The University of the State of New York

The State Education Department
State Review Officer
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No. 18-116

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

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

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, 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) determining her son'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 the International Academy of Hope (iHope), the placement established pursuant to the unappealed decision of an IHO, dated January 12, 2018, without evidence that the student could no longer attend iHope, and declined to address the parent's request for a determination that the International Institute for the Brain (iBrain) constituted the student's pendency placement absent such evidence. The appeal must be remanded for further proceedings.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee

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

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

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

III. Facts and Procedural History

The hearing record reflects that the student attended iHope for the 2017-18 school year (Parent Ex. B).[1] According to the parents, a district CSE convened on May 11, 2018 to develop an IEP for the student for the 2018-19 school year, and recommended a "12:1+(3+1)" special class placement in a district school (Parent Ex. A at pp. 2-3).

The parent initiated the instant administrative proceeding by filing a due process complaint notice dated July 9, 2018 (Parent Ex. A). The parent raised concerns about the adequacy of the CSE process and the student's IEP for the 2018-19 school year and asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (id. at p. 2). The parent sought requested an interim order on pendency that the district fund the student's placement at iBrain for the 2018-19 school year based on an unappealed January 2018 IHO decision granting the parent tuition reimbursement for iHope for the 2017-18 school year (id. at pp. 1-2; Parent Ex. B). The parent identified that the program at iBrain included "academics, therapies and a 1:1 professional" and a "private duty 1:1 nurse" during the school day (id. at p. 2). The parent also requested special transportation for the student including limited travel time (60 minutes), a wheelchair-accessible vehicle with air conditioning, a nurse, and a flexible pick up and drop off schedule (id.).

The parties proceeded to an impartial hearing on August 24, 2018 and concluded the pendency portion of the hearing that day (see Tr. pp. 1-27).[2] The parent's advocate argued during the hearing that iBrain constituted the student's pendency placement because the program it provided was "substantially similar" to the student's placement at iHope (Tr. pp. 4-5). In an interim decision dated September 4, 2018, captioned "Hearing Officer's Interim Order on Pendency," the IHO noted that the district agreed that the student's pendency placement was established by an unappealed IHO decision and consisted of placement at iHope with related services (IHO Decision at pp. 2-3). However, rather than addressing the parent's argument that the student's placement at iBrain constituted a continuation of the student's pendency placement because the program at iBrain was substantially similar to that at iHope, the IHO found that "the reasons why [the student] can no longer attend iHope is fundamental to a determination of pendency where pendency lies in a parental placement," and that the parent bore the burden of establishing why the student could no longer attend iHope (id. at pp. 3-4). The IHO determined that during the "continuation of the hearing in this matter, the parent shall produce evidence regarding why [the student] can no longer continue attending [iHope] for the [2018-19] school year for the purpose of determining pendency . . . in the form of documentation from [iHope] that [the student] can no longer attend the school" (id. at p. 4). Without such evidence, the IHO indicated that "the issue of a substantially similar

[1] Due to the status of this matter as a dispute regarding a pendency determination, there has been little evidence entered into the hearing record and the factual background is derived from factual allegations in due process complaint notice and a prior IHO decision involving this student (see Parent Exs. A-B).

[2] At the impartial hearing, the IHO requested that the parties submit a "short memo[randum] . . . and some supporting case law" regarding their respective positions (see Tr. pp. 21-23). Correspondence from the district to the Office of State Review reflects that neither party submitted a post-hearing brief prior to the IHO's issuance of the decision appealed from in this matter.

placement for pendency purposes will not be heard, and the parent's placement at [iHope] will constitute pendency unless the parties otherwise agree" (id.).

IV. Appeal for State-Level Review

On appeal, the parent argues that the IHO improperly found that the parent has the burden of establishing that the student was unable to continue attending iHope in order to transfer him to iBrain and maintain his entitlement to pendency. The parent also argues that the IHO incorrectly found that the student's inability to continue attending iHope could only be shown through documentation from iHope. The parent claims that the IHO erroneously conflated the student's then-current educational placement to be a physical location or specific building. In addition, the parent maintains that the hearing record establishes that the programs provided at iBrain and iHope are substantially similar, which is based solely on the student's program, not on the "particular school or its geography."[3] The parent also argues that the district should be precluded from raising a defense concerning the substantial similarity of these programs because the similarities between iHope and iBrain have been previously adjudicated in multiple impartial hearings involving other students, several of which have been resolved in favor of the parents of those students, the district failed to appeal those cases, and it would be inefficient to keep litigating the same issue. The parent also argues the IHO cannot be fair and impartial in this matter, and requests that the IHO be removed from hearing this matter.[4]

In an answer, the district generally denies the parent's allegations and requests dismissal of the parent's request for review. The district maintains that the parent's appeal should be dismissed because the IHO has not yet issued a final determination on pendency and the parents have no right to appeal from an interim order on pendency. If the parents are permitted to appeal, the district claims that the IHO correctly found that it was the parent's burden to establish why the student was not permitted to reenroll in iHope before moving the student to iBrain. The district also argues that the parent does not have a right to pendency at district expense where the student has been removed from iHope and enrolled at iBrain. The district asserts that the student's pendency placement is iHope and the parent "abandon[ed] pendency by removing the [s]tudent from his

