The University of the State of New York

The State Education Department
State Review Officer
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No. 18-127

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Hae Jin Liu, Esq.

Brain Injury Rights Group, attorneys for respondents, by Karl J. Ashanti, 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 district) 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 respondents' (the parents') son's pendency placement during a due process proceeding challenging the appropriateness of petitioner's recommended educational program for the student for the 2018-19 school year. The IHO found that the student's pendency placement was the program offered at the International Institute for the Brain (iBrain) during the 2018-19 school year because that program was substantially similar to the program offered at the student's previous placement at the International Academy of Hope (iHope) during the 2017-18 school year, which was deemed appropriate pursuant to the unappealed decision of an IHO, dated March 5, 2018. The appeal must be sustained.

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 a nonpublic school, iHope, for the 2017-18 school year (see Tr. pp. 25-26).[1] The parents' unilateral placement of the student at iHope for the 2017-18 school year was the subject of a prior impartial hearing (see Req. for Rev. Ex. 1).[2] At the conclusion of the prior impartial hearing, an IHO issued a decision, dated March 5, 2018, finding that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year, that iHope was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of an award of the costs of the student's tuition at iHope, including related services, for the 2017-18 school year (id. at pp. 4-12).

According to the parents, a district CSE convened on March 7, 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 (Due Proc. Compl. Not. at p. 2). It appears that the parents did not accept the CSE's recommended placement because the student began attending a second nonpublic school, iBrain, on July 9, 2018 (see Tr. p. 27).

A. Due Process Complaint Notice

The parents initiated the instant administrative proceeding by filing a due process complaint notice dated July 9, 2018 (Due Proc. Compl. Not. at p. 1). 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) for the 2018-19 school year (id. at pp. 2-3). As relevant here, the parents asserted the student's right

[1] Due to the status of this matter as an interim appeal disputing a pendency determination, at the time of the district's request for review, no documentary evidence has been entered into the hearing record; accordingly, the factual background is derived from testimony and allegations in the due process complaint notice (see Tr. pp. 1-60; Due Proc. Compl. Not.).

[2] During the impartial hearing, the parents offered the due process complaint notice and the March 5, 2018 IHO decision as exhibits; however, the IHO did not enter these exhibits into evidence (Tr. pp. 9-10). The district includes the March 2018 IHO decision, the parents' undated post-hearing brief, and the district's September 26, 2018 post-hearing brief with its request for review as additional evidence (see Req. for Rev. at p. 2, n.1; Req. for Rev. Exs. 1-3). While the IHO explained in correspondence postdating the interim decision and included as part of the hearing record that she did not enter the post-hearing briefs or the March 2018 IHO decision as exhibits because they are not evidence and, further, because the latter represents "legal precedent," there is no dispute that the documents were actually considered by the IHO in making her pendency determination and, as such, they do not constitute additional evidence offered for consideration for the first time on appeal. Indeed, State regulation specifically indicates that, in addition to exhibits and the transcript of the proceedings, the due process complaint notice, any briefs filed by the parties for consideration by the IHO, and "any other documentation deemed relevant and material by the [IHO]" are part of the hearing record (8 NYCRR 200.5[j][5[vi][a], [b], [e]-[g]). The IHO may want to consider identifying and admitting such documents as exhibits during the impartial hearing as a matter of administrative convenience and in order to streamline the compilation of the hearing record. This is particularly so for a document such as the March 2018 IHO decision, since the decision does not represent a document relied upon by the parties for a legal proposition or a legal precedent widely available, but rather involves the very student who is the subject of the impartial hearing before the IHO. For purposes of this decision, the March 2018 IHO decision and the parties' briefs will be cited by reference to the copies attached to the district's request for review (Req. for Rev. Exs. 1-3).

to a pendency placement was based on an unappealed IHO decision (id. at p. 2). The parents requested an interim order on pendency requiring the district "to prospectively pay for" the full cost of the student's placement at iBrain including "academics, therapies and a 1:1 professional" as well as special transportation services, including limited travel time (60 minutes), a wheelchair-accessible vehicle with air conditioning, a flexible pick-up and drop-off schedule and a paraprofessional (id. at pp. 1-3).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on August 14, 2018 and concluded the pendency portion of the hearing on September 6, 2018, after two days of proceedings (see Tr. pp. 1-60). At the impartial hearing, the parents asserted that pendency lay in the unappealed decision of an IHO, dated March 5, 2018, which found that the student's unilateral placement at iHope during the 2017-18 school year was appropriate and awarded reimbursement for the costs of the student's attendance (Tr. pp. 8-9; see Req. for Rev. at pp. 10-12). However, the parents sought the cost of tuition for the program provided to the student at a different nonpublic school (iBrain) where the student had been unilaterally placed for the 2018-19 school year, arguing it was the "same educational program" offered at iHope during the 2017-18 school year (see Tr. pp. 8-9).

