The University of the State of New York

The State Education Department
State Review Officer
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No. 18-139

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

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

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Mary H. Park, Esq.

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The hearing record reflects that the student attended iHope for the 2017-18 school year (see Parent Ex. B).[1] The parent's unilateral placement of the student at iHope for the 2017-18 school year was the subject of a prior administrative hearing (id.). At the conclusion of the prior impartial hearing, an IHO issued a decision, dated June 20, 2018, finding that the district denied the student a FAPE for the 2017-18 school year, that iHope was an appropriate unilateral placement for the student, and that equitable consideration weighed in favor of an award of the costs of the student's tuition at iHope, including a 1:1 paraprofessional, related services, transportation, and an assistive technology device (id. at pp. 6-7).

According to the parent, the district failed to timely convene a CSE meeting, develop and issue an appropriate IEP, and issue a placement recommendation to the parent prior to the start of the 2018-19 school year (Parent Ex. A at p. 2). Thereafter, the student began attending iBrain (id. at p. 1).

A. Due Process Complaint Notice

The parent initiated the instant administrative proceeding by filing a due process complaint notice dated July 9, 2018 (Parent Ex. A at p. 1). The parent raised concerns about the adequacy of the CSE process and the CSE's failure to meet and develop an IEP for the 2018-19 school year, and asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (id. at p. 2). As relevant here, the parent asserted the student's right to a pendency placement was based on an unappealed IHO decision (id. at p. 2; see Parent Ex. B). The parent 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.).

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 18, 2018, after three days of proceedings (see Tr. pp. 1-58). At the impartial hearing, the parent asserted that pendency lay in the unappealed decision of an IHO, dated June 20, 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. 24-27; Parent Ex. B at pp. 6-7). However, the parent argued that the student was entitled to receive his pendency placement at iBrain since the program offered at iBrain during the 2018-19 school year was substantially similar to the program offered at iHope

[1] Due to the status of this matter as an interim appeal disputing a pendency determination, at the time of the parent's request for review, there has been very little evidence entered into the hearing record, accordingly the factual background is derived from allegations in the due process complaint notice and a prior unappealed IHO decision involving this student (see Parent Exs. A; B).

during the 2017-18 school year (see Parents Closing Mem. of Law at pp. 7-9). The district argued that there was no right to pendency where the parent removed the student from iHope and enrolled him in her preferred placement at iBrain (Dist. Closing Mem. of Law at p. 4). The district also argued that the student's pendency placement remained at iHope based upon the June 2018 unappealed IHO decision and that the IDEA does not impose "an affirmative obligation on the school district to propose alternative pendency placements" where iHope is still available to the student (id. at pp. 6-7).

In an interim decision dated October 16, 2018, the IHO determined that a parent may not unilaterally move their child from one school to another and retain the right to pendency services (IHO Decision at p. 1). The IHO noted that the parent attempted to distinguish a prior SRO decision from the instant matter by arguing that the holding in that appeal "pertain[ed] only to services which are not mandated by law," but the IHO disagreed and found that the decision pertain[ed] "to tuition as well as related services" (IHO Decision at p. 1; see Application of the Bd. of Educ., Appeal No. 00-073). As a result, the IHO ordered that the student's pendency placement remain at iHope and that "pendency services w[ould] only attach at such time as" the student re-enrolled in iHope (id.).

