The University of the State of New York

The State Education Department
State Review Officer
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No. 18-122

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

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

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining their 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 the placement established pursuant to the student's April 29, 2015 individualized education program (IEP). 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 limited nature of the appeal and disposition thereof, a full recitation of the facts and procedural history is not necessary and will not be included. On March 21, 2014, a CSE convened to develop the student's IEP for the 2014-15 school year (see Dist. Ex. 1). The March

2014 CSE determined that the student was eligible to receive special education services as a student with multiple disabilities and recommended a 12-month program consisting of a 12:1+(3:1)[1] special class placement in a district specialized school with related services including three 30-minute sessions per week of individual occupational therapy (OT), individual physical therapy (PT), and individual speech-language therapy, and two 30-minute sessions per week of individual vision education services (id. at pp. 5-6, 8-9). The March 2014 IEP also indicated that the student required special transportation accommodations consisting of a "Lift Bus" (id. at p. 8). The CSE convened three additional times during the 2014-15 school year (see Dist. Exs. 2; 3; 4). An IEP developed by the CSE on August 18, 2014 included identical recommendations as those identified in the March 2014 IEP, except that the CSE no longer recommended the student receive vision education services (see Dist. Ex. 2 at pp. 6-7, 9-10).

On September 17, 2014, the CSE reconvened and continued the recommendations from the August 2014 IEP, but modified the related services recommendations to four 30-minute sessions per week of individual OT, PT, and speech-language therapy, and recommended the addition of a full-time 1:1 health paraprofessional (Dist. Ex. 3 at pp. 6-7, 9-10). A CSE convened again on April 29, 2015, and continued to recommend the same program set forth in the September 2014 IEP; however, the CSE reinstated the recommendation for two 30-minute sessions per week of individual vision education services (Dist. Ex. 4 at pp. 6-7, 9-10).[2]

The parents unilaterally placed the student at the International Academy of Hope (iHope) for the 2015-16 school year (Tr. pp. 19-20, 53).[3] A CSE convened on March 24, 2016 to develop the student's program for the 2016-17 school year (Parent Ex. B).[4] The March 2016 CSE recommended a 12-month program consisting of a 12:1+(3:1) special class placement in a district specialized school with related services including five 60-minute sessions per week of individual PT, four 60-minute sessions per week of individual speech-language therapy, and two 60-minute

[1] State regulation provides that the "maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students. In addition to the teacher, the staff/student ratio shall be one staff person to three students" (8 NYCRR 200.6[h][4][iii]). This type of special class is commonly referred to as a 12:1+4 special class (see Tr. p. 100).

[2] The hearing record reflects that, despite having reached school age, the student attended a State-approved nonpublic preschool program for the 2014-15 school year (Tr. pp. 11-12, 16-19, 43-44).

[3] Neither party included an IEP developed for the student for the 2015-16 school year after the April 2015 IEP, but the hearing record indicates that an IEP was developed for the student between July and September 2015 (see Dist. Ex. 5 at pp. 11-13).

[4] Exhibit B is numbered from 1 to 24; however, there are no pages 4 or 5. As the exhibit is separately paginated from 1 to 22, it does not appear that any pages are missing from the document (see Tr. pp. 29-32). Citations in this decision are to the exhibit as numbered by the parents.

sessions per week of individual vision education services (id. at pp. 20-21).[5] The CSE also recommended a full-time 1:1 health paraprofessional and a 1:1 transportation paraprofessional, and transportation accommodations including a Lift Bus, air conditioning, and "Wheelchair Regular Size" (id. at pp. 21, 23).[6]

On June 23, 2016, the parents submitted a letter to the district that provided 10-day notice of their intention to unilaterally place the student at iHope for the 2016-17 school year at district expense; the parents asserted that "it is our understanding that there is no private school placement the [district] can recommend which would be appropriate" for the student (Parent Ex. C). The student remained at iHope until the 2018-19 school year, when she was transferred by her parents to the International Institute for the Brain (iBrain) (Tr. pp. 9, 53, 90, 92; Parent Exs. A; C).[7]

A. Due Process Complaint Notice

In a due process complaint dated July 9, 2018, the parents 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) during the 2018-19 school year (Parent Ex. A). The parent asserted the student's right to a pendency placement established pursuant to the student's March 2016 IEP (id. at p. 2). The parents requested the district "prospectively pay for the student's Full Tuition at iBrain," including "academics, therapies and a 1:1 [para]professional during the school day," as well as transportation accommodations including "limited travel time of 60 minutes, wheelchair-accessible vehicle, A/C, flexible pick-up/drop-off schedule and a paraprofessional" (id. at p. 2).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on August 9, 2018 and concluded the pendency portion of the hearing on August 30, 2018, after three hearing days (Tr. pp. 1-119).[8] At the impartial hearing, the district asserted that pendency lay in the April 2015 IEP, while the parents asserted that pendency lay in the program set forth in the March 2016 IEP, although the CSE had agreed on a 6:1+1 special class placement during the related CSE meeting, rather than the 12:1+4 placement mistakenly reflected in the IEP, and that iBrain was implementing pendency

