The University of the State of New York

The State Education Department
State Review Officer
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No. 19-039

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 Cynthia Sheps, Esq.

Brain Injury Rights Group, attorneys for respondent, by Allison L. Corley, 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 in part, 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 2), which among other things, determined that the district failed to provide respondent's (the parent's) daughter with pendency services, and ordered the district to provide a bank of compensatory educational services during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student for the 2018-19 school year. IHO 2 found that the student's pendency placement was at iBRAIN. The appeal must be sustained in part.

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 student has been the subject of a prior State-level administrative appeal of an interim decision rendered by an impartial hearing officer (IHO 1) regarding the student's pendency placement after rejecting the district's offer of a public school placement and being unilaterally placed by her parent at the International Institute for the Brain (iBRAIN) for the 2018-19 school year (see Application of a Student with a Disability, Appeal No. 18-119). This State-level appeal relates to a second interim decision on the issue of the student's pendency placement rendered by

a second impartial hearing officer (IHO 2) in the same proceeding, and the parties' familiarity with the student's educational history and the prior due process proceedings is presumed and will not be repeated here in detail (id.).

Briefly, the parent initiated the instant administrative due process proceeding by filing a due process complaint notice dated July 9, 2018 (Parent Ex. A). As relevant here, the parent asserted the student's right to a pendency placement pursuant to an unappealed decision of an IHO dated April 30, 2018 (id. at pp. 1-2; see Parent Ex. B). The parent requested that pendency be determined to consist of prospective payment for the full cost of the student's tuition at iBRAIN (including academics, therapies, and a 1:1 paraprofessional during the school day), as well as special transportation (including a limited travel time of 60 minutes, a wheelchair accessible vehicle, air conditioning, a flexible pick-up and drop-off schedule, and a paraprofessional) (Parent Ex. A at p. 2). The parties proceeded to an impartial hearing on September 6, 2018 and concluded the pendency portion of the hearing that day (Tr. pp. 1-152). By interim decision dated October 4, 2018, IHO 1 found that the basis for pendency lay in the unappealed April 2018 IHO decision (Interim IHO Decision at p. 3). IHO 1 further found that, although a change in location does not necessarily constitute a change of placement, parents are not free to unilaterally transfer their child from one school to another, and because the parents had not demonstrated that iHOPE was unable to implement the student's pendency placement, iHOPE was the student's pendency placement (id. at p. 5).

A. Impartial Hearing Officer Decision

Following the pendency hearing and issuance of the interim decision, the parties proceeded to additional hearing dates on October 9, 2018 and October 16, 2018 (Tr. pp. 153-394). While the proceeding was pending before IHO 1, the parent filed an interlocutory appeal seeking State-level review of IHO 1's interim decision regarding the student's pendency placement. On November 21, 2018, an SRO issued a decision with respect to the parent's appeal of IHO 1's October 4, 2018 interim decision (Application of a Student with a Disability, Appeal No. 18-119). The SRO found that the student did not receive vision education services from the time she entered iBRAIN on July 9, 2018 until at least the date of the September 6, 2018 pendency hearing (id.). The SRO further determined that the hearing record established that vision education services were an important component of the student's pendency program and, accordingly, a program without that service was not substantially similar to one that provides vision education services (id.). Noting the parent's representations in his memorandum of law that the student may have begun receiving vision services at some point since the pendency hearing, the SRO stated that as the impartial hearing proceeded, the IHO should permit the parent to present evidence regarding the date on which vision services became available and, if the evidence supported it, find that the programs were 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 (id.).

The parties convened for an additional hearing date on November 30, 2018 (Tr. pp. 395-509). By email dated December 4, 2018, IHO 1 recused himself and IHO 2 was appointed on December 7, 2018 (Interim IHO 2 Decision at p. 3). A prehearing conference was held on December 18, 2018 and a second hearing on pendency was held over seven non-consecutive hearing dates (Tr. pp. 510-1625). In a second interim decision regarding the student's pendency placement dated April 15, 2019, IHO 2 determined that iBRAIN became substantially similar to