By interim decision dated October 3, 2018, the IHO determined that iHope was the "legally sanctioned school at the time pendency was invoked," but that the IDEA does not require students to "receive the 'then-current educational placement' at the same school which provides it"; instead, the IHO determined that the new school must offer an educational placement which is '"substantially and materially the same"' as the previous placement (IHO Decision at p. 2). The IHO found that the programs offered at iBrain and iHope were substantially similar (id.). Specifically, the IHO identified that both schools provided the student with a 12-month program in a 6:1+1 special class with the following related services: four 60-minute sessions per week of occupational therapy (OT), five 60-minute sessions per week of physical therapy (PT), and five 60-minute sessions per week of speech-language therapy (id.). The IHO further found that both schools offered parent counseling and training once per month and employed a push-in and pull-out method of "integrating related services into the classroom" (id.). While the student was not receiving vision therapy services at iBrain, the IHO noted that the school was in the process of hiring a vision therapist and would be "providing services soon" (id.). The IHO also noted that she did not find "any support for the proposition that a change in schools must be precipitated by the demise of the first school" (id. at p. 2, n.2). The IHO ordered the district to directly fund the student's tuition at iBrain during the pendency of the proceedings (id. at p. 3).

IV. Appeal for State-Level Review

On appeal, the district argues that the student has no right to pendency at Brian under these circumstances, where the parents unilaterally removed the student from his placement at iHope and enrolled him in the parents' preferred placement at iBrain. The district maintains that the student's pendency placement remains at iHope based upon the unappealed March 2018 IHO decision. The district claims that the IHO's determination that the programs offered at iHope and iBrain were substantially similar is in contravention of established law and should be reversed. Rather, according to the district, the issue of whether the two programs are substantially similar

should only "come[] into play "when a school district has failed to provide the "same exact school and/or services" or a student's previous placement is no longer available. As a result, the district maintains that the IHO erred when she did not require the parents to establish iHope's unavailability before making a determination as to whether the programs were substantially similar. Additionally, the district claims that the parents failed to show that iHope was actually unavailable or that they were unable to enroll the student in iHope for the 2018-19 school year. Thus, the district asserts that the IHO's determination that the programs are substantially similarities should be reversed.

The district also argues that the parents failed to establish that the programs offered at iHope and iBrain were substantially similar. The district claims that the parents failed to provide sufficient evidence of the student's previous program at iHope and his then-current program at iBrain to establish that the programs were substantially similar. The district also maintains the director of special education at iBrain (director) could not "credibly and reliably testify about" whether any program was implemented for the student at iHope in the 2017-18 school year, and that the director also testified that the student did not receive hearing or vision services at the start of the 2018-19 school year while at iBrain, and was still not receiving vision services at the time of the impartial hearing. Therefore, the district requests that the IHO's decision that the district fund iBrain during the pendency of this matter be overturned.

In an answer, the parents argue to uphold the IHO's determination. The parents assert that the district failed to cite to legal authority to support its claim that the parents must first prove that iHope was unavailable to the student. Furthermore, the parents maintain that the district misunderstands that the then-current educational placement means the student's specific school or location, rather than his program. As a result, the parents argue that the district's legal reasoning is erroneous and the request for review is without merit. The parents also claim that they have satisfied the substantial similarity test; the only legal standard they are required to meet. The parents argue that the IHO correctly found that substantial similarity between the programs at iHope and iBrain was established in the record based upon the testimony of the director of iBrain. The parents also contend that the 2017-18 iHope IEP is "incorporated into the record by reference," as an exhibit to the March 2018 IHO decision, and that, in any case, testimony from the director of iBrain sufficiently "set[] forth all necessary information concerning the educational program [the student] actually received at iHope during" the 2017-18 school year. The parents further claim that, with respect to vision services, the temporary absence of vision services at iBrain should not preclude a finding of substantial similarity, which does not require the programs be identical. Finally, the parents claim that, as a result of the districts failure to meet their burden to show that they secured the student's pendency placement at iHope and that iHope could continue to provide the student with his then-current educational placement, the parents had no choice but to enroll the student at iBrain In a footnote in the answer, the parents contend that, if the SRO finds that they are required to show that iHope was unavailable, the case should be remanded back to the IHO to hear further evidence and decide on that issue explicitly. Also in a footnote, the parents argue that, if the SRO determines that "pendency relief should not be granted with respect to any portion of [the student's] current educational program or related support services," the parents request that