[5] The parents submit as additional evidence a recording of the March 24, 2016 CSE meeting, which will be discussed below (Req. for Rev. Ex. BB). The parents claim that the recording shows the district intended to recommend a 6:1+1 special class placement. Other portions of the IEP indicated that the student required a classroom with no more than six students and that the CSE had rejected classroom placements containing more students (Parent Ex. B at pp. 1, 12, 24).

[6] It seems that the "wheelchair" notation reflected the need for a bus that could accommodate the student's wheelchair (see Dist. Ex. 5 at p. 11).

[7] The hearing record reflects that the district funded the student's placement at iHope for the 2015-16 and 2016-17 school years pursuant to stipulations of settlement (Tr. pp. 9-10, 20-21). Neither stipulation was included in the hearing record.

[8] The IHO who presided over the first hearing date recused herself at the close of the first hearing date, after which another IHO presided over the remaining hearing dates at issue (Tr. pp. 60-61, 65; IHO Ex. I).

(Tr. pp. 37, 52, 58, 90-91, 96, 99-103, 112-13, 115-16). By interim decision dated September 10, 2018, the IHO found that the parent could not "move the [s]tudent anywhere the general type of educational program exists" for purposes of pendency (IHO Decision at pp. 6-7). Additionally, the IHO found that the parents' contention that pendency was established by the March 2016 IEP was not supported by the hearing record as the fact that the parents' alleged errors in the student's program were included in the IEP indicated that there was no agreement by the parties and that the document was actually in dispute (id. at p. 7). Rather, the IHO determined that the "operative placement actually functioning at the time when pendency . . . was invoked" was the April 2015 IEP and that the student's pendency placement includes a 12:1+4 special class placement with four 30-minute sessions per week of individual OT, PT, and speech-language therapy, two 30-minute sessions per week of vision education services, and a full-time health paraprofessional (id. at pp. 7-8).

IV. Appeal for State-Level Review

On appeal, the parents argue that the IHO erred in finding that the March 2016 IEP was in dispute and not the last agreed upon IEP for purposes of pendency; the parents assert that while they rejected "the document that [the district] purported to represent the" March 2016 IEP, the document does not properly memorialize the program agreed upon by the parties at the time of the March 2016 CSE meeting. The parents submit as additional evidence an audio recording of the March 2016 CSE meeting. The parents argue that the IHO's failure to consider the recording of the March 2016 CSE meeting constitutes reversible error because it greatly prejudiced the parents.

The parents further contend that the IHO erred in finding that the student was not allowed to transfer to iBrain for pendency purposes, even if it provided the same educational placement. The parents assert that in order to "qualify for pendency placement" at iBrain, the "only legal standard the Parents must meet is that of substantial similarity" between the program provided to the student at iBrain and the March 2016 IEP. The parents claim that the record supports a conclusion that the program the student currently receives at iBrain is substantially similar to the March 2016 IEP. In support of their request for review, the parents submit additional evidence consisting of: an April 2018 "Recommended" IEP developed by iHope which they assert is "modeled after" the March 2016 IEP and is currently being implemented at iBrain (Req. for Rev. Ex. AA); an audio recording of the March 2016 CSE meeting (Req. for Rev. Ex. BB); October 2018 correspondence between the IHO and counsel for the parent (Req. for Rev. Ex. CC); and a copy of the March 2016 IEP (Req. for Rev. Ex. DD).[9]

[9] In a footnote, the parents request that if the SRO determines that "pendency relief should not be granted with respect to any portion of [the student's] current educational program," the SRO "grant pendency relief insofar as [the SRO] determines pendency is warranted for some services, as pendency relief is divisible." 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] [holding that 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]).