the student's program at iHOPE on December 6, 2018, when the student began receiving vision education services on a face-to-face basis (Interim IHO 2 Decision at pp. 9, 15). IHO 2 then determined that the district had failed to provide pendency services prior to December 6, 2018 (id. at p. 14). IHO 2 further found that the student was entitled to compensatory educational services for the district's failure to provide pendency services as of the date of the filing of the parent's due process complaint notice on July 9, 2018 (id. at pp. 14, 15).[1] IHO 2 ordered the district to "create a bank of compensatory services to include 24 weeks (the period from July 1, 2018 to December 6, 2018)" of attendance in a 6:1:1 program such as iBRAIN, plus the related services of individual physical therapy (PT) five times per week for 60 minutes, individual occupational therapy (OT) three times per week for 60 minutes, individual vision education services two times per week for 60 minutes, individual speech-language therapy five times per week for 60 minutes, individual assistive technology two times per week for 60 minutes, and parent counseling and training one time per month for 60 minutes, at a rate of $90.00 per hour (id. at pp. 14-15).

IV. Appeal for State-Level Review

The district appeals IHO 2's determination that it failed to provide the student with pendency services from July 10, 2018 through December 6, 2018. The district further appeals IHO 2's order directing the district to fund a bank of compensatory services to remediate the student for the lack of pendency services during that time period on the grounds that (1) the parent intervened upon the status quo by placing the student at iBRAIN; and (2) iBRAIN was not substantially similar during that time period. The district does not appeal IHO 2's finding that iBRAIN became the student's pendency placement from December 6, 2018 going forward.

According to the district, the student's program at iHOPE during the 2017-18 school year had included individual vision education services two times per week for one-hour sessions provided face-to-face. The district contends that the vision education services that the student was supposed to receive according to iBRAIN were not provided at all between July 9, 2018 and September 13, 2018. From September 14, 2018 through December 6, 2018, the district alleges that only two face-to-face vision education sessions were provided by iBRAIN to the student while the remaining sessions were delivered remotely via video conferencing, which according to the district, offered little benefit to the student.

In an answer, the parent alleges that he demonstrated that the student's program at iBRAIN delivered from July 10, 2018 through December 6, 2018 was substantially similar to the one the student previously received at iHOPE. The parent also argues that IHO 2's award of compensatory educational services should be upheld because iBRAIN was the student's "stay-put" placement from July 10, 2018 through December 6, 2018 (Answer at p. 3).

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[1] The due process complaint notice is dated July 9, 2018 (Parent Ex. A at p. 1). IHO 2 alternatively indicated that the parent was entitled to relief beginning on July 1, 2018 and July 10, 2018 (compare Interim IHO 2 Decision at p. 14, with Interim IHO 2 Decision at p. 15). The parties have for the most part referenced July 10, 2018 as the beginning date of IHO 2's award in their respective pleadings.

V. Discussion

A. Compensatory Education for Failure to Provide Pendency Services

At the outset, I note that the SRO in Application of a Student with a Disability, Appeal No. 18-119 did not explicitly remand this matter to an IHO, rather she determined that at the time of the pendency hearing and interim decision reached by IHO 1, the student's program at iBRAIN was not substantially similar to iHOPE, due to a lack of evidence of vision education services. However, the SRO was cognizant of the fact that iBRAIN could become substantially similar at some unknown date over the course of the impartial hearing and advised IHO 1 that the parent should be given the opportunity, if he so chose, to demonstrate when the student began to receive substantially similar vision education services at iBRAIN. The hearing record reflects that the parent requested a second pendency hearing from IHO 2 (Tr. p. 569). IHO 2 was not directed to conduct a separate pendency inquiry but did so at the parent's request. The SRO also previously determined that the parent had waived his claim for an order directing the district to provide pendency for any services that overlapped between iHOPE and iBRAIN (Application of a Student with a Disability, Appeal No. 18-119). Nevertheless, IHO 2 resurrected the parent's claim sua sponte to find that the district had failed to provide pendency services prior to December 6, 2018 and to award compensatory educational services from July 10, 2018 through December 6, 2018.

Initially, as neither party appeals from IHO 2's determination that iBRAIN became substantially similar to iHOPE on December 6, 2018 and thereafter became the student's placement for the pendency of this proceeding, those determinations are final and binding (34 CFR 300.514 [a]; 8 NYCRR 200.5 [j][5][v])[2]. The district contends that it was not obligated to provide pendency services from the initiation of the due process until December 6, 2018 and, consequently, that the compensatory education award by the IHO was improper.