IV. Appeal for State-Level Review

On appeal, the parent argues that the IHO "erroneously" and exclusively relied on one SRO decision to make her determination. Specifically, the parent contends that the IHO misapplied the law and misconstrued a sentence in one SRO decision stating that "parents are not free to unilaterally transfer their child from one school to another." The parent argues that, in context, the full quotation reflects that "[a]lthough a change in location is not necessarily a change in educational placement," parents are not entitled to move a student from one school to another "with the assurance that special services will be provided by the school district at the new location." As a result, the parent contends that the case cited by the IHO was not relevant to the facts at issue in this case. The parent also argues that the IHO's failure to make a determination as to whether the programs offered at iHope and iBrain were substantially similar is reversible error. The parent cites to a previous decision issued by the same IHO to show that she has previously applied the standard of substantial similarity and found in favor of parents' request for an award of pendency at iBrain. Therefore, the parent contends that the IHO should have addressed whether the iHope and iBrain programs were substantially similar in this case. The parent further contends that testimony from the director of special education at iBrain (director) shows that the programs at iBrain and iHope are substantially similar and, as a result, the student is "entitled to pendency placement at iB[rain]." For relief, the parent requests that the IHO's determination on pendency be reversed and that the SRO order the district to fund the cost of the student's tuition at iBrain for the 2018-19 school year. In a footnote in the request for review, the parent alternatively requests 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," 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 at issue."[2]

In an answer, the district denies the parent's allegations and argues that the IHO's decision should be upheld in its entirety.[3] The district argues that the parent had no right to pendency once she removed the student from iHope and placed him at iBrain for the 2018-19 school year. Furthermore, the district contends that, if the student was not permitted to re-enroll in iHope for the 2018-19 school year, it would have been the parent's burden to establish why. The district claims the parent provided no evidence that they were unable to enroll the student at iHope. The district also contends that the IHO correctly relied on an SRO decision, which held that parents are not entitled to unilaterally transfer a child from one school to another with the assurance that tuition and related services will be provided by the school district at the new location.

Alternatively, the district argues that the parent failed to establish that the student's program at iBrain was substantially similar to his program at iHope. In particular, the district cites to testimony from the director of iBrain that the student was no longer receiving vision education services at iBrain. The district also maintains that the student was in a 6:1+1 special class for only half an hour a day at iBrain and the parent failed to offer any evidence at the impartial hearing as to whether the new location of the school affected the student's transportation needs. The district also maintains that the parent failed to provide evidence concerning how many hours per day the student was in a 6:1+1 special class at iHope or the reason vision education services were discontinued at iBrain. The district further maintains that the director's testimony was conclusory and insufficient because she only made broad statements about the type of services the student might receive at iBrain and that she was "insufficiently experienced and lacked the knowledge about iH[ope] to credibly give testimony about the program." Finally, the district argues that the parent's submission of additional evidence should be rejected as the parent does not argue for its inclusion, the exhibits were available at the time of the pendency hearing, and the exhibits are unnecessary to render a determination.[4]

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[2] While, as previously explained to parent's 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 parent may attempt to pursue the argument before the IHO and in order to put the issue to rest, the parent's argument is briefly discussed below.

[3] The district acknowledges that the parties agreed that the student's pendency placement was based on the unappealed June 2018 IHO decision (see Tr. pp. 24-25; Answer ¶ 6).

[4] The parent submits the student's proposed 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

In a reply, the parent responds to the assertions made in the district's answer, largely by rearguing the claims set forth in the request for review, which is beyond the permissible scope of a reply as permitted by State regulation (see 8 NYCRR 279.6[a]). In addition, the parent argues that there is no requirement that she show iHope was unavailable to the student before determining whether the programs were substantially similar. The parent also argues that the student's transportation needs, while necessary, are "not relevant to the substance of [his] educational program at iB[rain]." Finally, the parent claims that the district failed to advocate that the student's pendency placement existed "somewhere," even if that school was not iBrain. The parent also claims that, as a result of the district's failure to meet its burden to show that it secured the student's pendency placement at iHope and that iHope could continue to provide the student with his then-current educational placement, the parent had no choice but to enroll the student at iBrain.

V. Applicable Standards

The IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not

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. Likewise, Exhibit CC to the answer—the IHO's decision in a matter involving a different student—has no bearing on the present matter and shall not be considered.

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

Turning to the crux of the parent's appeal, the parties agree that the student's educational placement for purposes of pendency is based on the unappealed June 2018 IHO decision (see Tr. pp. 24-25; Parent Ex. B; Answer ¶ 6). 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 parent has 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 the parent is permitted to transition her 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"]).[5] 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 pursuant to the stay put provision, so long as the alterations do not amount to a change in educational placement.