[3] In a footnote, the parent requests that, if the SRO "finds that pendency relief should not be granted with respect to any portion of [the student's] current educational program or related support services," the SRO "grant pendency relief insofar as [the SRO] determines pendency is warranted for some services, as pendency relief is divisible by each individual service at issue." 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] [raising an argument only in a footnote is insufficient to preserve an issue for review on appeal], citing United States v. Restrepo, 986 F.2d 1462, 1463 [2d Cir. 1993]; see also R.R. v. Scarsdale Union Free Sch. Dist., 366 Fed. App'x 239, 241-42 [2d Cir. Feb. 18, 2010]; 8 NYCRR 279.8[c]). However, the IHO may consider this argument on remand.

[4] The affidavit of service attached to the request for review indicates that service was effectuated on October 16, 2018; however, the request for review was stamped received by the district, and the jurat reflects that the affidavit was sworn to, on October 15, 2018. In addition, the memorandum of law submitted by the parent failed to include a table of contents as required by State regulation (see 8 NYCRR 279.8[d]). While counsel for the parent is relatively new to practicing in this forum, my expectation is that he will improve with compliance quickly and become more attentive to the regulations governing the appeals process in the future.

pendency placement" and placing him at iBrain. Alternatively, the district argues that the matter should be remanded to the IHO to determine whether the parent has established that the student's program at iBrain is substantially similar to his program at iHope, as the IHO did not reach this issue. Additionally, the district claims it is not estopped from arguing that the programs are not substantially similar because the analysis of substantial similarity is case specific for each student, and that the student "is not the same" as the students in the other cases cited by the parent. Finally, the district claims there is no basis for recusal of the IHO.

In a reply, the parent responds to the district's stated defenses. With respect to the district's argument that the parent may not appeal from the IHO's interim determination because there was no final determination on pendency, the parent argues that interim decisions regarding pendency are subject to immediate review. The remainder of the parent's reply consists largely of rearguing the claims set forth in the request for review, beyond the scope of a reply as permitted by State regulation, and has not been considered to that extent (see 8 NYCRR 279.6[a]). Furthermore, the parent did not verify her reply as required by State regulation (8 NYCRR 279.7[b]).[5]

V. Discussion

A. Preliminary Matters

1. IHO Bias/Conduct of the IHO

The parent claims that the IHO was biased and must be removed from this case because the IHO "went to great lengths" to deny the parent's request that the district be required to fund the student's pendency placement at iBrain—by developing "new . . . law for the explicit purpose of erecting his own personal legal hurdle for the [p]arent to stumble over"—and falsely claimed that interim orders on pendency were not appealable. In response, the district argues there is no basis for recusal of the IHO as the IHO never informed the parent that interim orders of pendency were not appealable and the parent's disagreement with the IHO's findings does not provide a basis for finding bias.

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]). A review of the transcript reveals that both parties were

[5] Although denominated a reply memorandum of law, such is only permitted in support of a reply (see 8 NYCRR 279.8[b]).

treated fairly, with courtesy and respect by the IHO during the impartial hearing (see Tr. pp. 1-27). Regarding the parent's claim that the IHO provided incorrect information with respect to the appealability of interim orders on pendency, the parent cites to a document, submitted as additional evidence, that references a different student and impartial hearing than the student involved in this case (Req. for Rev. Ex. AA). As to the parent's claim that the IHO intentionally utilized an inappropriate legal standard to deny the student's pendency placement at iBrain, the record shows that the IHO, in making his decision, cited to pertinent legal authority relevant to the issue of pendency and attempted to apply it in a fair and neutral manner (see IHO Decision at pp. 3-4).

The only evidence of bias that the parent points to is that the IHO did not agree with the parent's proffered legal standard or issue a ruling in her favor that iBrain was the student's pendency placement. The parent's evidence and proffered argument falls markedly short of bias. To the extent that the parent disagrees with the conclusions reached by the IHO regarding the pendency ruling, 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] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083). In this case, even if the IHO misstated the laws applicable to pendency, it would not be an appropriate basis to require the IHO's recusal (see Liteky, 510 U.S. at 555). Accordingly, the parents' claims with respect to IHO bias are dismissed.

2. Ripeness

The district argues that the parent's request for review should be dismissed because the parent may not appeal from an interim order that was not a final determination on pendency. In essence the district is arguing that the pendency matter is not ripe for review. The district submits two supplemental exhibits to support their argument that no final determination was made (Answer Exs. 1; 2). As stated above, the purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability (Honig, 484 U.S. at 323; Evans, 921 F. Supp. at 1187, citing Ambach, 612 F. Supp. at 233), and a student's right to pendency arises once a due process complaint notice is filed (see Doe, 790 F.3d at 452). The parent filed the due process complaint in this proceeding on July 9, 2018, and on September 4, 2018 the IHO issued an interim order on pendency. The IHO identified that "at the continuation of the hearing in this matter, the parent shall produce evidence regarding why [the student] can no longer continue attending" iHope for the 2018-19 school year, and that "[a]bsent such evidence the issue of a substantially similar placement for pendency purposes will not be heard, and the parent's placement at [iHope] will constitute pendency unless the parties otherwise agree to pendency" (IHO Decision at p. 4). In an e-mail to counsel for the parent dated October 15, 2018, the IHO indicated that he would "issue [a] final order on pendency after [the hearing] record is complete. The interim order was purely procedural" (Answer Ex. 2). The district correctly identifies the IHO's intention to continue contemplating the did not intend to issue a final determination regarding the student's placement for purposes of pendency in this matter by the decision appealed from, and such a determination was contingent upon the receipt of additional evidence.