1. Legal Framework-Pendency

At the risk of repeating much of the legal standards stated in Application of a Student with a Disability, Appeal No. 18-119, 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,

[2] The parent attempts to assert several alternative arguments in his answer that iBRAIN should be considered substantially similar to iHOPE during the period from July 9, 2018 to December 6, 2018. First, as a party aggrieved by the determination of the IHO, it was incumbent upon the parent, if he wished to seek review of "all or a portion" of the IHO's decision, to assert a cross-appeal in the answer (NYCRR 279.4[f]) and, failing to do so, his argument is waived. The arguments would fail in any event. The provider's own notes suggest that the ability to provide such services to this particular student remotely may be limited, trying with little success with several platforms such as Blackboard and Skype, and the district's expert opined that the approach was not workable (see, e.g., Tr. pp. 1495-97, 1554-55; Parent Ex FF at p. at pp. 5-7). To the extent that the parent could have relied on the "operative placement test" for the same reasons described in Navarro Carrilo, (2019 WL 2511233, at *19), the test does not apply in these circumstances in which the student has IEPs and an unappealed IHO decision to look to for purposes of establishing pendency rather than the operative placement test (see, e.g., Parent Exs. B-D). Similarly, for essentially the reasons described by the Court in Navarro Carrilo, Gabel v. Bd. of Educ. of Hyde Park Cent. Sch. Dist., 368 F. Supp. 2d 313 (S.D.N.Y. 2005) also does not apply.

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]). 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 & Citizens for the Continuing Educ. at Malcolm X (PS 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"]).

An educational agency's obligation to maintain stay-put placement is triggered when an administrative due process proceeding is initiated (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 445, 452 [2d Cir. 2015]). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71; see E. Lyme, 790 F.3d at 452; Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). In addition, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]). 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).

Stay-put "is often invoked by a child's parents in order to maintain a placement where the parents disagree with a change proposed by the school district; the provision is used to block school districts from effecting unilateral change in a child's educational program" (Susquenita, 96 F.3d at 83). "Where the parents seek a change in placement, however, and unilaterally move their child from an IEP-specified program to their desired alternative setting, the stay-put rule does not immediately come into play" (M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 [3d Cir. 2014]). "[A]n administrative ruling validating the parents' decision to move their child from an IEP-specified public school to a private school will, in essence, make the child's enrollment at the private school her 'then-current educational placement' for purposes of the stay-put rule. Having been endorsed by the State, the move to private school is no longer the parents' unilateral action, and the child is

entitled to 'stay put' at the private school for the duration of the dispute resolution proceedings" (M.R., 744 F.3d at 119; see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 484 [2d Cir. 2002]; see also Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 201 [2d Cir. 2002]). The purpose of the pendency provision is "to maintain the educational statuts quo while the parties' dispute is being resolved," and it "therefore requires a school district to continue funding whatever educational placement was last agreed upon for the child until the relevant administrative and judicial proceedings are complete" (T.M., 752 F.3d at 152, 170-71).

When a school district has been paying for a student's tuition at a nonpublic school pursuant to pendency as the then 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. v. New York City Dep't of Educ., 694 F.3d 167 [2d Cir. 2012]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *6 [S.D.N.Y. Mar. 17, 2010]). Parents can successfully secure stay put protection if they obtain an administrative or judicial ruling that validates their decision to move a student from an IEP-specified public school setting to a nonpublic school that they unilaterally selected without the district's input and this placement becomes the "then-current educational placement" for purposes of the stay-put rule, so long a proceeding is pending (Schutz, 290 F.3d at 483 [noting that "once the parents' challenge succeeds, . . . consent to the private placement is implied by law" and the funding of the private placement becomes the responsibility of the school district pursuant to stay put]). 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 programming 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.

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 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 [OSEP 1994]; see Application of a Student with a Disability, Appeal No. 16-020). The United States Department of Education's Office of Special Education Programs 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.

