1 paraprofessional (id.). It also indicated she was in a 6:1+1 class and was receiving physical therapy (PT), occupational therapy (OT), vision education services, speech-language therapy, and parent counseling and training; however, the decision did not indicate the frequency of those services (id.).

The iBrain director of special education testified that prior to working at iBrain, she was the IEP coordinator at iHope until January 2017, and then a part-time consultant at iHope until August 2017 (Tr. pp. 43-44, 45-47). However, the IHO found that the iBrain director could not testify as to what the student's program at iHope consisted of for the 2017-18 school year, as she did not have direct knowledge of the student's program (see Tr. pp. 47-52). Further, no other witnesses testified and no evidence was presented as to the student's program at iHope during the 2017-18 school year (see Tr. pp. 1-92).

The parent also points to the proposed March 2017 iHope IEP as evidence of the student's program at iHope for the 2017-18 school year, which appears from the exhibit list to have been included as an exhibit during the impartial hearing related to the 2016-17 school year that resulted in the May 17, 2018 IHO Decision (Parent Ex. C at p. 11). Although the proposed iHope IEP was not cited to in the decision, it is referenced in a summary of the testimony (see id. at pp. 4-5). However, during the hearing, the parent only introduced the IHO decision, and not the accompanying exhibit, and, as mentioned above, the May 2018 IHO decision only described the student's program at iHope in general terms (id. at pp. 4-5, 8). Additionally, while the parent did include the March 2017 iHope IEP as additional evidence with the request for review, and this document does identify the frequency of the related services recommended for the student for the 2017-18 school year, it cannot be used to identify what the student's program consisted of during the 2017-18 school year without at least some testimony from someone with knowledge that the recommended services were actually provided at iHope.

With respect to the general program provided at iBrain, the iBrain director of special education testified that all of the students at the school have the medical history of a traumatic

brain injury, the students all have 1:1 paraprofessionals, the program incorporates 30 minutes per day of 1:1 instruction as well as small group instruction throughout the day, and the school provides an extended school day, 12-month services, and related services, including PT, OT, vision services, hearing services, and speech-language therapy (Tr. pp. 38-40). She also testified that in addition to special education teachers and paraprofessionals, iBrain has a conductive educator, a teacher of the deaf, vision teachers, speech-language therapists, physical therapists, and occupational therapists (Tr. pp. 40-41).

With respect to the student's program at iBrain for the 2018-19 school year, the iBrain director of special education testified that the student had the same teacher, all of the same classmates, and the same paraprofessional as she had at iHope (Tr. p. 50). She testified that as of the date of the pendency hearing the student received PT, OT, and speech-language therapy, with all of those services provided five times per week for 60-minute sessions (Tr. p. 49). The director also testified "[The student will] have vision education two days a week for sixty minutes" (id.). During cross-examination, the director testified that as of July 25, 2018, iBrain did not yet have a social services department or a provider of vision services (Tr. p. 70). The director of special education further testified that parent counseling and training at iBrain is provided by a social worker, who started at the school on August 1, 2018 (Tr. pp. 67, 71). There is no indication in the hearing record as to when the student would begin receiving vision education services at iBrain.[5]

Based on the above, although the hearing record lacks detailed information as to the program and related services that the student received at iHope during the 2017-18 school year, the hearing record does support finding that vision education services were a part of the student's program at iHope and that the student did not receive vision education services at iBrain. The parent contends that the failure to provide vision education services is "a minor difference that would still not defeat the overwhelming similarity of the two programs." However, there is no evidence in the hearing record to support finding that the failure to provide vision education services could be considered a minor difference. Vision education services were a part of the unilateral placement that was found appropriate for the student in the May 2018 decision establishing pendency (see Parent Ex. C at pp. 4-5, 9).[6] Without any information indicating that the unilateral placement would have been appropriate for the student without vision education services, failure to provide that service must be considered as a change affecting the student's educational program (see Lunceford v. D.C. Bd. of Educ., 745 F.2d 1577, 1582 [D.C. Cir. 1984] [elimination of a basic element of an education program is a change in educational placement]). Accordingly, the hearing record supports the IHO's finding that as of the time of the hearing, the student's educational program at iBrain was not substantially similar to her prior program at iHope.

[5] In the affidavit annexed to the request for review, the director of special education indicated that the student began receiving two sessions per week of vision education services on October 9, 2018, which is the same date that the document was notarized and the request for review was filed.

[6] In the May 2018 decision establishing pendency, the IHO noted that the March 2017 iHope IEP was prepared, in part, by a teacher of the blind and vision impaired, that the student received vision education services, and that the student had made progress at iHope "in her vision" (Parent Ex. C at pp. 4-5, 9).

VII. Conclusion

Based on the above, I find that the IHO properly found that the hearing record did not support a finding that the student's programming and related services she received at iHope during the 2017-18 school year were substantially similar to the programming and related services she was currently receiving at iBrain for the 2018-19 school year, and therefore, the IHO was correct in finding that iBrain was not the student's placement for the purposes of pendency.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 3, 2018

CAROL H. HAUGE
STATE REVIEW OFFICER