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."[3]

In a reply to the parents' answer, the district asserts that the parents' supplemental exhibits should not be considered on appeal because the parents do not argue that the exhibits should be reviewed as additional evidence necessary to make a determination and both exhibits were available at the time of the impartial hearing. Furthermore, the district maintains that, while the parents argue that the iHope IEP was incorporated into the record by reference, 8 NYCRR 279.10(b) should not serve as a basis to review it. However, in the event that these exhibits are considered, the district argues that a review of the exhibits demonstrates that the programs offered by iBrain and iHope are not substantially similar. Specifically, the district maintains that the IEPs show that vision therapy was an important component of the student's pendency program, and iBrain's failure to provide the student with vision therapy services demonstrates that the programs were not substantially similar.[4] Finally, the district maintains that the parents' answer used extensive footnotes, and it should be rejected for failure to conform with State regulations.[5]

V. Applicable Standards

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

[3] While, as previously explained to parents' counsel in decisions involving other students (see Application of a Student with a Disability, Appeal No. 18-119; Application of a Student with a Disability, Appeal No. 18-116), arguments raised only in a footnote are 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]). However, since the parents may attempt to pursue the argument before the IHO and in order to put the issue to rest, the parents' argument is briefly discussed below.

[4] The parents submit the student's proposed 2017-18 iHope IEP for the 2017-18 school year and recommended iBrain IEP for the 2018-19 school year as additional evidence (Answer Exs. AA; BB). As a general matter, private institutions which are not State-approved to provide special education services to students with disabilities—such as iBrain—are not required to develop their own IEP for students (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 13-14 [1993]), and are not mandated by the IDEA or State law to provide services in compliance with an IEP. Accordingly, the privately created IEPs are not dispositive of the issue whether the program provided to the student at iBrain is substantially similar to the stay put program provided to the student at iHope. The consideration of additional evidence is a determination that rests solely within the discretion of the SRO (see 8 NYCRR 279.10[b]; L.K., 932 F. Supp. 2d at 488-89). I find that the documents attached to the answer as Exhibits AA and BB are not necessary to render a decision; accordingly, they will not be considered.

[5] While the parents utilized unnecessarily lengthy footnotes in the answer—which were ultimately unnecessary since the text of the footnotes was included verbatim in the parents' memorandum of law (see Answer at pp. 3, 5; Parent Mem. of Law at pp. 7-10)—I decline to reject the parents' answer on this ground.

Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X 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).

VI. Discussion—Pendency

The parties in this case agree that the student's educational placement for purposes of pendency is based on the unappealed March 2018 IHO decision (see Tr. pp. 8-9; Req. for Rev. at pp. 1-3,4 ; Req. for Rev. Ex. 1). As noted above, 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). However, the circumstances in the present case are such that, since the IHO decision from the prior proceeding, the parents have transferred the student from one nonpublic school setting that was unquestioningly a valid stay-put placement (iHope) to another nonpublic school setting (iBrain), and the parties sharply dispute whether parents are permitted to transition their child in this manner and still receive public funding under the protections of the stay put rule.

It appears that this particular nuance of stay put (the transfer of the student from one parentally-selected nonpublic school to another) has not been passed upon by a court. In examining this circumstance, which Congress assuredly did not contemplate, it is necessary to look to the primary purpose of the stay-put provision of the IDEA; to wit, to maintain the status quo (Zvi D., 694 F.2d at 906) and prevent unilateral action by the district to exclude disabled students from their educational programs during the pendency of proceedings under the IDEA (Honig, 484 U.S. at 323; Evans, 921 F. Supp. at 1187). Under these circumstances raised in this case, the unilateral action of the district that the stay-put provision would prevent would be the district's action of refusing to fund the student's attendance at a nonpublic school.