However, the district's accurate portrayal of the IHO's intentions is unavailing because the district misapprehends the scope of the regulation governing permissible interlocutory pendency appeals. State regulation provides parties with the right to appeal from an impartial hearing officer's ruling, decision, or failure or refusal to issue a determination on pendency on an interim basis, prior to issuance of a final decision (8 NYCRR 279.10[d]). As of the date of this decision, there is no indication the IHO has issued a final decision on pendency. To the contrary, a letter from the district to the Office of State Review reflects that as of October 31, 2018, "[n]o final pendency determination has yet been rendered, as the IHO stated he would entertain closing briefs that have not yet been submitted." The district also suggests that the continuation of the IHO hearing in this matter "alleviates any concern expressed by the SRO regarding 'the prompt resolution of the parties' dispute.'" I strongly disagree with this assessment. To the contrary, the district's response is particularly worrisome. A student's right to pendency automatically attaches as of the filing of the due process complaint notice (see 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see also Child's Status During Proceedings, 71 Fed. Reg. 46,710 [2006] ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]) and, considering the focus on maintaining the status quo during the proceeding and the time-sensitive nature of a pendency determination, an IHO may and generally should promptly resolve a pendency dispute as quickly as possible after the due process complaint is filed (see Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199-200 [2d Cir. 2002] [explaining that "given the time-sensitive nature of the IDEA's stay-put provision," appeals are necessary to give protections to the parent's rights]; see also "Questions Relating to Impartial Hearing Procedures Pursuant to Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner, as Amended Effective February 1, 2014," at p. 7, Office of Special Educ. [Rev. Sept. 2016] [noting that, if there is a dispute regarding a student's pendency placement, it is incumbent upon the IHO "to render a written decision regarding pendency as soon as possible and prior to determining any other issue"] [emphasis added], available at http://www.p12.nysed.gov/specialed/dueprocess/documents/qa-procedures-sep-2016.pdf). Well over four months has passed since pendency attached in this matter, and resolution of the pendency matter is still outstanding. While the legal ramifications of moving the student from one private school to another require careful consideration, there are no conceptually difficult fact questions to resolve in this case.[6] Consequently, the parent is entitled to appeal the IHO's determination in this case, however incomplete.[7] As a result, the district's arguments with respect to the parent's right to appeal are rejected.

[6] Whether the student is actually receiving a particular intervention or service or not, does not require lengthy fact-finding process. Furthermore, assuming, for the sake of argument, that the IHO was correct in holding that the reasons for moving the student from iHope to iBrain are critical to a correct stay-put determination, it should not take weeks, let alone months, of bantering to resolve that question.

[7] There may be instances where time has passed and there is no pendency ruling, but it does not constitute a failure on the part of the IHO within the meaning of (8 NYCRR 279.10[d]). For example, it is incumbent on parties to make it known to a presiding IHO if there is a pendency dispute that requires a ruling. If a party fails to make reasonable efforts to notify an IHO that there is a pendency dispute, it would be inaccurate to state that such IHO has "failed" to issue a ruling where such failure has only occurred because of the party's silence.

B. Collateral Estoppel

The parent claims that the district should be collaterally estopped from raising a defense concerning whether there are substantial similarities between iHope and iBrain as the issue has been previously adjudicated in favor of parents in other cases. The parent submits as Request for Review Exhibit BB a "sample of favorable decisions" to show that this issue has been contested in other pendency hearings between the district and other iBrain students and has been adjudicated in favor of the parents in those cases. The district claims that every analysis of substantial similarity is case specific for each student, and the district should not be precluded from raising a defense to substantial similarity because this case is not factually similar to the cases identified by the parent.

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19, 2006]). The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Grenon, 2006 WL 3751450, at *6). 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 (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6). Claims that could have been raised in the prior proceeding have been 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]).

In addition to res judicata, parties are also limited by the doctrine of collateral estoppel (or issue preclusion), which "precludes parties from litigating 'a legal or factual issue already decided in an earlier proceeding'" (Grenon, 2006 WL 3751450, at *6, quoting Perez, 347 F.3d at 426). To establish that a party is collaterally estopped from raising an issue, the opposing 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]).

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"]).

