The University of the State of New York

The State Education Department
State Review Officer
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No. 20-044

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 respondent, by Peter G. Albert, Esq. and John Henry Olthoff, 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 the pendency placement of respondent's (the parent's) son during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student for the 2018-19 school year. The IHO found that the student's pendency placement was at the International Institute for the Brain (iBrain). The appeal must be sustained and the cross-appeal must be sustained in part, and the matter must be remanded to the IHO.

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 in this matter has a history of traumatic brain injury resulting in significant cognitive, academic, physical, and daily living skill needs (see Parent Exs. B at pp. 1-2; F at pp.

1-20; G at pp. 1-20). On August 16, 2016 the CSE convened and developed an IEP for the student which offered a 6:1+1 special class placement and provided that he receive occupational therapy (OT), physical therapy (PT), and speech-language therapy (Parent Ex. B at p. 4). The CSE also recommended that the student receive special education services on a 12-month basis (id.).

In a letter dated August 17, 2016, the parent notified the district of her intent to unilaterally place the student at the International Academy of Hope (iHope) for the 2016-17 school year (Parent Ex. C at p. 1). An April 4, 2017 stipulation of settlement indicated that the parties agreed that the district would issue payment for the costs of the student's tuition and related services for the 2016-17 school year at iHope (id. at pp. 1-2, 6).[1]

On April 1, 2017, the student's nonpublic school, iHope, created its own IEP for the student (Parent Ex. F at p. 1). iHope recommended that the student receive instruction in a 6:1+1 class with five 60-minute sessions of individual PT per week, four 60-minute sessions of individual OT per week, three 60-minute sessions of individual vision education services per week, and five 60-minute sessions of individual speech-language therapy per week (id. at p. 33). Additionally, iHope recommended a 12-month program, assistive technology services, one 60-minute session of group parent counseling and training per month, and 1:1 paraprofessional services (id.).

On December 1, 2017 and February 9, 2018, the district requested consent from the parent to evaluate the student (Dist. Exs. 6; 9). The district completed a classroom observation, a standardized measure of the student's adaptive functioning (Vineland-3), and a social history update (see Dist. Exs. 8; 12; 13).

The district sent out CSE meeting notices for proposed meetings on Tuesday April 10, 2018, Tuesday May 15, 2018 and Friday June 8, 2018 (see Dist. Exs. 10; 11; 14; 18).[2, 3] In a letter to the CSE chairperson dated April 19, 2018, the parent requested that the upcoming CSE meeting be a full committee meeting with a district physician in attendance (see Dist. Ex. 17 at p. 3).[4] Further, the parent requested that the student's special education teacher and related service providers from iHope attend the CSE meeting (id.). The parent also requested that the meeting be held at iHope on either a Monday or Thursday after 3 p.m. (id.).

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[1] In a January 3, 2018 finding of fact regarding pendency for the 2017-18 school year, the IHO found that there was no dispute as to the student's last agreed upon IEP dated August 2016 (Parent Ex. E at pp. 3-4). The IHO found that the student's pendency was her 6:1+1 placement at iHope with the related services of three 30-minute sessions of OT per week, three 30-minute sessions of PT per week, two 30-minute sessions of speech-language therapy per week, and transportation to and from school, effective November 3, 2017 (id. at p. 4). This decision was not appealed (Parent Ex. A at p. 2).

[2] Each meeting notice contained a notice in English and a notice in Spanish (see Dist. Exs. 10; 11; 14; 18).

[3] The June 8, 2018 meeting notice was sent prior to a letter the district received from the parent's attorney (see Dist. Exs. 14; 20).

[4] The letter from the parent was provided to the district in Spanish and translated for the record (see Dist. Ex. 17). The translated version of the letter will be cited to in this decision.