In an answer, the district generally denies the parents' allegations and argues to uphold the IHO's interim decision. The district asserts that the parties agreed to the April 2015 IEP and implemented that program following the CSE meeting; moreover, the district claims this IEP has not been contested. The district also asserts that the parents challenged the March 2016 IEP when they submitted a ten-day notice letter indicating that the student would be unilaterally placed at iBrain; specifically, the district claims that the parents rejected the March 2016 IEP when they asserted that the district could not recommend an appropriate nonpublic school, as the IEP recommended a public school placement. The district further contends that the parents cannot "rehabilitate the March 2016 IEP with allegations that its contents were improperly memorialized." The district asserts that because the duty to develop an IEP ultimately remains with the district, the March 2016 IEP "represents the ultimate recommendation of the CSE" and the parents' claim that the program memorialized by the March 2016 IEP deviated from the program actually agreed to by the CSE during the March 2016 CSE meeting is without merit.

The district also asserts that parents are not free to unilaterally transfer their child from one school to another, and the parents failed to demonstrate that iBrain was substantially similar to the "educational program under pendency," as the hearing record contains no evidence showing that iBrain was substantially similar to either the programs set forth in the April 2015 or March 2016 IEPs, or the student's nonpublic school placement. The district contends that the IHO properly refused to consider an audio recording purporting to be of the March 2016 CSE meeting. In the event that the SRO finds review of the audio recording is necessary, the district asserts that the matter should be remanded to the IHO so that both parties may be given the opportunity to submit additional evidence and argument with respect to it.[10]

In a reply, the parents respond to the assertions made in the district's answer. The parents' reply consists largely of reargument of 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 parents did not verify their reply as required by State regulation (8 NYCRR 279.7[b]).[11]

V. Applicable Standards

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004]; 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

[10] The district also asserts that the other exhibits submitted by the parents as additional evidence should not be considered.

[11] Although denominated a reply memorandum of law, memoranda are permitted only in support of pleadings (see 8 NYCRR 279.8[b]; see, e.g., 8 NYCRR 279.4[g]; 279.5[d]).

4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X 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. Preliminary Matters—Additional Evidence

The parents argue that the IHO's failure to consider the audio recording of the March 2016 IEP meeting is reversible error. The parents submit the audio recording and three other exhibits for consideration on appeal. In the answer, the district contends that these exhibits should not be considered because they could have been offered into evidence before the IHO issued the interim order on pendency and they are not necessary to render a decision in the present appeal. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial 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 additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). I decline to consider Request for Review Exhibit DD, as it is a copy of the March 2016 IEP already included in the hearing record as Parent Exhibit B. The parents also submit Request for Review Exhibit CC, an undated email between counsel for the parents and the IHO, in which counsel for the parents requests that the IHO consider an audio recording of the March 2016 CSE meeting to support their argument that the CSE recommended a 6:1+1 special class placement (Req. for Rev. Ex. CC). The IHO's response indicated that if the parents wished to submit audio, it should be transcribed and submitted for the next hearing date, and that the recording was "not necessary for [a] pendency order which is forthcoming" (id.). With respect to Request for Review Exhibits AA and BB, an April 2018 iHope IEP and the audio recording of the March 2016 CSE meeting, the parents' submissions are accepted as it is necessary to consider these exhibits in order to fully address the claims raised by the parties. However, upon consideration of this evidence, as described in detail below, it does not establish that the IHO erred in determining that iBrain was not the student's pendency placement. For that reason, I dismiss the parents' claim that the IHO's failure to consider this evidence constituted reversible error (see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 6 [2d Cir. Aug. 24, 2016]).

B. Pendency

The parties disagree as to the student's then current educational placement at the time this proceeding was commenced. The parents assert that it was the placement described in the student's March 2016 IEP, while the district claims it was the placement described in the student's April 2015 IEP.

Turning first to the parents' arguments with respect to the March 2016 IEP, during the impartial hearing the parents' attorney stated that the last agreed-upon IEP was "clearly the IEP that was developed from the [March 2016 CSE] meeting" (Tr. p. 26). However, the attorney asserted that this IEP document was an "imperfect memorialization" of the student's program that "contain[ed] a couple of very important clerical errors," specifically, that the program developed by the CSE during the March 2016 meeting included a 6:1+1 special class instead of the 12:1+(3:1)

special class ultimately recommended in the resultant IEP (Tr. pp. 27-28).[12] The parents claim on appeal that the recommendation for a 12:1+(3:1) special class included in the March 2016 IEP was a "false representation" of the program that was agreed to during the March 2016 CSE meeting. During the impartial hearing, counsel for the parents stated that it was "not the document itself" that was important but "the program . . . developed and the intent of the parties" (Tr. p. 31).