It is also unclear from the request for review whether the parent is arguing that the district is precluded based upon the doctrine of res judicata or collateral estoppel.[8] However, the district cannot be precluded from raising the issue of substantial similarity based on either doctrine under the facts of this case. Initially, both doctrines require a final 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 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 (Req. for Rev. Ex. BB at pp. 1, 10, 14). Only one of the decisions on pendency is dated and it was issued on October 3, 2018, almost one month after the decision on pendency was issued in this matter (id. at pp. 3, 10, 14).[9] Because a party may seek review from an interim determination on pendency in an appeal from the IHO's final determination (8 NYCRR 279.10[d]), and the parent has not provided any indication that any of the matters for which pendency decisions have been submitted has reached a final decision, the record before me contains no basis to determine that the pendency decisions have become final.

Further, taking both doctrines into consideration, the parent fails to establish the first element of collateral estoppel, that the identical issue was raised in a previous proceeding, and the third element of res judicata, that the claim could have been raised in the prior proceeding because they involved the same nucleus of operative fact. With respect to both elements, the program developed for each student is factually distinct as one of the purpose of the IDEA is to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs, (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]). Neither the IHO decisions provided by the parent as Request for Review Exhibit BB nor the facts of this case establish that the identical issue has been resolved in any of the other matters or that those matters arise from the same nucleus of operative fact. While it may be possible that some students share similar or even substantially the same programs from iHope to iBrain, this would only be evident through further development of the hearing record and a ruling on the merits of the parties claims. Moreover, review of the program descriptions in Request for Review Exhibit BB shows that they do not match the program provided to this student. As described in further detail below, the student's program at iBrain for the 2018-19 school year includes a 6:1+1 special class with five 60-minute sessions per week of individual occupational therapy (OT), physical therapy (PT) and speech-language therapy, two 60-minute sessions per week of individual vision therapy, one 60-minute session per month of parent

[8] The parent asserts that the "Second Circuit has held that a party may be collaterally estopped from raising a defense concerning an issue where" the elements of res judicata are met (Req. for Rev. at p. 6; see Grenon, 2006 WL 3751450, at *6; see also Marcel Fashion Group, Inc. v. Lucky Brand Dungarees, Inc., 898 F.3d 232, 241 [2d Cir. 2018] [explaining the elements of defense preclusion]).

[9] In addition, although one of the undated decisions indicates that it was issued prior to August 10, 2018 (Req. for Rev. 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 as a basis to preclude the district from arguing that the programs were not substantially similar.

counseling and training, and the services of a 1:1 paraprofessional and a 1:1 nurse (see Tr. pp. 14-15; Req. for Rev. Ex. A). In contrast, the IHO decisions submitted by the parent identify that one student received instruction in a 6:1+1 special class, four sessions per week of OT, five sessions per week of PT and speech-language therapy, and one session per month of parent counseling and training, and would be receiving three sessions of vision therapy (Req. for Rev. Ex. BB at p. 2). A second student received three 60-minute sessions per week of OT, five 60-minute sessions per week of PT and speech language therapy, one 60-minute session per month of parent counseling and training, three sessions of vision therapy, and the services of a 1:1 paraprofessional; however, the decision is unclear whether the student was in a 6:1+1 or 8:1+1 special class at iBrain (id. at pp. 8-10). The final IHO decision submitted by the parents does not identify what services the student receives as part of his program at iBrain (id. at p. 14). None of the decisions reflects that the students in those matters receive 1:1 nursing services. Accordingly, the additional evidence submitted by the parents reflects that the program provided to students at iBrain consists of varying amounts of services—specifically, that the students received differing amounts of OT and vision therapy—and precludes a determination that iHope and iBrain are substantially similar as a matter of law. Thus the evidence of prior rulings submitted by the parent does not enhance but undermines her argument that res judicata or collateral estoppel should apply in these circumstances.

Finally, to the extent that the parent is arguing "defense preclusion," the elements of defense preclusion are identical to those enumerated for the doctrine of res judicata, except that defense preclusion includes an additional fourth element that "the district court, in its discretion, concludes that preclusion of the defense is appropriate because efficiency concerns outweigh any unfairness to the party whose defense would be precluded" (Marcel, 898 F.3d at 241). The parent argues that "it would be inefficient to keep relitigating this same issue over and over again," and the district "should be precluded from contesting substantial similarity.". However, pendency determinations do not require exhaustion at the administrative level before bringing such an action to state or federal court (Murphy, 297 F.3d at 199-200; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 455 [2d Cir. 2015] [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"]), and if the parent was concerned with the efficiency of this process, she is permitted to bypass the administrative process for pendency purposes, if she chose. Furthermore, the parent provides no basis to conclude that the IHO decisions favoring her position should have preclusive effect, rather than the IHO decisions in favor of the district's position.

For these reasons, the parent's argument that the district must be precluded from challenging whether the student's iHope and iBrain programs are substantially similar is without merit.

C. Pendency

1. Legal Framework – Pendency

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]).

