The University of the State of New York

The State Education Department
State Review Officer
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No. 20-010

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 Theresa Crotty, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondents, by Peter G. Albert, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining respondents' (the parents') son's pendency placement during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student for the 2019-20 school year. The IHO found that the student's pendency placement was at the International Institute for the Brain (iBrain). 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 student has been the subject of a prior State-level administrative appeal regarding the student's pendency placement after the parents filed a due process complaint notice challenging the district's offer of a public school placement for the 2018-19 school year and the parents unilaterally placed the student at iBrain (see Application of a Student with a Disability, Appeal

No. 18-132).[1] The parties' familiarity with the student's educational history and the prior due process proceedings is assumed and will not be repeated here in detail, except as relevant.

Briefly, the hearing record reflects that the student attended a nonpublic school, the International Academy of Hope (iHope), for the 2017-18 school year (see Parent Ex. I at p. 1). The parents' unilateral placement of the student at iHope for the 2017-18 school year was the subject of a prior due process impartial hearing (see Parent Ex. B). At the conclusion of the impartial hearing concerning the student's 2017-18 school year, an IHO issued a decision, dated March 12, 2018, finding that the district conceded that it had failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year, that iHope was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of an award of the costs of the student's tuition at iHope, including related services, for the 2017-18 school year (id. at pp. 3-5).

For the 2018-19 school year, the parents unilaterally placed the student at iBrain and filed a due process complaint notice challenging an IEP developed by a CSE on March 14, 2018 (see Application of a Student with a Disability, Appeal No. 18-132).

According to the parents, a CSE convened on May 29, 2019 to develop an IEP for the student for the 2019-20 school year and recommended that the student be placed in a "12:1+(3:1)" special class in a district public school (Parent Ex. A at p. 2).[2] The parents rejected the CSE's recommendation and the student continued attending iBrain for the 2019-20 school year (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated July 8, 2019, the parents alleged that the district failed to offer the student a FAPE for the 2019-20 school year (Parent Ex. A). As relevant here, the parents alleged that the basis for pendency was the unappealed March 12, 2018 IHO decision granting the parents tuition reimbursement for iHope for the 2017-18 school year (id. at pp. 1-2). The parents requested that pendency be determined to consist of 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 1:1 paraprofessional) (id. at p. 2).

[1] In addition, the parents filed an appeal of a second interim IHO decision regarding the student's pendency placement in the administrative proceeding concerning the student's 2018-19 school year, and a decision in that matter is being issued by another SRO contemporaneously with this decision under the caption Application of a Student with a Disability, Appeal No. 20-001.

[2] Due to the status of this matter as an interim appeal disputing a pendency determination, at the time of the parents' request for review, there had been very little evidence received at the impartial hearing; accordingly, some of the factual background is derived from allegations in the due process complaint notice (see generally Tr. pp. 1-102; Parent Exs. A-C, E, I; Dist. Exs. 1-3).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on November 21, 2019 and concluded the portion of the hearing related to pendency that day (see Tr. pp. 1-102). At the impartial hearing, the parents asserted that pendency lay in the March 12, 2018 IHO decision, 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. 26-27; Parent Ex. B at pp. 3-5; see Parent Pendency Br. at p. 2). Further, the parents asserted that the student's educational program and placement at iBrain was "substantially similar" to the student's program and placement at iHope for the 2017-18 school year (Tr. p. 27; see Parent Pendency Br. at pp. 2, 7-9). The district opposed the request for funding arguing that the student had no right to pendency at iBrain under these circumstances, where the parents unilaterally removed the student from his placement at iHope and enrolled him in the parents' preferred placement at iBrain (Tr. p. 94; see Dist. Pendency Br. at pp. 2-3).