On April 10, 2018, a nonpublic school IEP was drafted by iBrain for the student for the 2018-19 school year (Parent Ex. G at pp. 1, 34). iBrain recommended that the student receive instruction in a 6:1+1 class with five 60-minute sessions of individual PT per week, four 60-minute sessions of individual OT per week, three 60-minute sessions of individual vision education services per week, and five 60-minute sessions of individual speech-language therapy per week (id. at p. 34). Additionally, the IEP provided for a 12-month program, assistive technology services, one 60-minute session of parent counseling and training per month, and 1:1 paraprofessional services (id.).

In a letter dated May 10, 2018, the parent's attorney indicated that he was following up with the CSE after the parent's April 19, 2018 letter (Dist. Ex. 20 at p. 1). The parent's attorney reiterated the requests that a full committee convene, including the in-person participation of a district physician, and that the meeting occur on a Monday or Thursday after 3 p.m. (id.).

The district convened a CSE meeting on June 15, 2018 to develop a public school IEP for the student (see Dist. Exs. 21 at p. 10; 22). The CSE recommended a 12-month program in a 12:1+(3:1) special class at a specialized school (id. at pp. 7-8, 10). Additionally, the CSE recommended three 30-minute sessions of individual OT per week, three 30-minute sessions of individual PT per week, two 30-minute sessions of speech-language therapy per week, and one 60-minute session of group parent counseling and training per month (id. at p. 7). The parent did not attend the CSE meeting (Dist. Ex. 22).

In a letter dated June 21, 2018, the parent notified the district of her intent to enroll the student at iBrain for the 2018-19 school year and seek public funding for the placement (Parent Ex. R; Dist. Ex. 24).

A. Due Process Complaint Notice

In a due process complaint notice dated July 9, 2018, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year as "several substantive and procedural errors" occurred while developing the June 15, 2018 IEP (Parent Ex. A at pp. 1-2). As relevant here, the parent requested that an interim decision regarding the student's pendency (stay-put) placement be issued immediately (id. at p. 1). The parent asserted the student's right to a pendency placement pursuant to an unappealed decision of an IHO dated August 29, 2016 (id. at p. 2). The parent asserted that the specific pendency request was for the district to prospectively pay for the student's full tuition at iBrain for the 2018-19 school year (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) (id.).

The parent contended that her right to meaningfully participate in the decision-making process was significantly impeded (Parent Ex. A at p. 2). The parent asserted that the CSE was not properly composed and the recommended IEP would have caused substantial regression (id.). Moreover, the parent claimed that the IEP did not reflect the student's individual needs and did not offer an appropriate program and placement to address the student's highly intensive management needs (id. at pp. 2-3). Further, the parent argued that the 12:1+(3:1) class size was not appropriate for the student nor did the program offer an extended school day necessary to implement the

student's mandated related services (id. at p. 3). The parent requested tuition reimbursement for the costs of iBrain for the 2018-19 extended school year (id.).

B. Procedural History Subsequent to Due Process Complaint Notice

The parties proceeded to an impartial hearing on August 17, 2018 and following three hearing dates, IHO 1 entered an interim order on pendency (see generally Tr. pp. 1-162; Nov. 29, 2018 Corrected Interim IHO 1 Decision).[5] IHO 1 denied the parent's request for pendency at iBrain for the 2018-19 school year holding that the "parent has not cited any legal authority for the proposition that a parent can unilaterally change a student's placement, and obtain public funding for that placement during the pendency of due process proceedings" (Nov. 29, 2018 Corrected Interim IHO 1 Decision at pp. 5-6). In April 2019, the parent filed an action appealing IHO 1's pendency determination in the United States District Court for the Southern District of New York (New York City Dep't of Educ., 2019 WL 5212233, at *4 [S.D.N.Y. Oct. 15, 2019]).

Subsequent to the interim decision on pendency, the parties proceeded to an impartial hearing regarding the claims raised in the due process complaint notice and additional hearing dates were presided over by IHO 1 (see Tr. pp. 163-242).[6] During the hearing held on January 16, 2019, the parties entered exhibits into the record (Tr. pp. 198-217). During the district's opening statement, the district's attorney asserted that the district intended to demonstrate that it offered the student a FAPE for the 2018-19 school year (Tr. p. 219). Shortly after the district called its first witness (Tr. p. 224); it became apparent that IHO 1 had a conflict of interest and she decided to recuse herself (Tr. pp. 224, 228-29; 235-37).