2. Pendency as Applied in the Context of iBRAIN

As noted above, the parties do not challenge IHO 2's determination that the student's program at iBRAIN became substantially similar to the student's program at iHOPE as of December 6, 2018. IHO 2 also determined that the student's program at iBRAIN prior to December 6, 2018 was not substantially similar to the programming at iHOPE because the student was not receiving face-to-face vision education services (Interim IHO 2 Decision at p. 9). Having found that the student's vision education services were not substantially similar prior to December 6, 2018, IHO 2 erred by finding that the district was obligated to provide pendency services from July 10, 2018 through December 6, 2018, when the parent—by IHO 2's own analysis—had effected a change in educational placement by moving the student from one nonpublic school to another. IHO 2 further compounded that error by awarding compensatory educational services retroactively to the (incorrect) filing date of the parent's due process complaint notice.

The parent argued unsuccessfully in a footnote in Application of a Student with a Disability, Appeal No. 18-119 that if the student's programming at iBRAIN was not found to be substantially similar to the programming at iHOPE, the district should be responsible for the costs of services that do overlap between the two programs. As indicated above, the SRO determined that the parent had waived this argument. IHO 2 seized upon it as a basis to award compensatory educational services for a time period he had determined to be a parental change in educational placement. While IHO 2 clearly appreciated that "context is everything" (Interim IHO 2 Decision at p. 10), it was nonetheless lost on him given his reliance on an SRO's application of 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). Since the decision was rendered in Application of a Student with a Disability, Appeal No. 18-119, one of the first, SROs have more clearly stated on several occasions that 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 (see Application of a Student with a Disability, Appeal No. 18-139; Application of a Student with a Disability, Appeal No. 18-132; Application of the New York City Dep't. of Educ., Appeal No. 18-127; Application of a Student with a Disability, Appeal No. 18-123).[3]

[3] 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 circumstance presented 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 in

Another point that was lost in IHO 2's analysis is that where, as here, the parent has unilaterally rejected the public placement and placed the student at iBRAIN, (see e.g., Parent Ex. P) the general rule in a Burlington/Carter tuition reimbursement case is that when parents commence due process after rejecting a proposed IEP and unilaterally enrolling a student in a private school in contravention of the stay-put provision, they take responsibility for the costs of the student's tuition obligations and run the risk that they will not receive reimbursement therefor (T.M., 752 F.3d at 172; Murphy, 86 F. Supp. 2d at 357; see New York City Dep't of Educ. v. S.S., 2010 WL 983719 [holding that if a student's pendency is in the public school when due process proceedings commence, a parent who unilaterally places the child in a private school setting pending the completion of an appeal does so at his own financial risk]). Districts are not, under the general rule in Burlington/Carter unilateral placement cases, required to fund the unilateral placement pursuant to the stay-put rule, nor are they required or in some cases permitted to romp into a private school and start providing pendency services, compensatory or otherwise due to a lapse in public services resulting from the parent's decision to reject the public school offer and place the student privately (see, e.g., Tr. pp. 1605-06). The requirement that the district fund the student's placement at iBRAIN in this case is a limited exception to that general rule that was triggered because (1) the parent prevailed in the prior iHOPE due process proceeding for the 2017-18 school year and the matter was not further appealed; and (2) the parents so happen to have placed the student in a now substantially similar private placement. However, because it remains a unilateral placement case, any lapse in the pendency services in the iBRAIN context is attributable to the parent, not the district under the general rule. I only add to the prior SRO's reasoning in rejecting 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 eviscerate 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.[4] Consequently, the parent's argument asserting the a-la-carte divisibility of a stay-put placement fails, and in light of the discussion above, IHO 2's order must be reversed insofar as it ordered the district to provide compensatory educational services due to a lapse in pendency.

However, there is a final point to be discussed on the issue of making up pendency services. A district court decision on the issue of pendency rendered several days ago (also involving the district and a different student attending iBRAIN for the 2018-19 school year) suggests another possibility, one in which a parent's unilateral placement initially lacking the requisite vision education services could nevertheless meet the substantial similarity test if other conditions were also present. In that case, the District Court explained that missing one of twelve counseling sessions would not cause the private school placement to fail the substantially similar test, but that

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this circumstance 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.