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

[6] This echoes similar sentiments expressed by other circuit courts (see D.M. v New Jersey Dep't of Educ., 801 F.3d 205, 216-17 [3d Cir. 2015] [collecting cases indicating "that, at least in some situations, a child's 'educational placement' does not include the specific school the child attend"]; White v. Ascension Par. 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)"]).

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

However, the district's discretion to select a location at which to implement a student's pendency placement can, under certain circumstances, be forfeited (see Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook Cty., Ill. v. Illinois State Bd. of Educ., 103 F.3d 545, 549-50 [7th Cir. 1996] [in the case of a student expelled, examining "the power of the court and the parents, rather than the power of the school district, to effect [the student's] placement" when the district forfeited that power by not producing any placement alternatives];[7] Laster v. Dist. of Columbia, 439 F. Supp. 2d 93, 101-02 & n.10 [D.D.C. 2006] [noting that, "because the defendants failed to comply with IDEA provisions by not finding a substantially similar placement facility when the children's current facility became unavailable, the parents were entitled to act unilaterally"]). It would appear that one way in which the district might forfeit its discretion to select a location for the student's stay-put placement may arise as a result of the district's failure to provide the student a FAPE, resulting in "an administrative ruling validating the parents' decision to move their child from an IEP-specified public school to a private school [which], in essence, make[s] 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. v. Ridley Sch. Dist., 744 F.3d 112, 119 [3d Cir. 2014]; see Schutz, 290 F.3d at 484; see also Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 201 [2d Cir. 2002]). Where a school district has been paying for private school tuition pursuant to pendency as the student's current educational placement, "it must continue to do so until the moment when the child's educational placement changes" (E. Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 599 [S.D.N.Y. 2011], aff'd sub nom., R.E., 694 F.3d 167; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *6 [S.D.N.Y. Mar. 17, 2010]).

An additional query that may arise in instances where the parent moves a student from one nonpublic school to another is the underlying reasons for such a move and whether the original

[7] Cook County arose in the disciplinary context, which is governed by a different set of rules under the IDEA (compare 34 CFR 300.518, with 34 CFR 300.533). Nevertheless, the Court's observations are instructive to the present context.

nonpublic school must be shown to be incapable of implementing the student's pendency placement. However, given the notion that a pendency placement does not mean a student must remain in a particular location, it would not appear that, in most circumstances, the reasons for a change in location would be accorded much weight in an examination of whether or not the new location constituted the student's then-current educational placement. In cases involving location changes precipitated by districts, the reasons for the transfers have not been deemed to effect a change in placement so long as those reasons were broader (i.e., external factors, such as those based on policy or fiscal considerations) and did not relate to the particular student (i.e., a student's expulsion due to his or her behaviors) (see D.M. v New Jersey Dep't of Educ., 801 F.3d 205, 217 [3d Cir. 2015]; Hale v. Poplar Bluffs R-I Sch. Dist., 280 F.3d 831, 834 [8th Cir. 2002]; Cook Cty., 103 F.3d at 548-49). Ultimately, while the reasons for a parent's decision to transfer a student from one nonpublic school to another may be relevant to the discussion, it is unlikely to be determinative except in an instance where the student's needs influenced the transfer, in which case the new nonpublic school would probably not meet the substantial similarity standard discussed below (i.e., if the student's needs changed and, as a result, the parent sought a nonpublic school with different or additional services, the student's educational placement would have changed).

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).[8] The United States Department of Education's Office of Special Education Programs 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). Student-to-staff ratio is also a relevant factor in determining whether a student's program has changed (M.K. v. Roselle Bd. of Educ., 2006 WL 3193915, at *14-*15 [D.N.J. Oct. 31, 2006]; Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 60-61 [D.N.H. 1999]; Application of a Child with a Disability, Appeal No. 05-028). State regulations define a change in program as "a change in any one of the components" of an IEP, which include the size of the special class in which a student is recommended to receive services (8 NYCRR 200.1[g]; 200.4[d][2][a], [b][2]). While these factors, in many instances, are specific to district programs, they are instructive in this current circumstance.

[8] In order to qualify as a change in educational placement, one district court 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; see N.M. v. Cent. Bucks Sch. Dist., 992 F. Supp. 2d 452, 464 [E.D. Pa. 2014]). Similarly, the District of Columbia Circuit has described it as "a fundamental change in, or elimination of a basic element of the education program" (Lunceford v. D.C. Bd. of Educ., 745 F.2d 1577, 1582 [D.C. Cir. 1984]).