A second IHO (IHO 2) was assigned to the case and the parties proceeded with additional hearing dates during which further evidence was entered (see Tr. pp. 243-346). Additionally, the district indicated that it had changed its decision to defend the IEP it created for the 2018-19 school year and conceded that it did not offer the student a FAPE for that school year; however, the district argued that the evidence in the hearing record would show that iBrain was not an appropriate placement and that the equities did not favor reimbursement (Tr. pp. 277-78).[7]

On October 15 2019, the district court issued a decision vacating IHO 1's determination on pendency for the 2018-19 school year and remanded the case back for an impartial hearing to

[5] The corrected interim decision on pendency was dated November 29, 2018 (Nov. 29, 2018 Corrected Interim IHO 1 Decision at p. 7). The initial interim decision was dated November 13, 2018 (Nov. 13, 2018 Interim IHO 1 Decision at p. 7).

[6] It is noted that the first hearing was dated November 13, 2018; although that is the same date as the Nov. 13, 2018 Interim IHO 1 Decision, the IHO indicated that the last hearing on the issue of pendency was held on October 30, 2018 (Nov. 13, 2018 Interim IHO 1 Decision at p. 3; Nov. 29, 2018 Corrected Interim IHO 1 Decision at p. 3).

[7] The district's attorney indicated that it would be calling a witness to testify on the issue of equities (Tr. p. 278). The district's witness, the CSE chairperson, testified; however, the witness was not cross-examined and after an off-the-record discussion, IHO 2 indicated that the cross-examination of the witness would be lengthy and would be continued on another date (Tr. pp. 295-329; 329-30)

determine whether the program provided by iBrain was substantially similar to the program provided by iHope (New York City Dep't of Educ., 2019 WL 5212233, at *9-10). The district court found that the parent would be "entitled to reimbursement for the services [the student] received at iBrain to the extent that those services are substantially similar to the services that he received at iHope for the 2017-18 school year"; however, if the student "receive[d] additional services that are not substantially similar, [the parent] is not entitled to reimbursement" (id. at *9). The district court also held that the question of whether the programs at iHope and iBrain are substantially similar was "better reserved for the IHO" and as such remanded the case "to determine to what extent the services [the student] received at iBrain are substantially similar to those he received at iHope" (id.).[8]

C. Impartial Hearing Officer Decision

Following remand from the district court, the parties continued the impartial hearing with one additional hearing date (see Tr. pp. 347-93). In a final decision dated January 26, 2020, IHO 2 held that the programs of iHope and iBrain are substantially similar (IHO 2 Decision at pp. 4, 14).[9] IHO 2 found that the programs were substantially similar "in that they offer[ed] the student the same class size and related services" though noted that iBrain offered the related services at a greater frequency and that iBrain offered additional "vision services" (id. at p. 4). IHO 2 concluded that the parent was entitled to reimbursement for the entire cost of iBrain for the 2018-19 school year (id.). Based on this finding that iBrain was the student's pendency placement, IHO 2 held that the merits of the case had become moot (id. at pp. 4, 8-11, 13-14). IHO 2 reasoned that "regardless of the merits of a decision concerning whether the [district] offered the student a FAPE for the 2018-2019 school year, no further meaningful relief may be granted to the Parent because they ha[ve] received all of the relief sought pursuant to 'pendency'" (id. at pp. 5-6).

IHO 2 also found that "there [was] no longer any live controversy relating to the parties' dispute over the placement or program" for the 2018-19 school year, because even if there was "a determination on the merits" that the district failed to offer the student a FAPE for the 2018-19 school year, "it would have no actual effect on the parties because" the 2018-19 school year had "expired" (IHO 2 Decision at p. 8). The IHO ordered the district to reimburse or directly pay the cost of the student's "continued placement and services" at iBrain (id. at p. 13).