An educational agency's obligation to maintain stay-put placement is triggered when an administrative due process proceeding is initiated (E. Lyme, 790 F.3d at 445). When triggered, there are numerous ways that the terms of the stay-put placement may be established. First, a school district and parent may simply reach an agreement as to the services and programing that the student shall receive while a proceeding is pending (20 U.S.C. § 1415[j] ["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"] [emphasis added]). Where the parents and school district cannot agree upon the stay-put placement, the focus shifts to identifying the "last agreed upon" educational placement as the then-current educational placement (E. Lyme, 790 F.3d at 452; A.W. v. Bd. of Educ. Wallkill Cent. Sch. Dist., 2015 WL 3397936, at *3 [N.D.N.Y. May 26, 2015]). 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 E. Lyme, 790 F.3d at 452; Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Noting the inexact science of identifying a student's educational placement for purposes of pendency, the Seventh Circuit has noted that the inquiry necessarily requires a "fact-driven approach" (John M. v. Board of Educ. of Evanston Tp. High School Dist., 502F.3d 708, 714 [7th Cir. 2007] [holding that "respect for the purpose of the stay-put provision requires that the former IEP be read at a level of generality that focuses on the child's 'educational needs and goals'], citing Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS79) v. New York City Bd. of Educ., 629 F.2d 751, 754 [2d Cir. 1980] [holding that "educational placment" refers "to the general educational program in which a child who is correctly identified as handicapped is enrolled, rather than mere variations in the program itself"]). However, that the approach is fact-driven does not require that the proceeding be protracted, or that reams of evidence be submitted prior to issuance of a determination. As noted above, an IHO is expected to issue a decision on pendency as soon as possible.

Stay-put "is often invoked by a child's parents in order to maintain a placement where the parents disagree with a change proposed by the school district; the provision is used to block school districts from effecting unilateral change in a child's educational program" (Susquenita, 96 F.3d at

83). "Where the parents seek a change in placement, however, and unilaterally move their child from an IEP-specified program to their desired alternative setting, the stay-put rule does not immediately come into play" (M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 [3d Cir. 2014]). "[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" (M.R., 744 F.3d at 119; see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 484 [2d Cir. 2002]; see also Murphy, 297 F.3d at 201).

> The stay-put provision of the IDEA provides 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). The purpose of the provision is 'to maintain the educational status quo while the parties' dispute is being resolved.' T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 152 (2d Cir.2014). 'It therefore requires a school district to continue funding whatever educational placement was last agreed upon for the child until the relevant administrative and judicial proceedings are complete.' Id. at 171.

E. Lyme, 790 F.3d at 452).

The question in this case involves the circumstances in which the parent has already proceeded though due process at least once during which the desired alternative setting was endorsed by an administrative determination and the school district does not question that the private school that was the subject of the prior proceeding may serve as the student's stay-put. However, in the interim, the parent has transferred the student from one private setting that was unquestioningly a valid stay-put placement to another private school setting, and the parties sharply dispute whether the parent is permitted to transition their child from one private school to another and still receive public funding under the protections of the stay-put rule. The district argues that maintaining public funding under stay-put in the face of a transition to a new private school is a categorically impermissible change in the status quo, while the parents argue that if the new private school placement is "substantially similar" to the previously publicly-endorsed private school then the stay-put rule is satisfied and the district is required to fund the new private school during the pendency of the administrative proceedings and judicial review.

It appears that this particular nuance of stay-put (the transfer of the student from one parentally selected private school to another) has not been passed upon by a court; however, courts have assessed which features attendant to an "educational placement" are significant for stay-put purposes. One district court described the cases as falling into three categories "(1) Cases dealing with disciplinary expulsions of disruptive students who are protected under the IDEA; (2) Cases dealing with wholesale school closings based on fiscal or other policy considerations determined by the local school board; and (3) Cases dealing with adjustments to special educational services

provided to an individual student" (Cavanagh v. Grasmick, 75 F. Supp. 2d 446, 467 n.27 [D. Md. 1999] [collecting cases] [citations omitted]). In construing the stay-put provision, one district court faced a dispute in which the parents argued that the then current educational placement included the physical school while the district argued that the phrase addressed the IEP only, without regard to the physical location of the services (Eley v. D.C., 47 F. Supp. 3d 1, 8-9 [D.D.C. 2014]). After engaging in statutory construction and a review of caselaw including Concerned Parents, 629 F.2d 751, Lunceford v. Dist. of Columbia Bd. of Educ., 745 F.2d 1577, 1579 (D.C. Cir. 1984), and Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook Cty., Ill. v. Illinois State Bd. of Educ., 103 F.3d 545, 548 (7th Cir. 1996),[10] the Eley Court found "the Seventh Circuit's reasoning in Cook County persuasive and holds that the term 'educational placement' in the IDEA does mean 'something more than the actual school attended by the child and something less than the child's ultimate educational goals,' and can include both the physical location of educational services and the services required by the student's IEP" (Eley, 47 F. Supp. 3d at 16–17, quoting Cook County, 103 F.3d at 549).