The argument raised by the parents with respect to the difference between the program agreed upon during the CSE meeting and the subsequent recommendations made on the IEP is compelling. The March 2016 IEP reflects that the CSE recommended the student be placed in a 12:1+(3:1) special class (Parent Ex. B at p. 20). However, as the parents argue, there are indications elsewhere in the IEP that suggest this recommendation was in error. Review of the student's management needs indicates that due to the student's "complex medical history and diagnoses, [she] requires . . . a high degree of individualized attention and intervention in a 6:1:1 setting" (id. at p. 12). The parents also argue, and the IEP reflects, that a 12:1+(3:1) special class placement was considered and rejected "because [the student] presents with highly intensive management needs that require a smaller class setting with additional adult support to carry out therapeutic interventions and make meaningful progress" (id. at p. 24). Furthermore, the parents submit as additional evidence Request for Review Exhibit BB, a recording purported to be of the March 2016 IEP meeting, to show that the CSE agreed upon a 6:1+1 special class for the student (Req. for Rev. Ex. BB). A review of the recording shows that the CSE agreed a 6:1+1 special class was appropriate for the student and would be recommended on her IEP (id.).

However, even if I accepted the parents' claim that the CSE agreed to a 6:1+1 special class in addition to the remaining services provided in the March 2016 IEP, the parents provide no evidence supporting that this program was the student's most recently implemented IEP. The parents claim that the March 2016 IEP was implemented at iHope but provide no evidence that this program was implemented by iHope during the 2016-17 school year.[13] Moreover, iHope is not a State-approved nonpublic school and the March 2016 IEP recommended the student be placed in a district specialized school (see Parent Ex. B at p. 23). Counsel for the parents asserted during the hearing that the student was placed at iHope because the district did not have a placement available that could implement the student's program; however, the parents do not raise this implementation argument on appeal (see Tr. pp. 48, 52). Furthermore, the June 2016 letter indicated that "it is [the parents'] understanding that there is no private school placement the [district] can recommend which would be appropriate for [the student]" (Parent Ex. C [emphasis added]). Thus, contrary to the parent's claim on appeal that the March 2016 IEP was never in dispute, the June 2016 letter indicates that the parents directly disputed the district's recommendation for a district specialized school, and as a result, the March 2016 IEP could not

[12] While the parents asserted at the impartial hearing that there were "a couple of very important clerical errors," in the request for review the parents only disagree with the special class recommendation and do not specifically dispute other aspects of the IEP (Tr. pp. 27-28).

[13] Moreover, there is no evidence establishing that the parties agreed to the student's educational placement at iHope during the due process proceedings or that a prior unappealed IHO decision established the student's current educational placement at iHope for purposes of pendency (see Schutz, 290 F.3d at 483-84; Murphy, 86 F. Supp. 2d at 366; Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

have been the last agreed upon placement for purposes of pendency (see Tr. pp. 48, 52; Parent Ex. C).

Even if the March 2016 IEP were the last agreed upon placement, the hearing record does not establish that iBrain was an appropriate pendency placement. While the parents contend that the program provided at iBrain is substantially similar to the March 2016 IEP, the parents have provided no evidence identifying the services the student received at iBrain during the 2018-19 school year.[14] Whether a student's educational placement has been maintained under the meaning of the pendency provision depends on whether the educational program is "substantially and materially the same" as the student's educational program for the prior school year (Letter to Fisher, 21 IDELR 992 [OSEP 1994]; see Application of a Student with a Disability, Appeal No. 16-020). The United States Department of Education's Office of Special Education Programs has identified a number of factors that must be considered in determining whether a move from one location to another constitutes a change in educational placement, including: whether the educational program in the student's IEP has been revised; whether the student will be educated with nondisabled peers to the same extent; whether the student will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement is the same option on the continuum of alternative placements (Letter to Fisher, 21 IDELR 992 [OSEP 1994]). The parents reference the April 2018 iHope IEP as evidence that the student is receiving services at iBrain for the 2018-19 school year that are "very similar" to the services recommended in the March 2016 IEP (Req. for Rev. Ex. AA). However, missing from the hearing record or the additional evidence submitted by the parents is any basis to determine that the IEP developed by iHope for the 2018-19 school year is being implemented at iBrain. Furthermore, placement of the student at iBrain is not substantially similar to the services provided in the March 2016 IEP. In particular, as noted above the March 2016 IEP recommends placement in a district specialized school, while iBrain is a nonpublic school. State regulations explicitly define "[c]hange in placement" to include "transfer of a student to or from a public school" (8 NYCRR 200.1[h]). The parents acknowledge as much in their memorandum of law, admitting that "a parent may not unilaterally transfer his or her child from public school to private school, regardless of program similarity, for purposes of pendency placement," because "a move from public school to private school is a disruption in the student's status quo, as, by definition, public schools and private schools are not substantially similar" (Parent Mem. of Law at pp. 6-7 n.4). In sum, the evidence does not support a finding that the program offered at iBrain for the 2018-19 school year is substantially similar to the program offered in the March 2016 IEP. Thus, I find that the March 2016 IEP does not establish the student's pendency placement and, in any event, the hearing record lacks any evidence that the program offered at iBrain for the 2018-19 school year was substantially similar to the March 2016 IEP.