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[8] The district court also held that "reliance on the operative placement provision [was] unnecessary" because courts typically only rely on that factor of pendency when there is "no previously-implemented IEP", which is not the case here as there was an unappealed decision in the record that found the student was offered a FAPE for the 2017-18 school year at iHope (New York City Dep't of Educ., 2019 WL 5212233 at *10). Based on this, the district court held that "the more appropriate course is to focus on the substantial similarity between the programs at iHope and iBrain" (id.)

[9] IHO 2's interim decision was not paginated (see generally Interim IHO 2 Decision). For ease of reference, citations to IHO 2's interim decision will reflect pages numbered "1" through "15," with the cover page identified as page "1".

IV. Appeal for State-Level Review

The district appeals from IHO 2's final decision. The district contends that IHO 2 erred because student does not have a right to pendency at iBrain for the 2018-19 school year as the parent unilaterally removed the student from iHope. The district asserts that iHope is the student's pendency placement. The district argues that the substantially similar standard is the incorrect standard because the stay-put provision of the IDEA "does not entitle parents to transfer" a student from the student's pendency placement, iHope, a parentally placed nonpublic school, to another, iBrain, when there is "no evidence" that iHope, "was no longer an available placement." The district contends even if the substantial similarity standard is applied, "it should include, at a bare minimum, evidence that the Student's pendency program was not [] available at iHope."

Further, the district asserts with respect to pendency that IHO 2 erred in finding that the programs at iHope and iBrain were substantially similar. The district argues that the student was recommended to receive vision education services for the 12-month school year; however, those services were not provided to the student until mid-September 2018. Since iBrain did not provide the student with vision services for the entire 2018-19 school year, the district contends that the programs were not substantially similar. The district notes that in addition to the lack of vision services for more than two months, the parent failed to present any evidence that the student received make-up vision services.

Next, the district argues that IHO 2 erred in dismissing the case as moot and failing to reach the merits of the 2018-19 school year claims. The district asserts that IHO 2 should have rendered a decision on the merits, specifically, on whether iBrain was an appropriate placement and whether the equities favor the parent.[10] The district argues that when a parent's challenge to the district's program and/or placement has repeated itself in the past, and may repeat itself in the future, previous SROs have found that a case such as this is not moot. The district contends that a claim is not moot when the conduct complained of "is 'capable of repetition, yet evading review'" and therefore, the SRO should remand the case for an IHO to address the merits of the case and award both parties an opportunity to litigate their respective cases.

In an answer with cross-appeal, the parent generally denies the district's allegations. The parent contends that IHO 2 correctly held that the student is entitled to pendency at iBrain for the 2018-19 school year. The parent asserts that the district's argument that the substantial similarity standard should not be applied is without merit as it was the correct legal standard applied by both the district court and IHO 2. The parent contends that the 2017-18 educational placement at iHope was substantially similar to the 2018-19 educational placement at iBrain. Further, the parent argues that the district argument that a parent must demonstrate that iHope was unavailable has been soundly rejected by both SROs and courts.

Additionally, the parent also argues that IHO 2 erred by failing to reach a decision on the merits of the case. The parent notes that she agrees with the district that IHO 2 erred by rendering the case moot; however, contends that her rationale differs. Moreover, the parent asserts that rather than remand the case back to IHO 2, "the SRO should conduct and complete the substantive

[10] The district, in the request for review, did not claim that it offered the student a FAPE for the 2018-19 school year.

hearing, schedule oral argument, take in additional evidence, and then render a decision on the merits."

The parent argues that IHO 2 erred by rendering the case moot as IHO 2 failed to allow the parent's attorney to complete cross-examination of all of the district's witnesses and failed to allow the parent to present her witnesses. The parent contends that a determination that the educational placement at iBrain is appropriate will affect the student's pendency going forward.[11] The parent also asserts "the IHO had a responsibility to render a decision based on record evidence" regarding whether the district denied the student a FAPE, whether iBrain was appropriate for the student during the 2018-19 school year, and whether equitable considerations favor the parent. The parent argues that IHO 2 should have found that the student was denied a FAPE for the 2018-19 school year as the district conceded on this issue. The parent requests that the SRO make a finding that iBrain was an appropriate placement for the 2018-19 school year and that equitable considerations favor the parent.