[4] Generally speaking if the parent wants continued public funding at iBRAIN under pendency, the parent should be forthcoming with documentation from the private school showing that services are being delivered in accordance with pendency. If there comes a time when a fundamental change in educational placement occurs for which public funding is being provided under pendency, the district is correct that it should be made aware of that fact by the parent and iBRAIN (see Tr. p. 626-27).

"[t]he loss of twenty sessions of vision services over a two and a half month period is more troubling. And, if there were no plan to make up those services, then they would be effectively eliminated, which would render the educational program at iBRAIN not 'substantially similar' to that at iHope" (Navarro Carrilo v. New York City Dep't of Educ., 2019 WL 2511233, at *16 [S.D.N.Y. Jun. 13, 2019]). In this case, as the district points out,[5] the lack of in-person (or face-to-face as referred to in the pleadings) vision education services for the first five months of the year, or approximately 40 out of 42 hourly in-person sessions over the course of 21 weeks, is troubling to me as well. However as in the Navarro Carrilo case, also present in this hearing record is some evidence that iBRAIN is utilizing two vision teachers on-staff to varying degrees to make up missed vision education services for the student face-to-face that she did not receive while there was no vision education teacher on site (Tr. p. 624, 633-35, 637). The district's teacher of the visually impaired also indicated that it would be a good idea to do the makeup services for the student (Tr. pp. 1593-95). Consequently, if the parent can provide iBRAIN documentation to the district showing that a sufficient number of makeups of the missed vision education services have been achieved then, in accord with Navarro Carrilo, the district may be required to fund the services when it is shown by the parent that substantial similarity has been achieved.

In most cases, significant changes in the delivery of a student's special education programming that exceed ten school days will constitute a change in educational placement (see 34 CFR 300.530[a] [describing when disciplinary removals constitute a change in placement]; see e.g., Questions and Answers on Providing Services to Children With Disabilities During an H1N1 Outbreak, 53 IDELR 269 [OSERS 2009] [noting that the need for a CSE meeting occurs generally for absences of more than ten consecutive school days and for which an IEP meeting is necessary to change the child's placement and the contents of the child's IEP, if warranted]).[6] Ten school days out of a 180 day school year would be approximately five and one-half percent of the total enrolled time, or slightly less than five percent if summer services during July and August are also taken into account. In this case five percent of the missed services would be about two-to-three sessions and, similar to Judge McMahon's reasoning in Navarro Carrilo, such a low number of missed sessions would not cause iBRAIN to fail the substantially similar test. Thus, I will give the parent an opportunity to complete the makeup vision education services at iBRAIN that have already commenced under iBRAIN's own initiative at a rate of approximately one extra session per week (Tr. p. 635).[7] Consequently, I will direct the district to pay for the student's pendency at

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[5] Upon learning of the decisions two days ago, the undersigned granted the parties permission to file supplemental letter briefs to address Abrams v. Carranza, 2019 WL 2385561 (S.D.N.Y. Jun. 6, 2019) and Navarro Carrilo v. New York City Dep't of Educ., 2019 WL 2511233. I appreciate their prompt, thoughtful responses which were necessarily limited in scope by the undersigned in order to consider their viewpoints within the 30-day timeframe for issuing this decision.

[6] A similar but not identical time period for missed services involving a nondisabled student in the general education context is described as chronic absence from school, which is defined as missing at least ten percent of enrolled school days "Chronic Absenteeism Reports Now Available in SIRS," Office of Student Support Services [May 2, 2016], available at http://www.p12.nysed.gov/sss/documents/FINALchronicabsenteeismmemo_May2_2-16.pdf). Ten percent of the missed vision education services in this case would be approximately four sessions.

[7] If a student had been enrolled by the parent in a public school for the 2018-19 school year, I would likely have ordered 100 percent of the missed pendency services as make up services to be provided with a similar rate and timeframe by the district in order to satisfy the stay-put rule. However, as noted above, this is a unilateral

iBRAIN upon the submission of documentation such as dated session logs/notes showing that iBRAIN has made up at least 37 of the approximately 40 missed sessions prior to December 1, 2019, which is about one year from when the vision education services began being provided in face to face. A longer period is not necessary where the evidence shows that the student is capable of doing one make up per week and already has started, but I will allow the parties to mutually agree to extend that timeframe due to unforeseeable events regarding the student. I have seen no indication in the hearing record that the parties' Burlington/Carter dispute on the merits has ended or that the parent has reached the point at which he is ready to return his daughter to public school enrollment, and I believe it likely that the parent will continue to unilaterally place the student at iBRAIN into the 2019-20 school year such that iBRAIN will have the opportunity to provide the makeup services by the deadline.