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 to provide a student special education and related services is an administrative decision within the discretion of the school 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).

[5] This echoes similar sentiments expressed by other circuit courts (see D.M. v New Jersey Dept. of Educ., 801 F3d 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)"]).

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 who had been expelled from school, 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];[6] 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 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

[6] 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.

discussed below (i.e., if the parent sought a nonpublic school with different or additional services because of a change in the student's needs, such a transfer would in all likelihood amount to a change in the student's educational placement).

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; see Application of a Student with a Disability, Appeal No. 16-020).[7] 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 [OSEP 1994]). 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.

Turning to the application of these principals to the present matter, the IHO based her denial of the parent's request for pendency at iBrain entirely on her finding that parents were not free to unilaterally transfer their children from one school to another under pendency (IHO Decision at p. 1). Given the legal principals summarized above, I find that the IHO erred in reaching her conclusion on this basis. Also, as addressed above, the district's argument that the parent was required to establish the unavailability of iHope must fail.[8] Accordingly, it remains to be determined whether iBrain provides a substantially similar program to the program provided by iHope during the 2017-18 school year—the student's placement under pendency—such that the

[7] 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]).

[8] To the extent the parent attempts to argue that this burden exists but that it should fall on the district, the student's placement at iHope was a unilateral placement made by the parent and the parent has 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). Accordingly, the district was not in a position to know the availability or lack thereof of iHope.

parent's 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.

The unappealed June 2018 IHO decision found that the student's placement at iHope for the 2017-18 school year was appropriate and that the district should provide payment to iHope for the cost of tuition which included a 1:1 paraprofessional and the following related services: five 60-minute sessions per week of individual physical therapy (PT), three 60-minute sessions per week of individual occupational therapy (OT), one 60-minute session per week of individual vision education services, three 60-minute sessions per week of individual speech-language therapy, and one 60-minute session per month of parent counseling and training (see Parent Ex. B at p. 7). The decision also noted that the student was entitled to special transportation including "air-conditioning, lift capacity with a regular wheelchair, limited travel duration of no more than 60 minutes . . . and a travel aid," and that the district should provide and maintain the student's "AAC" assistive technology device for "in school and at home purposes" (id. at p. 8). The June 2018 IHO decision also reflected that the student was receiving his education at iHope in a 6:1+1 special class "as described in the Due Process Complaint" (see id. at p. 4).

With respect to iHope, the director of iBrain, who had previously been employed by iHope, testified to her general knowledge of the program provided by iHope and her familiarity with the student's iHope IEP for the 2017-18 school year (Tr. p. 16).[9] The director testified that she was familiar with the student's program for the 2017-18 school year because "one of the last things [she] did over . . . spring and summer [2017] was to review . . . those IEPs for that upcoming school year" (id.). The director testified that the student was placed in a 6:1+1 special class and that he was provided with a 1:1 paraprofessional and a 1:1 paraprofessional on the bus during the 2017-18 school year (Tr. p. 17). The director maintained that the student was getting "the same . . . push-in/pull-out for 60-minute services, PT, OT, speech" as he received while at iBrain (id.). The student also received "assistive technology support" and one 60-minute session of parent counseling and training (see Tr. pp. 17, 22-23). The director also noted that iHope was still in operation at the time of the hearing (Tr. p. 57).

With respect to iBrain, the director testified that her responsibilities included supervising teachers and paraprofessionals and that she was on the "intake team" (Tr. p. 9). The director explained that iBrain accepts students from 5 to 21 years old and the school's roster currently includes students from 6 to 19 years old (Tr. p. 13). The director testified that all of the students at iBrain have brain injuries or brain-based disorders and that iBrain has four 6:1+1 special classes and two 8:1+1 special classes (Tr. pp. 12-15). All students attending iBrain have a 1:1 paraprofessional and one third of those students have a 1:1 private nurse (Tr. pp. 12-13). The director noted that the school offers a "direct instruction model in the classroom," with each student receiving a "half an hour of direct instruction from the teacher one-on-one" and that the "same principles [we]re followed in paired and small [group] instruction in the classroom as well" (Tr. p.