In its answer to the cross appeal, the district denies the parent's material allegations in the cross-appeal. The district asserts that the SRO should reject the cross-appeal because the parent failed to serve a notice of intention to cross-appeal as required by the State regulations. Also, the district reiterated its request that the case be remanded for further development of the record to address the underlying claims; however, in the event the undersigned does not remand the case, the district requests that I determine that iBrain was not an appropriate placement for the student and that equitable considerations do not favor reimbursement. The parent served a reply to the district's answer.

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,

[11] The parent's speculative plan to assert pendency at iBrain in a different proceeding is not a valid basis to avoid a mootness determination in this proceeding.

and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

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

A. Initial Matters

Turning first to a threshold matter, the district argues that the parent's cross-appeal should be dismissed because she failed to comply with State regulations due the failure to serve a notice of intention to cross appeal (Answer to Cross Appeal at p. 2). The parent, in the reply, asserted that the failure to serve a notice of intention to cross appeal was a "mere administrative oversight" and there was no prejudice to the district (Reply at p. 2).

State regulation requires that any party "who intends to seek review by [an SRO] of the decision of an [IHO] shall personally serve upon the opposing party . . . a notice of intention to seek review" in the form described therein (8 NYCRR 279.2[a]). A respondent who wishes to cross-appeal to seek review by a State Review Officer of the decision of an impartial hearing officer shall personally serve upon the opposing party, in the manner prescribed for the service of a request for review pursuant to section 279.4 of this Part, a notice of intention to cross-appeal within 30 days after the decision of the impartial hearing officer. (8 NYCRR 279.2[d]). In addition "[e]very . . . notice of intention to cross-appeal shall be accompanied by a case information statement, which shall identify those issues the party wishes to be reviewed by a State Review Officer, and may be made on a form prescribed by the Office of State Review." (8 NYCRR 279.2[e]). Whether the petitioner is a school district or a parent, the notice of intention to cross-appeal (along with the accompanying case information statement) provides a petitioner with advance notice of a respondent's imminent challenge to an IHO's determination, which may give a petitioner additional time to contemplate a position to be stated in an answer to a cross-appeal—time that is particularly valuable in light of the short time frame allotted for a petitioner to answer a cross-appeal (see 8 NYCRR 279.2[e]; N.Y. State Register Vol. 38, Issue 26, at p. 50 [June 29, 2016]; see also 8 NYCRR 279.4[b]; 279.5[b]).

Here, IHO 2's decision was dated January 26, 2020 (see Interim IHO 2 Decision at p. 14). The parent acknowledged that the notice of intention to cross appeal was not served on the district (Reply at p. 2). No case information statement was filed by respondent either. The district has not asserted that the parent's failure to serve a notice of intention to cross appeal or case information statement prevented it from properly responding to the parent's cross-appeal or that it was otherwise unduly prejudiced by the parent's lack of service of the notice of intention to cross-appeal. Moreover, both parties allege that IHO 2 erred in dismissing the case as moot with respect to the merits. However, counsel for the parent is now well-aware of the requirement to serve a notice of intention to cross-appeal upon the district and is warned that if non-compliance with the requirement becomes a pattern, he will risk dismissal of his clients' claims. Accordingly, in my discretion, I will review the determinations of IHO 2 that are challenged by the parent, notwithstanding her failure to timely serve the district with a notice of intention to cross appeal or to file a case information statement.