As for the development of the caselaw in the Second Circuit, I note that Concerned Parents does not address the stay-put provision itself, but interprets the meaning of a change in "educational placement" which is used in another section of the IDEA, and the Court notes that the statute failed to define the term (Concerned Parents, 629 F.2d at 753). After Eley was decided the Second Circuit, when interpreting the stay-put provision, found that the interpretation of the term "educational placement" in Concerned Parents also guided the meaning of the term in the stay-put context, holding 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 while his administrative and judicial proceedings are pending. Instead, it guarantees only the same general level and type of services that the disabled child was receiving" (T.M., 752 F.3d at 171).[11] In T.M., the school district initially refused to provide pendency services directly but the Court held that the IDEA did not bar Cornwall from subsequently correcting its mistake and offering to provide the required pendency services directly and reversed the district court because it erred in holding that "Cornwall was obligated to afford T.M. 'stability and consistency' by keeping him with the same private service providers" that the parents had selected to provide pendency services (T.M., 752 F.3d at 171-72). The Court's opinion in T.M. appears to emphasize points previously stated in Concerned Parents, namely that "educational placement" in the stay-put context does not turn on the physical location of services or the identity of the provider. Instead, contrary to the holding in Eley that educational placement for stay-put purposes can include the physical location of educational services, the Second Circuit has reaffirmed the holding in Concerned Parents that "the term 'educational placement' refers only to the general type of educational program in which the child

[10] Although the facts in the instant proceeding are quite different, the Seventh Circuit's description of the issue before it seems similar—"What is challenged is the power of the court and the parents, rather than the power of the school district, to effect J.B.'s placement" (Cook County, 103 F.3d at 549).

[11] This echoes similar sentiments expressed by other circuit courts (see White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380 [5th Cir. 2003] [endorsing the view "that 'placement' does not mean a particular school, but means a setting (such as regular classes, special education classes, special schools, home instruction, or hospital or institution-based instruction)"]; DeLeon v. Susquehanna Cmty. Sch. Dist., 747 F.2d 149, 153 [3d Cir. 1984] [stating that "the touchstone in interpreting section 1415 has to be whether the decision is likely to affect in some significant way the child's learning experience"]).

is placed" (T.M., 752 F.3d at 171, quoting Concerned Parents, 629 F.2d at 753 [emphasis added]; G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *6 [S.D.N.Y. Jan. 31, 2012] [explaining that the pendency provision does not require a student to remain at a specific brick-and-mortar school).[12]

As noted above, in some circumstances 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 private school that they selected without the district's input and this placement becomes the "then-current educational placement" for purposes of the stay-put rule, so long as a proceeding is pending (Schutz, 290 F.3d at 484 [noting that "once the parents' challenge succeeds, . . . consent to the private placement is implied by law" and the funding of the private stay-put becomes the responsibility of the school district]). If "then-current educational placement" means only the general type of educational program in which the child is placed, then it appears that parents are not precluded from effecting alterations to a student's private programing without jeopardizing the district's obligation to fund the placement as stay put, so long as the alterations do not effect a change in educational placement. In order to qualify as a change in educational placement, one district court has held that the change "must affect the child's learning experience in some significant way" Brookline Sch. Comm. v. Golden, 628 F. Supp. 113, 116 [D. Mass. 1986], citing Concerned Parents, 629 F.2d at 751; N.M. v. Cent. Bucks Sch. Dist., 992 F. Supp. 2d 452, 464 [E.D. Pa. 2014]) and similarly, the District of Columbia Circuit has described it as "at a minimum, a fundamental change in, or elimination of a basic element of the education program" (Lunceford, 745 F.2d at 1582). 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]). Thus, in order to continue to receive the protections of stay-put funding, parents who effectuate a change in the student's programing must not change the child's learning experience in a significant way by ensuring that the private programing that they select remains substantially similar to the private programing that was endorsed in the ruling granting the parents tuition reimbursement. With this background in mind, I turn next to the question to be answered in this case, whether the student's learning experience in the programs offered at iHope and iBrain are substantially similar or if the student's learning experiences have been changed in a significant way such that his transfer from iHope to iBrain constituted a change to his educational placement.

2. Parent's Claim for Pendency Funding at iBrain

The IHO in the 2017-18 proceeding noted that the district conceded that it had failed to offer the student a FAPE for the 2017-18 school year and determined that the student's program at

[12] Another district court has relied on other Second Circuit precedent in T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 (2d Cir. 2009) to hold that "educational placement" in the stay-put provision does not refer to the 'bricks and mortar' of the specific school (D.C. v. Oliver, 991 F. Supp. 2d 209, 214 [D.D.C. 2013]).

iHope for the 2017-18 school year was appropriate to address the student's needs (Parent Ex. B at pp. 4, 7). The IHO in that proceeding described the student's program for the 2017-18 school year as follows: the student was in a 12-month program in a 6:1+1 special class with "extended school hours," and the student received five 60-minute sessions per week of individual OT and individual PT, four 60-minute sessions per week of speech-language therapy in a group of three students, one 60-minute session per week of individual speech-language therapy, and an unspecified amount of vision services (id.). The student also received the services of a 1:1 paraprofessional and a 1:1 nurse (id.)[13]

The special education director at iBrain (director)—who was previously the "IEP coordinator" at iHope—provided testimony further explaining the student's program at iHope in the 2017-18 school year (see Tr. p. 11). The director testified that while attending iHope, the student was placed in a 6:1+1 classroom with an interim paraprofessional;[14] she indicated that the student received 30 minutes of "direct instruction within the classroom, every day one-on-one with the teacher," in addition to classroom instruction throughout the day (Tr. pp. 12-13). The student also received OT, PT, speech-language therapy, and vision therapy services, "using a push in and pull out model" (Tr. pp. 12-13). The director also testified that the student received transportation services consisting of a "large bus" to accommodate his wheelchair, 1:1 nurse supervision while on the bus, and "a limit . . . on travel" (Tr. p. 13).