Turning to the district's argument that pendency should be based on the April 2015 IEP, the hearing record does not support a finding that it is the most recently implemented IEP. In the answer, the district asserts that the April 2015 IEP was implemented following the April 2015 CSE

[14] At the impartial hearing, counsel for the parents indicated his intent to have a witness testify to the student's current placement but the IHO stated that he only needed documentary evidence describing "where [the parents] want the student to go" (see Tr. pp. 71-72).

meeting, and the parents have never contested that the IEP "represent[ed] an agreed-upon educational placement" for the student. As noted above, the April 2015 CSE meeting was a reconvene for the student's 2014-15 school year (see Tr. pp. 14, 17-18, 20). The CSE made changes with respect to the student's related services at that time but continued to recommend placement in a district specialized school (Dist. Ex. 4 at p. 9).[15] However, according to counsel for the district, the student was placed in a State-approved nonpublic preschool program for the 2014-15 school year "at the consent of" the district (Tr. pp. 11-12, 16-18, 44). Moreover, in the answer, the district reiterates that at the time the CSE recommended the April 2015 IEP, a 12:1+(3:1) program was being implemented at the approved nonpublic school.[16] The record is clear then that the April 2015 IEP cannot be the most recently implemented IEP because the program provided to the student following the April 2015 CSE meeting included placement in a nonpublic school rather than a district specialized school as recommended by the IEP.

Then current placement may also be established by the operative placement actually functioning at the time of the due process proceeding. The "operative placement" test tends to be one of the tests for stay-put that is employed when there is, for one reason or another, no valid IEP that is relevant to the stay-put issue (see Drinker, 78 F.3d at 867; Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625–26 [6th Cir. 1990] ["where . . . a dispute arises before any IEP has been implemented, the 'current educational placement' will be the operative placement under which the child is actually receiving instruction at the time the dispute arises"]; see Mackey, 386 F.3d at 163).[17-058, fn. 6] In this case, the IHO found that the April 2015 IEP was the student's operative placement for pendency purposes. While the last agreed upon placement between the parties was neither the April 2015 IEP nor the March 2016 IEP, it does not appear that the parties contest that the student attended a nonpublic school during the 2014-15 school year in an agreed-upon program. Accordingly, the student's pendency placement is the program actually provided to the student at the approved nonpublic school for the 2014-15 school year.

Initially, it is unclear from the record what services the student may have received while attending the approved nonpublic school, and, as stated above, the April 2015 IEP cannot be the student's pendency placement given its recommendation for a district specialized school that was not implemented. The district contends that the student received services as recommended in the April 2015 IEP at the approved nonpublic school, but the record is unclear on this point. While the evidence on this point is sparse, without evidence to the contrary, the hearing record reflects that there was some agreement between the parties with respect to the program provided to the student during the 2014-15 school year, despite that its precise contours cannot be determined at this point. Furthermore, as discussed above, since the 2015-16 school year the student has been unilaterally placed by the parents, and there is no evidence of a pendency-changing event, such as a subsequent agreement between the parties or an unappealed IHO decision.

[15] All of the IEPs developed for the 2014-15 school year recommended that the student be placed in a district specialized school (Dist. Exs. 1 at p. 8; 2 at p. 9; 3 at p. 9; 4 at p. 9).

[16] It is unclear whether the "consent" of the district was the result of the parent filing an impartial hearing request, such that the student remained in her nonpublic preschool program pursuant to pendency (Tr. pp. 16-17, 43-44; see Req. for Rev. Ex. BB).

VII. Conclusion

While I agree with the IHO's determination that iBrain does not constitute the student's pendency placement, upon review of the record I find the student's operative placement at the time the due process complaint was filed was the program actually provided to the student at an approved nonpublic school during the 2014-15 school year. I have considered the parties' remaining contentions and find that they are without merit or that I need not address them in light of the findings made herein.

THE APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's interim decision on pendency, dated September 10, 2018, is modified, by reversing so much thereof as found that the student's pendency placement was the program set forth in an IEP dated April 29, 2015; and

IT IS FURTHER ORDERED that the student's pendency placement is the program provided to the student at the approved nonpublic school during the 2014-15 school year.

Dated: **Albany, New York**
November 23, 2018

CAROL H. HAUGE
STATE REVIEW OFFICER