By interim decision dated December 13, 2019, the IHO determined that the student's program and placement at iBrain was substantially similar to the student's program and placement at iHope (Interim IHO Decision at pp. 12-20).[3] After reviewing the parties' positions and the relevant caselaw related to the issues presented, the IHO noted that the "legal standard that is currently being used for this student" in the proceedings relating to the student's 2018-19 school year "is whether or not the programs are substantially similar" (id. at pp. 1-19 [emphasis in the original]). On that basis, the IHO determined that the appropriate legal standard to apply in determining the student's stay-put placement during the pendency of the proceedings relating to the student's 2019-20 school year was whether iBrain was substantially similar to iHope (id. at pp. 18-19). In applying the standard, the IHO credited the testimony of the director of special education at iBrain, who had also worked at iHope and had knowledge of both programs (id. at pp. 19-20). The IHO noted that the witness averred that the student attended a class at iBrain with the same student-to-teacher ratio and received the same related services with the same frequency and duration as the student received at iHope (id. at p. 20). Accordingly, the IHO found that iBrain was substantially similar to iHope and ordered the district to directly fund the cost of the student's tuition and related services for the 2019-20 school year at iBrain (id.).[4]

IV. Appeal for State-Level Review

The district appeals and requests that the IHO's interim decision be reversed. The district argues that the IHO erred by finding that the student has a right to pendency at iBrain when the parents unilaterally removed the student from his existing pendency placement at iHope and enrolled him in their preferred placement at iBrain. The district maintains that the student's pendency placement remains at iHope based upon the unappealed March 2018 IHO decision. The district claims that the IDEA does not entitle the parents to transfer the student from the student's

[3] The IHO's interim decision is not paginated. For purposes of this decision, citations to the interim decision shall refer to the consecutive pages (see IHO Decision at pp. 1-21).

[4] Having found that iBrain was substantially similar to iHope, the IHO determined that it was not necessary to address the parents' alternative argument that iBrain was the student's operative placement (IHO Decision at p. 20).

pendency placement at iHope to another nonpublic school (iBrain), when there was no evidence that iHope was no longer an available placement for the student. The district asserts that the "substantial similarity test should not have been applied" and that the IHO erred in doing so. The district further alleges that the IHO incorrectly applied the substantial similarity test because it had been applied in prior school years. The district contends that the IDEA contemplates that each school year be viewed independently and as such the IHO was not bound to apply the same standard. As relief, the district requests that the IHO's interim decision be reversed.

In an answer, the parents deny the district's allegations and argue that the IHO's decision should be upheld in its entirety.[5] The parents argue that the IHO correctly determined that the student was entitled to pendency at iBrain for the 2019-20 school year based on its substantial similarity to the student's program and placement at iHope for the 2017-18 school year.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, 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 (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

[5] The parents acknowledge that the student's pendency placement was based on the unappealed March 2018 IHO decision (see Tr. pp. 18, 26, 95; Answer at p. 2).

appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. 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

Here, the parties agree that the student's educational placement for purposes of pendency is based on the unappealed March 12, 2018 IHO decision (see Parent Ex. B). 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). The substance of the parties' arguments subject to review in this proceeding focuses on the question of when a parent may unilaterally transfer a student from one nonpublic school (iHope), which was being funded by the district, to another nonpublic school (iBrain) and continue to have the student's tuition funded by the district pursuant to pendency.

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"]). In prior decisions, I have noted that, if "then-current educational placement" means only the general type of educational program in which the child is placed, then it appears that parents are not precluded from effecting alterations to a student's private programming without jeopardizing the district's obligation to fund the placement as stay put, so long as the alterations do not effect a change in educational placement (see Application of a Student with a Disability, Appeal No. 18-139; Application of the Dep't of Educ., Appeal No. 18-127; Application of a Student with a Disability, 18-123; Application of a Student with a Disability, Appeal No. 18-119). As I discussed in these prior decisions, 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 also Matter of Beau II, 95 N.Y.2d 234, 239-40 [2000] [applying Letter to Fisher]; Application of a Student with a Disability, Appeal No. 16-020).