Turning to the program the student received at iBrain during the 2018-19 school year, the director testified that all students at iBrain receive 1:1 paraprofessionals, and that the student had a 1:1 nurse (Tr. p. 14). The director noted that iBrain teachers "utilize a direct instruction model for at least half an hour a day [in] the one-on-one setting," and that they "use the same principles during the small group and . . . paired instruction during the rest of the day" (Tr. p. 14). Additionally, the student's program at iBrain is a 12-month program (see Tr. p. 18). As to related services, the student receives five 60-minute sessions per week of individual OT, PT, and speech-language therapy, and two 60-minute sessions per week of individual "vision education services" (Tr. pp. 14-15). The director also testified that the parent receives one 60-minute session per month of parent counseling and training (Tr. p. 15). The director concluded her testimony by stating that the programs at iHope and iBrain were "essentially identical" (Tr. p. l5).[15]

[13] The IHO identified that iHope provides "[e]ach student" in the school with a 1:1 paraprofessional (Parent Ex. B at p. 7).

[14] The hearing record does not reflect what the director meant by an interim paraprofessional (Tr. p. 12).

[15] Although the director of iBrain did not testify regarding the student's transportation to iBrain, as limited travel time was alleged to be a part of the student's educational placement at iHope, some courts have found that a change in the location of a school may impact the district's ability to provide 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, 747 F.2d at 154 [holding that 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 two programs "significantly dissimilar" from each other]).

On cross examination, the director testified that, to her knowledge, iHope was still in existence at the time of the impartial hearing (Tr. p. 17).[16] When the director was questioned about the student's vision services, she admitted that iBrain did not currently have an adequate staff, but that she was "expecting to be fully staffed for the vision department in September" (Tr. pp. 19-20). However, it is unclear from the hearing record whether iBrain's inability to adequately staff the vision department meant that the student was receiving none, some, or all of his recommended vision services. It was also unclear from the director's testimony whether the program at iBrain was being provided in a 6:1+1 classroom. On October 29, 2018, I directed the Office of State Review to initiate an inquiry to the parties requesting additional evidence; specifically, the parent was directed to submit additional evidence reflecting the student-to-teacher ratio of the student's classroom in his current program at iBrain and the district was requested to identify "if it stipulates or denies the parent's representations regarding the student-to-teacher ratio" at iBrain. The parties were also permitted to submit written argument to provide their reasons in support of or opposition to the consideration of such evidence. Pursuant thereto, the parent submitted Request for Review Exhibit A, a letter from the director of iBrain dated October 30, 2018, as additional evidence. The letter described that the student's program for the 2018-19 school year were consistent with the director's descriptions provided at the hearing and clarified that the student was placed in a 6:1+1 classroom at iBrain. Additionally, the exhibit identified that the student received two 60-minute sessions of assistive technology services per week. The district objected to consideration of any additional evidence on this point, asserting that it would be unfair to accept this evidence without the district having an opportunity to review or rebut it, and that it was "without sufficient information to admit or deny" the parent's assertion regarding the student-to-teacher ratio at iBrain.[17] Accordingly, the district asserts the pendency hearing is continuing before the IHO, and that the parent has "failed to exhaust her administrative remedy with respect to pendency."[18]

Based upon the information in the hearing record, there are a number of similarities between the programs provided to the student at iHope in the 2017-18 school year and at iBrain in the 2018-19 school year. I find that in both programs, the student was provided with a 12-month program in a 6:1+1 special class, and the services of a 1:1 paraprofessional and a 1:1 nurse. The student was also provided five 60-minute sessions of individual OT and PT per week and five 60-minute sessions of speech language therapy per week. There are also differences. For instance, iHope provided the student with four sessions of individual speech language therapy per week and one group session, while iBrain provided the student with five sessions of individual speech

[16] The director testified that parents, in general, have removed their children from iHope and placed them at iBrain because they had become unhappy with administrative changes at iHope, and the tuition "down payment" may have become prohibitively expensive (see Tr. pp. 20-21). However, the director did not specifically discuss this matter with the parent in this case (Tr. p. 21).

[17] The district does not provide one concrete example of actions that it would take to obtain further information about iBrain that would further illuminate whether it was providing substantially similar or dissimilar services to the student than those received at iHope. The district already had the opportunity to explore the similarity of services or lack thereof at the impartial hearing and asked very few questions when cross-examining the director.

[18] As noted above, the IDEA's exhaustion requirement does not apply to pendency claims (see Murphy, 297 F.3d at 199-200) and the district's argument to the contrary is frivolous.

language therapy, but that difference is not so great as to represent a fundamental change in a basic element of the student's educational programming.