Turning to the application of these principals to the present matter, the district's arguments that the parents could not unilaterally transfer the student from one school to another under pendency and that, assuming they could, the parents had to establish that the student's previous placement was no longer available are without merit. I turn to the question of whether iBrain provides a substantially similar program to the program provided by iHope during the 2017-18 school year such that the parents' unilateral placement of the student at iBrain for the 2018-19 school year does not constitute a "change in placement" for the purposes of pendency.

Beginning with the program provided by iHope during the 2017-18 school year, the unappealed March 2018 IHO decision fails to set forth the components of the student's program during that school year. In the March 2018 decision, the IHO only identified that the "current program being implemented for [the student] at iHope complies with [the] iHope IEP as outlined in Exhibit E," without further explaining the contents of the program (see Req. for Rev. Ex. 1 at pp. 9-11).[9] Moreover, the final order merely indicates that the district provide "[f]ull payment of tuition and the cost of related services" for the student at iHope for the 2017-18 school year (id. at p. 11).

However, the director of iBrain, who was previously employed by iHope, testified to her knowledge of the program provided to the student during the 2017-18 school year (Tr. p. 20).[10] The director testified that she was generally familiar with iHope because she worked as a

[9] With respect to the iHope IEP for the student's 2017-18 school year—which, as discussed above, the parents attached to their answer and I have declined to consider—the parents argue that the IEP was an exhibit to the March 2018 IHO decision (Answer at p. 8). The parents' argument in this regard is not only unsupported, it is also manifestly unreasonable and legally untenable. State regulation provides parties with the means to present evidence at the impartial hearing and to develop the hearing record (8 NYCRR 200.5[j][3][xii]) and does not otherwise identify incorporation as a means of entering evidence into the record. Further, State regulation provides that an IHO "shall attach to the decision a list identifying each exhibit admitted into evidence," as well as "an identification of all other items the impartial hearing officer has entered into the record" (8 NYCRR 200.5[j][5][v] [emphasis added]). Neither State regulation, nor standard legal practice in any other area of law of which I am aware, contemplates that a formal written decision would have all of the actual evidentiary exhibits that were entered into the underlying administrative record incorporated into and made part of the written decision. To attach all of the evidence to every IHO's written decision would be incredibly burdensome and ultimately unnecessary, since the intended audience for the decision is the parties to the dispute the decision is addressing, and those parties have access to the exhibits (being the parties who presented the evidence to the decisionmaker). If the parents wanted the IHO to consider certain documentary evidence, it was up to the parents to identify it and present it for the IHO's consideration in a timely manner. This is particularly the case, here, where there was a discussion on the record with the IHO about the iHope IEP and the IHO correctly noted that, even if the IEP was incorporated by reference into the March 2018 IHO decision, she needed the parents to provide her a copy of that IEP (Tr. p. 11). Since the parents never offered the IEP into evidence, it is unclear from the hearing record whether the IHO was ever provided a copy of the IEP, although there was some discussion about obtaining a copy or copies (Tr. pp. 11-12). If the question of pendency is revisited during the course of the impartial hearing going forward, the parents may wish to offer the IEP(s) as evidence.

[10] The director worked for iHope from April 2015 until December 2016; from that point forward until August 2017 she worked in a consultancy role with iHope while working fulltime as an education coordinator at a residential school (Tr. p. 22). The director left the position at the residential school in June 2018 to start her current position at iBrain (id.).

consultant between December 2016 and August 2017, and a key aspect of her consultancy role with iHope was "reading [students'] IEPs and clarifying, giving feedback . . . [in] any areas of correction where things might need to be elaborated and sending that back to the teaching staff" to address those issues (Tr. p. 25). The director also testified that she was specifically familiar with the student's program at iHope for the 2017-18 school year because she had previously reviewed his 2017-18 IEP as well as progress notes from the prior school year (see Tr. p. 26).[11] The director testified that the student's program consisted of a 6:1+1 special class with five 60-minute sessions per week each of PT and speech-language therapy, four 60-minute sessions per week of OT, three 60-minute sessions per week of vision therapy services, and one 60-minute session per month of parent counseling and training (Tr. pp. 21, 26-28). The director also indicated that the student began receiving hearing services at iHope but she did not specify the frequency of that service (Tr. p. 21). The director further testified that the student received related services in individual sessions "with a push-in and pull-out model" (Tr. p. 27). The student also received the support of a 1:1 paraprofessional (see Tr. p. 28).