B. Pendency

The district contends that IHO 2 erred by finding that the student has a right to pendency at iBrain because once the parent unilaterally removed the student from iHope and placed him at iBrain for the 2018-19 school year, she terminated the services constituting pendency—essentially

an argument that the substantial similarity test is irrelevant or should not apply to the pendency determination. Moreover, the district argues that should the SRO determine that the standard of substantial similarity be applied in this case, the SRO should "dismiss the case" because IHO 2 erred in finding that the programs at iBrain and iHope were substantially similar (id. at p. 6).[12] The parent contends that IHO 2 correctly determined that the student's pendency placement was at iBrain (Answer with Cross Appeal at pp. 4-5)

The district's contention that IHO 2 should not have applied the substantial similarity standard is without merit. With regard to this student, the district court rendered a decision in October 2019, in which it held that the substantially similar standard should be applied and remanded the case to the IHO to make a determination on whether the programs were substantially similar (New York City Dep't of Educ., 2019 WL 5212233, at *9-10). While acknowledging that as of the date of this writing there are a number of hotly contested legal theories in this Circuit regarding stay put that involve the meaning and precise contours of the term "educational placement"—with both administrative hearing officers and district court judges taking a wide variety of approaches— the substantial similarity standard was employed as the applicable legal test by the District Court and has become the law of the case in this matter unless and until such time as the Second Circuit rules otherwise.[13] As such, IHO 2 correctly applied the substantially similar standard.

Although IHO 2 applied the court's standard to determine pendency, there is not enough information in the hearing record to determine whether the student's 2018-19 program at iBrain was substantially similar to the 2017-18 program at iHope. Specifically, the lack of information regarding the student's vision services is concerning. The district asserts that the programs are not substantially similar because iBrain failed to provide the student with vision services until mid-September 2018. IHO 2 did not make a specific finding regarding vision services and pendency. In this case, the record demonstrates that the student did not receive vision services until mid-September 2018 (Tr. p. 388). However, when the iBrain director of special education was questioned about whether the student received make-up services for the vision services, IHO 2 sustained the objection and did not permit testimony regarding whether make-up services occurred (Tr. pp. 388-89). The failure to provide vision services to the student until September 2018 is a significant factor in determining whether the programs are substantially similar (see Application of a Student with a Disability, Appeal No. 20-001; Application of a Student with a Disability, Appeal No. 18-114; Application of a Student with a Disability, Appeal No. 18-139; Application of Dep't of Educ., Appeal No. 19-015; Application of a Student with a Disability, Appeal No. 18-132). The issue of whether and when a student received make-up services is also significant when

[12] The district may have intended to seek dismissal of the parent's request for pendency, but it is unclear why the case would be dismissed if iHope and iBrain were not similar. The district conceded that the student's pendency was at iHope; however, argues that the iBrain program for 2018-19 was not substantially similar to the iHope program (Req. for Rev. at p. 6).

[13] The doctrine of the law of the case is intended to avoid retrial of issues that have already been determined within the same proceeding (People v. Evans, 94 N.Y.2d 499, 502-04 [2000] [noting that law of the case has been described as "'a kind of intra-action res judicata'"]; see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Cone v. Randolph Co. Schs. Bd. of Educ., 657 F. Supp. 2d 667, 674-75 [M.D.N.C. 2009]; see generally Application of a Child with a Disability, Appeal No. 98-73 [noting that a pendency determination by an SRO would not be reopened during the proceeding once it was decided]).

determining whether programs are substantially similar (see Navarro Carrilo v. New York City Dep't of Educ., 384 F. Supp. 3d 441, 461 [S.D.N.Y. 2019]; Application of Dep't of Educ., Appeal No. 19-039; see also Application of Dep't of Educ., Appeal No. 19-019). Therefore, the finding that the programs are substantially similar is reversed, as further record development is required to make a determination on the issue in accordance with the court's directive. The case is remanded for development of the record on the issue of vision services and whether the programs at iBrain and iHope were substantially similar.

C. Mootness

I will turn next to IHO 2's determination that the parent had received all of her requested relief through the pendency and his finding that the merits of the case had become moot. The district argues that IHO 2 erred by finding that the issues of whether iBrain was an appropriate placement for the 2018-19 school year and whether equities favored the parent are moot (Req. for Rev. at p. 9). The district contends that they are not moot and requests that the case be remanded to IHO 2 to render a decision on these issues (id.). The parent agrees with the district that IHO 2 erred by dismissing the case as moot; however, contends that the issue remains "live" because a determination on the merits would affect the student's pendency placement going forward (Answer with Cross-Appeal at pp. 6-7). The parent requests that rather that remand to IHO 2, the SRO makes a final determination on the merits (id. at p. 6).

A dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]).

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

IHO 2 based his mootness determination on the fact that the parent had received under pendency, all of the relief sought at the impartial hearing and that the extended 2018-19 school year at issue had expired (IHO 2 Decision at pp. 4, 6). However, as discussed above, the hearing record lacks sufficient information to determine whether the 2017-18 program at iHope and the 2018-19 program at iBrain were substantially similar due to the fact the student did not receive vision services until mid-September 2018 (see Tr. p. 388).

Additionally, courts have taken a dim view of dismissing a Burlington/Carter reimbursement case as moot because all of the relief has been obtained through pendency, finding that the case should be heard because of the applicable exception to the mootness doctrine when (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again (New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at *2-*3 [S.D.N.Y. Dec. 4, 2012]).

This is a case in which a court would not favor dismissal because of the exception to the mootness doctrine. Accordingly, IHO 2 erred in dismissing the case as moot. The hearing record lacks sufficient information to determine whether the 2018-19 educational placement at iBrain was appropriate for the student and whether equitable considerations favor the parent's request for reimbursement. Significantly, the district's witness who was testifying on the issue of equities was not cross-examined by the parent's attorney. The parent's witness testified regarding pendency but not regarding information to determine the appropriateness of iBrain. Further, the parent's attorney asserted that he was unable to call all of his witnesses during the impartial hearing as a result of IHO 2 prematurely dismissing the case as moot.

I have considered reaching the merits of the parent's claims; however that is unrealistic in light of IHO 2's decision to cut off the presentation of evidence and cross-examination. The case is remanded for development of the record as to whether iBrain was an appropriate unilateral placement for the 2018-19 school year and whether equitable considerations favor reimbursement.[14] It is left to the sound discretion of IHO 2 on remand to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to the parent's claims and/or whether the parties should submit further evidence to otherwise fully develop the hearing record. Additionally, IHO 2 may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the issues to be resolved (see 8 NYCRR 200.5[j][3][xi][a]).

VII. Conclusion

In light of the above, there was no error by IHO 2 in relying upon the substantial similarity standard to determine pendency; however, the evidence in the hearing record is inadequate to make a determination as to whether the programs were substantially similar because IHO 2 terminated a relevant line of questioning. Further, IHO 2 erred by dismissing the parent's claims raised in the due process compliant notice as moot due to pendency. The case must be remanded for development of the record on the issue of whether the 2017-18 iHope and 2018-19 iBrain programs

[14] It is noted that should IHO 2 find, upon remand, that the iBrain and iHope programs meet the substantial similarity test and pendency is granted, IHO 2 still must render a decision on the merits.

were substantially similar, whether the unilateral placement at iBrain for the 2018-19 school year was appropriate and whether equitable considerations favor reimbursement.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that IHO 2's decision dated January 26, 2020 is modified by reversing those portions determining that iBrain was substantially similar to iHope and dismissing the case as moot; and

IT IS FURTHER ORDERED that this matter is remanded to IHO 2 to determine whether the 2018-19 program at iBrain was substantially similar to the 2017-18 program at iHope, in light of fact that the student did not receive vision services until mid-September 2018, including any evidence of makeup services;

IT IS FURTHER ORDERED that IHO 2 shall continue the hearing and determine whether iBrain was an appropriate unilateral placement for the 2018-19 school year and whether equitable considerations favor tuition reimbursement.

IT IS FURTHER ORDERED that, in the event that IHO 2 is not available, the district shall appoint a new IHO in accordance with the rotational selection procedure and State regulations.

Dated: **Albany, New York**
May 4, 2020

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JUSTYN P. BATES
STATE REVIEW OFFICER