[9] The director explained that she began working at iHope in April 2015 until December 2016 (Tr. p. 12). She then worked in a consultancy role at iHope from January 2017 to August 2017 (id.). In addition, the director worked at a residential program from December 2016 to June 2018 before she began working at iBrain (id.).

13). The director also explained that services were delivered using a "push-in pull-out model" (Tr. p. 14). Finally, the director noted that the school had recently moved to a new location (Tr. p. 37).

The director also described the components of the specific program provided to the student at iBrain. She indicated that the student was placed in a 6:1+1 special class and was provided with a 1:1 paraprofessional, including a paraprofessional "that comes in with him on the bus" (Tr. p. 15). The director also testified that the student received five 60-minute sessions per week of individual PT, five 60-minute sessions per week of individual OT, five 60-minute sessions per week of speech-language therapy, one 60-minute session per week of "assistive technology support services," and one 60-minute session per month of parent counseling and training (Tr. pp. 15-16).[10] The director generally testified that the services ordered in the June 2018 IHO decision were available to the student at iBrain for the 2018-19 school year (Tr. pp. 26-27).

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. The hearing record establishes that vision education services, which the student received while he attended iHope, were not being provided at iBrain. The director testified that these services were "discontinued as per the recommendation from iHope this year" as a result of the student's progress and that "they felt . . . [the student] no longer needed that specific service, so it was being phased out" (Tr. pp. 17-18). She further noted that the student's vision services were discontinued because the "therapist" determined he no longer needed vision services (Tr. p. 39). On appeal, the parent contends that failure to provide vision education services "cannot legitimately be counted as a difference between the two programs," and even if it could, the programs remain substantially similar because the parents are not "required to show that the programs are literally identical" (Req. for Rev. at p. 6). Further, the parent maintains that the student no longer needs vision education services because of progress made in the previous school year (see id. at p. 6 n.2). However, the parent's position in this regard amounts to an argument about the appropriateness of the program at iBrain. As noted above, a student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program (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"]). Accordingly, the hearing record supports the IHO's finding that, as of the time of the pendency hearing in this matter and because of the elimination of vision education services, the student's educational program at iBrain was not substantially similar to her prior program at iHope (see Lunceford v. D.C. Bd. of Educ., 745 F.2d 1577, 1582 [D.C. Cir. 1984] [elimination of a basic element of an education program is a change in educational placement]).

There are also inconsistencies in the hearing record with respect to the components of the student's programs at iHope and iBrain, as described in the director's testimony versus the June 2018 IHO decision. The June 2018 IHO decision indicated that the student's program included five sessions per week of PT, three sessions per week of OT, and three sessions per week of speech-

[10] The director also testified that the student used an assistive technology device at iHope which he continues to use at iBrain (Tr. pp. 22-23).

language therapy (see Parent Ex. B at p. 8). However, during the impartial hearing the director of iBrain testified that the student was receiving five sessions per week of PT, OT, and speech-language therapy at iBrain (Tr. pp. 15-16). In addition, while her testimony with respect to iHope was not explicit, she identified that the student had been receiving the same services in frequencies of five sessions per week each during the 2017-18 school year, which represents an increase from the frequencies of OT and speech-language therapy services described in the June 2018 IHO decision (see Tr. p. 17). To the extent that iBrain was providing the student with more sessions of related services during the 2018-19 school year than iHope was during the 2017-18 school year, such an increase could affect whether the student's educational program remained "substantially and materially the same." While on its own, these discrepancies may not have defeated a finding of substantial similarity, they bolster the ultimate determination in this matter, which rests on the lack of vision education services in the student's program at iBrain.