Some district courts have adopted a similar approach finding that "[p]arents may unilaterally transfer their child from an established pendency placement to another educational setting so long as they comply with the ten-day notice requirement and establish that the two programs are substantially similar" (Soria v. New York City Dept. of Educ., 397 F. Supp. 3d 397, 402 [S.D.N.Y. 2019]; see Melendez v. New York City Dept. of Educ., 2019 WL 5212233, at *9 [S.D.N.Y. Oct. 16, 2019]; Navarro Carrilo v. New York City Dep't of Educ., 384 F. Supp. 3d 441, 464 [S.D.N.Y. 2019]; Abrams v. Carranza, 2019 WL 2385561, at *4 [S.D.N.Y. June 6, 2019]). However, other district courts have taken the opposite approach, finding that parents are not permitted to unilaterally move a student from one school to another and continue to receive the benefits of having the new placement paid for under pendency (see Hidalgo v. New York City Dept. of Educ., 2019 WL 5558333, at *8 [S.D.N.Y. Oct. 29, 2019]; Neske v. New York City Dept. of Educ., 2019 WL 3531959, at *7 [S.D.N.Y. Aug. 2, 2019], reconsideration denied, 2019 WL 5865245 [S.D.N.Y. Nov. 7, 2019]; de Paulino v. New York City Dep't of Educ., 2019 WL 1448088, at *6 [S.D.N.Y. June 13, 2019], reconsideration denied, 2019 WL 2498206 [S.D.N.Y. May 31, 2019]). In addition, the issue of whether a parent may transfer a student from one nonpublic school setting that was unquestioningly a valid stay-put placement—iHope in this matter—to another nonpublic school setting—such as iBrain—and still receive public funding under the protections of the stay-put rule is currently before the Second Circuit (see, e.g., Mendez v. New York City Dep't of Educ., No. 19-1852 [2d Cir. filed June 24, 2019, heard Jan. 28, 2020]; Paulino v. New York City Dep't of Educ., No. 19-1662 [2d Cir. filed June 3, 2019, heard Jan. 28, 2020]; Carrilo v. New York City Dep't of Educ., No. 19-1813 [2d Cir. filed Apr. 2, 2019, heard Jan. 28, 2020]). Until the Second Circuit has resolved the split in the district courts, I see no reason to depart from my previous decisions.

Moreover, as noted by the IHO, in prior proceedings involving this student related to the 2018-19 school year, substantial similarity has been determined to be the appropriate standard, most recently adopted in a remand order from the United States District Court for the Southern

District of New York (Dist. Ex. 2 at pp. 5-6; see also Application of a Student with a Disability, Appeal No. 18-132). The District Court's remand order specifically adopted the "substantial similarity" test and directed remand to an IHO to supplement the evidentiary record concerning whether iBrain and iHope had become substantially similar (Dist. Ex. 2 at pp. 5-6, citing Cruz v. New York City Dept. of Educ., 2019 WL 147500, at *10 [S.D.N.Y. Jan. 9, 2019]). Although I recognize that there is disagreement amongst the courts as to the issue before me, the IHO's application of the substantial similarity test in this matter is consistent with my prior decisions and the prior decisions that have been issued involving this student. Accordingly, I will uphold the IHO's decision adopting the substantial similarity test.

Having determined that the IHO was correct in applying the substantial similarity test, the next step would normally be to resolve any dispute as to whether or not the student's program at iBrain for the 2019-20 school year was substantially similar to the student's program at iHope for the 2017-18 school year. However, on appeal, the district has not challenged the IHO's factual finding that the two programs are substantially similar. The district has only appealed the IHO's adoption of the standard in this matter.

The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514 [b][1]; 8 NYCRR 200.5[k]). State regulations governing practice before the Office of State Review are explicit and require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see also 8 NYCRR 279.4 [a], [f]; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]).

The only allegation contained within the request for review that could be considered a challenge is that "if such a test were to be applied, it should include, at a bare minimum, evidence that the [s]tudent's pendency program was not . . . available at iHOPE" (Req. for Rev. p. 5).[6] This

[6] In prior decisions, I have noted that, because 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 (see, e.g., Application of a Student with a Disability, Appeal No. 18-139). 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]; Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook Cty., Ill. v. Illinois State Bd. of Educ., 103 F.3d 548, 548-49 [7th Cir. 1996]). 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

allegation though does not call into question the IHO's factual findings that the two programs were substantially similar, rather, it seeks to apply a condition on the applicability of the substantially similar test. Therefore, as there is no challenge to the similarity of the programs, the IHO's determination that the programs are similar and that the student's stay-put placement is at iBrain for the pendency of this proceeding must be upheld (see 8 NYCRR 279.8[c][2], [4]).

VII. Conclusion

Having found that the IHO correctly applied the substantial similarity standard in determining the student's pendency program and placement, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
February 21, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER

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 above (i.e., if the parent sought a nonpublic school with different or additional services because of a change in the student's needs).