Lastly, although too late to ameliorate at this stage of the proceedings, I am acutely aware that 12 hearing dates, two IHO decisions and two SRO decisions over ten months have been devoted to this student's pendency placement while the underlying issues related to the student's right to a FAPE and the parent's unilateral placement case have yet to be determined. Some of the time had to be expended due to the novel nature of the parent's pendency claims and the nuanced fact inquiry required. Parties and the IHOs should consider in the future whether it would be more efficient to direct the parents in similar circumstances to make their cases to a degree on the merits with respect to the appropriateness of iBRAIN under the Burlington/Carter standard and expand that evidentiary presentation to include facts relevant to pendency, should the issue arise in future school years.[8] Parents making substantial similarity claims should generally be prepared to make the needed fact-driven presentation in an expeditious, efficient manner, and IHOs are authorized to order parties to present direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony be made available for cross-examination (8 NYCRR 200.5[j][3][xii][f]). It may be necessary for parents to produce dated contemporaneous service delivery documents from the two schools if such business records exist, and it would be more probative to hear testimony from one or two individuals who worked with the student on a daily basis at the nonpublic school for which pendency has been previously determined to lie and from one or two individuals who worked with the student on a daily basis at the nonpublic school for which the parent now seeks pendency services. This guidance is suggestive only, in the interest of minimizing to the extent possible the length of time it takes to reach a determination of the merits of the case.

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placement case, and I would not impose the requirement on iBRAIN or the parent as they are not regulated entities, I am merely providing a limited opportunity for the parent to receive public funding for the period from July 9, 2018 through December 6, 2018 pursuant to pendency, assuming the parent and iBRAIN wish to continue with the makeup vision education services.

[8] IHO 2 has attempted to move matters along insofar as issuing an interim decision that the district denied the student a FAPE on procedural grounds, but not a substantive analysis of the district's proposed programming in the district's IEP for the student (see Interim IHO Decision dated March 25, 2019). The March 2019 interim decision also addressed issues such as the parent's live streaming of the impartial hearing and protective orders to avoid videoing opposing counsel's notes and workspace as well as that of the workspace and computer of IHO 2 (id.). The IHO also attempted to guide the parties on the procedures for further evidence in the proceeding, noting the amount of time the proceeding was taking (id.). Other than to note that he issued them, I express no opinion on these interim directives at this juncture, as they do not directly relate to IHO 2's pendency determination.

VI. Conclusion

In light of the above, IHO 2 erred by finding the district was obligated to provide pendency services from July 10, 2018 through December 6, 2018. IHO 2 further erred by ordering the district to fund a bank of compensatory educational services to remedy the student's lack of pendency services during that time frame. The district was under no obligation to provide pendency services for the time period that the student's program at iBRAIN was not substantially similar to the student's program at iHOPE. The parent however, will be given a limited opportunity to show that iBRAIN has made up the missing vision education services for the student.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's interim decision, dated April 15, 2019, is modified, by reversing so much thereof as found the district obligated to provide pendency services from July 10, 2018 through December 6, 2018, and directed the district to fund a bank of compensatory educational services for a period of 24 weeks; and

IT IS FURTHER ORDERED that, unless the parties shall otherwise agree, the parent shall have until December 1, 2019 to submit documentation to the district showing that iBRAIN has completed the equivalent of at least 37 60-minute vision education services makeup sessions for the student pursuant to pendency; and

IT IS FURTHER ORDERED that, upon the parent's submission to the district of documentation showing completion of at least 37 of the student's missed vision education services sessions the district shall fund the student's educational placement at iBRAIN pursuant to pendency for the time period from July 9, 2018 to December 6, 2018.

Dated: **Albany, New York**
June 20, 2019

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JUSTYN P. BATES
STATE REVIEW OFFICER