Next, the district argues on appeal that the student was receiving group instruction in a 6:1+1 special class at iBrain for only half an hour a day and that, as a result, the student was not actually receiving instruction in that class ratio. At the impartial hearing the director confirmed that the student received whole group instruction in the 6:1+1 class "probably only for a half an hour a day," and that group instruction was generally limited to "more social oriented interaction[s]" (Tr. pp. 43-46). The district also maintains that the parent failed to offer evidence at the impartial hearing concerning how many hours per day the student was in a 6:1+1 special class at iHope. However, the director testified at the impartial hearing that the student received "exactly" the same amount of group instruction at iHope as was currently received at iBrain (see Tr. p. 56). She further testified that students at iBrain have difficulty paying attention in large groups and it is easy for them to become confused by other students' answers and responses in a larger instructional grouping (see Tr. p. 44). The district's position in this regard looks beyond the contours of the program forming the basis of the pendency placement and more closely resembles an argument about the manner in which instruction is delivered within a particular class ratio, similar to a methodology or lesson plan. Absent evidence that the student's program at iHope included a set amount of time for small group versus full class-based instruction, I decline to conclude that this level of specificity defines the student's pendency placement.

The district's final argument about substantial similarity is that the parent failed to provide any evidence as to whether the new location of the school affected delivery of the student's transportation services. As noted previously, the director of iBrain testified that the school had moved to a new location (Tr. p. 37), but she did not provide further information regarding the student's transportation to iBrain.[11] Ultimately, the hearing record is insufficient to make a finding about the travel time between the student's home and iBrain at this juncture and, in any event, it is unnecessary in order to reach a final determination about pendency in this matter at this time.[12]

[11] In her reply, the parent maintains that the student's residence is "well less than one hour's travel" from the location of iBrain. However, the address listed by the parent in the reply is a different address than that about which the director of iBrain testified at the impartial hearing (compare Tr. p. 37, with Reply at p. 8).

[12] Some courts have found that a change in the location of a school may impact the district's ability to provide

Finally, the parent argues 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 parent cites 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 parent 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 parent's 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 June 2018 IHO decision. Should the parent attempt to advance before the IHO that the student's program at iBrain has become substantially similar to the student's program at iHope since the pendency hearing in this matter, the parent should ensure that the record is adequately presented to the IHO regarding the essential components of the student's programs at iHope and iBrain. The student's IEPs developed by each school, which the parent attempts to submit as additional evidence on appeal but which I have declined to consider at this juncture, may be relevant to the question of substantial similarity but they are unlikely to be dispositive without

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limited travel time and may be considered as a factor in determining whether a change in location amounts to a change in educational placement (see DeLeon v. Susquehanna Cmty. Sch. Dist., 747 F.2d 149, 154 [3d Cir. 1984] [holding that although minor changes to method or schedule of transportation did not result in a change in educational placement, the Court acknowledged that under some circumstances, changes in transportation may have a significant enough effect on a student's learning experience to be considered a change in educational placement]; M.K. v. Roselle Park Bd. of Educ., 2006 WL 3193915 at *14-*15 [D.N.J. Oct. 31, 2006] [finding that the difference in travel time made two programs "significantly dissimilar" from each other]).

[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 parent has intervened to maintain the status quo by selecting the private school that will deliver the student's special education services and is 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 parent assumes 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.

more. In particular, where as here, it is the parent who is purporting to procure the student's stay-put placement, evidence of the implementation of the alleged substantially similar program is critical. As discussed in detail above, while I disagree with the IHO's pendency analysis laid out in her decision, the evidence in the hearing record supports a finding that, at the time of the pendency hearing, the parent's placement of the student at iBrain constituted a "change in placement" for the purposes of pendency and, as such, there is no basis to reverse the IHO's denial of the parent's request that the district 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 DISMISSED.

Dated: **Albany, New York**
January 2, 2019

SARAH L. HARRINGTON
STATE REVIEW OFFICER