The director also described the components of the program provided to the student at iBrain during the 2018-19 school year. The director described iBrain as an interdisciplinary program for students ranging from ages 6 to 19 "with brain-based disorder[s]" or "brain injur[ies] of some kind" who were "primarily nonverbal and nonambulatory" (Tr. pp. 22-23). The school consists of 6:1+1 and 8:1+1 special classes and related services including PT, OT, speech-language therapy, and vision education services, which are delivered in a " push-in and pull-out model" (Tr. p. 23). She further testified that all students have a 1:1 paraprofessional and about one third of the students have a 1:1 nurse (id.). Teachers at iBrain use "the direct instruction model," whereby students receive 30-minutes of one-to-one direct instruction with a teacher and "also participate in other academic activities in the classroom in pairs and small groups at other times" (id.).

With respect to the student in this case, the director testified that he was a "12-month student" who began attending iBrain on July 9, 2018 (Tr. pp. 31-32). The director indicated that iHope was still operating at the time of the hearing, although "there ha[d] been some significant changes to their administration and potentially . . . to their programming" (Tr. pp. 32-33). The director further testified that the student's parents were unhappy with the significant administrative changes happening at iHope since the school had become affiliated with a larger organization, and the parents were concerned about "various things that had taken place . . . and that these changes would continue" (Tr. pp. 36, 38, 40-41).[12]

The director further testified that it was her "understanding" that the student received the same services at iBrain for the 2018-19 school year as provided at iHope in the 2017-18 school

[11] The director further testified that she was "like the final review person" on the student's 2017-18 IEP at iHope (Tr. pp. 42-44).

[12] Given this testimony, there is no factual basis for the parents claim that the district could have or should have secured the student's pendency placement at iHope. The student's placement at iHope was a unilateral placement made by the parents and the parents have pointed to no authority for the proposition that the district could have effectuated such a placement at an unapproved nonpublic school (beyond funding the same pursuant to the decision of an IHO).

year (Tr. p. 29). Specifically, the director testified that he attended a 6:1+1 special class at iBrain (T. p. 28). As for related services, she indicated that the student was or would be receiving services in 60-minute increments, consisting of the following: speech-language therapy and PT five times per week each; OT four times per week; vision therapy three times per week; hearing services two times per week; and parent counseling and training one time per month (Tr. pp. 27-28). She also testified that the student has a 1:1 paraprofessional (Tr. pp. 28-29).

As set forth above, there are a number of similarities between the program provided at iHope and the program provided at iBrain. However, the hearing record reflects that some of the services provided at iHope have not been provided at iBrain. In particular, the hearing record establishes that vision therapy, which the student received at iHope, had not been implemented at iBrain at the time of the pendency hearing as the vision education department was not fully staffed (see Tr. pp. 35-36, 53-57). According to the director, the student's vision education goals were still being addressed during academic sessions, and his services were still being implemented at iBrain; however, the student's goals were not being implemented by a vision specialist (Tr. pp. 53-57). Accordingly, the student lacked vision therapy from the time he entered iBrain on July 9, 2018 until at least the date of the September 6, 2018 pendency hearing (Tr. pp. 1, 32). Further, the director's testimony about hearing services was equivocal, at best. Although the director had indicated that the student began receiving hearing services at iHope (Tr. p. 21), she later stated her belief that "they may have added the hearing recommendation for" the 2018-19 school year (Tr. p. 32). Further, she indicated that she was unsure of the date that the hearing services started at iBrain but later indicated that it was at the end of August (Tr. pp. 28, 32).

It may be that an omission of one related service may not result in a finding that a change of placement has occurred in some instances, but, under the facts of this matter, that is not the case for this student with respect to vision therapy. The director testified with personal knowledge as to the importance of vision therapy to students attending iBrain. The director indicated that vision therapy at issue was for students with cortical visual impairment (Tr. p. 51). The director described cortical visual impairment as a vision problem that is not caused by a deficit in physical eye structure or functioning, but rather stems from the way the brain receives and processes information from the optical nerve (Tr. pp. 53, 56). The director stated that "vision education services for students with cortical visual impairment targets the best functioning . . . optical nerve . . . in terms of finding what" the student processes best, which takes "into consideration a really wide amount of information" such as colors of objects, size, and the way they move, among others (see Tr. pp. 56-57). The director explained that the student's recommendations and goals for vision education were being addressed during "his academic sessions" and the recommendations are "being followed throughout the day in our selection and presentation of materials" (Tr. p. 53). Moreover, the director testified that the student's materials in class were modified "based on what his current strengths [we]re and then what things they[] [were] working on for his visual processing," and that the student's vision education services [we]re being implemented at iBrain throughout the course of the school day by addressing his goals and methodologies during 1:1 instruction and academics (see Tr. pp. 53-55). The difference between the services the student was receiving at iBrain and the services previously delivered at iHope is that they were previously provided by a teacher of the visually impaired (Tr. pp. 55-56). According to the director, they had not yet hired a vision teacher at iBrain (Tr. p. 52). Based on the foregoing, the evidence in the hearing record shows that vision therapy is an important component of the student's pendency