On the other hand, the evidence shows that iBrain provides the student with parent counseling and training and two 60-minute sessions per week of assistive technology services, but it is unclear whether the student received such services at iHope. It is also unclear to what extent iBrain was capable of providing vision services to the student as a result of staffing difficulties. Taken individually or collectively, changes to these services could constitute material differences in the educational placement.

Turning to the factors as described by OSEP that should be considered when determining whether a move from one location to another constitutes a change in educational placement, the student was obviously not receiving services under the district's IEP at iHope, and no other IEP featured prominently in the 2017-18 school year proceeding; therefore, that factor is of little relevance in this case. While the IHO in the 2017-18 proceeding discussed the elements of significance at the unilateral placement that he found appropriate to address the student's needs (Parent Ex. B at p. 7), opportunities for the student to participate in nonacademic and extracurricular services did not feature in any way in his analysis, and I find that is not a significant factor in this case either. There is also no indication that there has been a significant change in the degree to which the student is educated with non-disabled peers, as it appears that the student has had minimal or no regular interaction with non-disabled peers in either school given the severe nature of his disabilites.

The evidence discussed above shows there are a large number of similarities between iHope and iBrain, but the evidence is still incomplete. A failure to provide vision services, changes to parent counseling and training services, or in assistive technology for the student could still tip the balance either way in terms of whether or not the student's programing at iBrain is substantially similar to what was provided at iHope. Therefore, despite my effort to bring additional clarification to the administrative record, it remains necessary to remand this matter to the IHO to determine, consistent with the standards identified in this decision, whether the student has been or is currently receiving vision services at iBrain, and a description of the parent counseling and training services and assistive technology services that the student previously received while at iHope. If, after comparing the similarity or lack thereof between iHope and iBrain with regard to the student's vision services, parent counseling and training services, and assistive technology services, the IHO finds no significant changes, the IHO should enter an order directing the district to fund the student's stay-put at iBrain. In the event that iBrain was unable to implement all of the student's programming at the beginning of the school year but became able to at some point thereafter (i.e., vision services became available at some later date), the IHO should determine the date at which the two programs became substantially similar and issue a directive awarding reimbursement from the date that the two programs became substantially similar.

I have carefully considered the view of the IHO and the district that a parent must offer some reason for changing the nonpublic school location while maintaining the same educational placement, and it is within the realm of possibility that a court may yet extend the law on this matter. It appears unseemly for the parent to abandon iHope when only months ago the parent was trying to prove in the 2017-18 proceeding it was an appropriate solution to address the student's needs, and then here in this proceeding, asserts that iBrain is essentially the same program

as iHope. The IHO's search for an explanation of these unusual circumstances were hardly unreasonable. However, under current law, with respect to the district's argument that the IHO correctly found that a determination on substantial similarity was contingent on the parent's production of evidence that the student can no longer attend iHope, the district cites to no authority to support such a proposition. Moreover, the case cited by the IHO does not support this proposition. The IHO cites to dicta in a district court decision, which indicated that the issue whether the student was unable to attend the previous nonpublic school was "so fundamental" that it would be "surprising if it were argued and ignored" by the SRO (see Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 373 F. Supp. 2d 292, 296 [S.D.N.Y. 2005]). As a result, while the IHO may wish to make such inquires, the IHO cannot require that the parent first show the student was incapable of attending the school before reaching the issue of substantial similarities.

Lastly, because the evidence suggests that iBrain may have had, or is still having difficulty with providing some services (i.e., vision services), public funds should not be used to maintain stay-put if, in fact, there are points in time when the programming being provided to the student is not substantially similar and thus not the same educational placement.[19] If, upon consideration of the matters remanded, it is determined by the IHO that reimbursement for iBrain is warranted under stay-put, I find it appropriate at that point to require the parent to obtain records from iBrain showing the student's continued attendance at iBrain and receipt of the educational programing in conformance with the student's stay-put placement. Upon the submission of such records to the district, the district shall reimburse the parents for the costs of the student's placement at iBrain while the proceedings are pending.

VI. Conclusion

For the reasons stated above, the matter is remanded to the IHO to complete the record in accordance with this decision and render a determination of whether the educational placement provided by iHope in the 2017-18 school year and iBrain in the 2018-19 school year are substantially similar for purposes of the student's stay-put placement.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED

IT IS ORDERED that the matter is remanded to the IHO who issued the September 4, 2018 decision, who shall in a manner not inconsistent with the body of this decision, address the remaining fact issues related to vision services, parent counseling and training services, and assistive technology services and reach a determination of whether there is substantial similarity between student's former educational placement at iHope and his current educational placement at iBrain no later than 20 days from the date of this decision.

Dated: **Albany, New York**
November 16, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER

[19] If a district fails to provide a pendency placement, then compensatory education is often considered as a potential remedy (see E. Lyme, 790 F.3d at 456-57), but where, as here, the parent has elected not to maintain the student's pendency placement at iHope, any lapse in services is attributable to the parent, not the district.