program, and so, a program without that service is not substantially similar to one that provides vision therapy.

Finally, the parents argue that, if the student's programming at iBrain is not found to be substantially similar to the programming at iHope, the district should be responsible for partial pendency amounting to the costs of services that do overlap between the two programs. In support of this proposition, the parents cite a Second Circuit case that provided that, if a district fails to implement a student's pendency placement, compensatory education in the form of reimbursement for services obtained by the parent is often considered as a potential remedy (see E. Lyme, 790 F.3d at 456-57). However, here, absent a finding of substantial similarity, there is no lapse on the part of the district for implementation of pendency for which a remedy in the form of the costs of services would be appropriate.[13] Rather, where, as here, the parent has unilaterally elected not to maintain the student's pendency placement at iHope, any lapse in services is attributable to the parent, not the district, and I reject the parent's argument that a student's stay-put, the "then current educational placement," is a divisible, a-la-carte program that may change at any given time, which would undermine both the "status quo" concept so prevalent in stay-put jurisprudence as well as the substantial similarity approach put forth by the parents as the very test to determine whether they are entitled to public funding for the costs of the student's placement at iBrain in the first place. Consequently, the parents' argument asserting the divisibility of a stay-put placement fails.

VII. Conclusion

In light of the above, the hearing record does not establish that, based on the evidence in the hearing record, the program implemented at iBrain—at the time of the impartial hearing—was substantially similar to the pendency program provided at iHope during the 2017-18 school year as set forth in the unappealed March 2018 IHO decision. Given the director's testimony that iBrain was in the process of interviewing candidates to ensure that the vision education department was fully staffed (see Tr. pp. 54-56), if the parents request to revisit the question of pendency as the impartial hearing proceeds, the IHO should permit them to present evidence regarding the date on which vision services became available and, if the evidence supports it, find that the programs are substantially similar and enter an order directing the district to fund the student's stay-put placement at iBrain from the date that the programs became substantially similar.[14] However, the evidence in the hearing record supports a finding that, at the time of the pendency hearing, the parents' unilateral placement of the student at iBrain constituted a "change in placement" for the

[13] If this were a situation in which a district was directly responsible for the actual delivery of services pursuant to pendency and there was a lapse in services, the appropriate relief would be compensatory or make-up services to remediate the deficiency as the Second Circuit indicated (see E. Lyme, 790 F.3d at 456-57). However, that is not the circumstances present here; rather, the parents have intervened to maintain the status quo by selecting the private school that will deliver the student's special education services and are now seeking public funding under the stay-put rule. iHope and iBrain are not regulated public programs and I lack the authority to order such nonapproved, nonpublic schools to provide compensatory education to a student. Consequently, the parents assume the risk that there may be a lapse in funding for stay put services for those times that their preferred private school fails to deliver the "then current educational placement" that constitutes the student's stay-put.

[14] Similarly, the IHO should permit the parents to present evidence, as necessary, regarding other services, such as 1:1 nursing or hearing education services, that may be relevant to a substantial similarities' determination.

purposes of pendency and, as such, the evidence in the hearing record does not support the IHO's determination requiring the district to fund the student's attendance at iBrain.

I have considered the parties' remaining contentions and need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that that the IHO's interim decision dated October 3, 2018, is modified by reversing the portion which found that the student's then-current educational placement for purposes of establishing pendency was the placement offered at iBrain; and

IT IS FURTHER ORDERED that the student's then-current educational placement for the pendency of this proceeding is the student's placement offered at iHope for the 2017-18 school year as reflected in the March 2018 IHO Decision.

Dated: **Albany, New York**
December 31, 2018

SARAH L. HARRINGTON
STATE REVIEW OFFICER