The University of the State of New York

The State Education Department
State Review Officer
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No. 20-051

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by John Henry Olthoff, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining her son's pendency placement during a due process proceeding challenging the appropriateness of the respondent's (the district's) recommended educational program for the student for the 2019-20 school year. The respondent cross-appeals the IHO's determination that the student's pendency placement was at the International Institute for the Brain (iBrain). The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

Due to the nature of the proceedings a full recitation of the student's educational history is unnecessary. The facts and procedural history will be provided as it pertains to the issues on appeal.

Following a prior impartial hearing regarding the student's 2017-18 school year, an IHO, in a decision dated June 20, 2018, found that the parent was entitled to reimbursement for the cost

of tuition and related services at the International Academy of Hope (iHope) for the 2017-18 school year (Parent Ex. B at pp. 7-8). The 2017-18 IEP from iHope recommended a 6:1+1 special class 35 times per week, as well as five 60-minute sessions of individual physical therapy (PT) per week, three 60-minutes sessions of individual occupational therapy (OT) per week, one 60-minute session of individual vision education services per week, five 60-minute sessions of speech-language therapy per week,[1] and one 60-minute session of parent counseling and training per month (Parent Ex. C at p. 29). Further, the iHope IEP provided that the student would have access to an "AAC device" throughout the school day and have support from a full-time 1:1 paraprofessional (id.).[2]

The student attended iBrain for the 2018-19 school year (see Parent Ex. K at ¶ 15; see also Parent Ex. D).[3] The parent filed a due process complaint notice regarding the district's offer of a free appropriate public education (FAPE) for the student for that school year and requested that the district be required to fund the student's tuition at iBrain pursuant to pendency; the request for pendency at iBrain was denied by both an IHO and an SRO in that matter (see Application of a Student with a Disability, Appeal No. 18-139).[4] The parent appealed the SRO's decision regarding pendency to the United States District Court for the Southern District of New York (see Docket, 19-cv-2937 [filed Apr. 2, 2019]).

An IEP for the 2019-20 school year was created by iBrain on April 9, 2019 (see generally Parent Ex. E). The student was recommended for a 6:1+1 special class 35 times per week and 12-month services (id. at p. 39). Additionally, the student was recommended for five 60-minute sessions of individual OT per week, five 60-minutes sessions of individual PT per week, five 60-minute sessions of speech-language therapy per week, one 60-minute session of individual vision education services per week, one 60-minute consult session of vision education services per week, one 60-minute session of parent counseling and training per month, and one 60-minute indirect

[1] The IHO decision ordering the district to fund iHope as an appropriate unilateral placement referenced payment for three 60-minute sessions of speech-language therapy, rather than the five listed in the iHope IEP (compare Parent Ex. B at p. 7, with Parent Ex. C at p. 29).

[2] The student was also recommended for 12-month and special transportation services (Parent Ex. C at p. 30).

[3] An IEP for the 2018-19 school year was created by iBrain on April 24, 2018 (see Parent Ex. D). The student was recommended 12-month services and a 6:1+1 special class 35 times per week (id. at p. 31). Additionally, the student was recommended to receive five 60-minute sessions of individual PT per week, five 60-minutes sessions of individual OT per week, five 60-minute sessions of individual speech-language therapy per week, one 60-minute session of individual vision education services per week, one 60-minute session of assistive technology services, and one 60-minute session of parent counseling and training per month (id.). iBrain also recommended a full-time 1:1 paraprofessional and an AAC communication device to be used throughout the day (id.).

[4] The IHO and SRO denied the request for pendency at iBrain for different reasons. The IHO held that a parent is not entitled to retain the right to pendency services when a parent unilaterally moves his or her child "from one school to another" (Application of Student with a Disability, Appeal No. 18-139). The SRO determined that the IHO erred in that rationale, finding that it is possible for a parent to maintain pendency when unilaterally moving a student from one nonpublic school to another, so long as the educational programs at the nonpublic schools are substantially and materially the same; however, the SRO denied the request for pendency at iBrain as the 2018-19 program at iBrain was not substantially similar to the 2017-18 program at iHope (Application of a Student with a Disability, Appeal No. 18-139).

session of assistive technology services per week (id. at pp. 39-40). The student was also recommended to receive assistive technology devices throughout the school day and support from a full-time 1:1 paraprofessional (id.).[5]

According to the parent, on May 20, 2019, a CSE convened to develop an IEP for the student for the 2019-20 school year (see Parent Ex. A at p. 2). The parent, in a letter dated June 21, 2019, provided notice to the district of her intent to unilaterally place the student at iBrain for the 2019-20 school year and seek funding for this placement (Parent Ex. J).

A. Due Process Complaint Notice and Impartial Hearing

By due process complaint notice dated July 8, 2019, the parent asserted that the district failed to offer the student a FAPE for the 2019-20 school year (Parent Ex. A at pp. 1-2).[6] The parent contended that the district failed to offer a FAPE "by committing many substantive and procedural errors" (id. at p. 2).[7]

The parent requested an interim order of pendency to be issued immediately (Parent Ex. A at p. 1). The parent asserted that the basis for pendency was an "unappealed" finding of fact that arose from a prior impartial hearing relating to the 2017-18 school year (id. at p. 2). The parent argued that based on this prior decision the district should "prospectively pay for the student's Full Tuition at iBrain (which includes academics, therapies and a 1:1 professional during the school day) and pay for his special transportation" (id.).

The parties proceeded to impartial hearing on January 3, 2020 and concluded the pendency portion of the hearing on February 20, 2020, after three days of proceedings (see Tr. pp. 1-42).

B. District Court Decision

Subsequent to filing her July 2019 due process complaint notice, the parent brought another proceeding in the Southern District of New York seeking a preliminary injunction and judgment "[o]rdering equitable relief and damages as a result of the failure and/or delay by [the district] in providing [the student] with a pendency placement for the 2019-2020 school year" (Answer & Cross-Appeal Ex. 1 at pp. 8-9; see also Complaint, 19-cv-8519 [S.D.N.Y. filed Sept. 12, 2019]).

[5] The assistive technology devices recommended included: "AAC Device," "AAC Wheelchair Mount," "Switches," "Switch Mounts," "Computer," "Computer Switch Interface," "Software," "Adaptive Seating: example: Rifton chair for toileting," and "Adaptive Seating" (Parent Ex. E at p. 40).

[6] The parent requested that her due process complaint notice relating to the 2019-20 school year be consolidated with the pending due process complaint notice she filed for the 2018-19 school year (Parent Ex. A at p. 1). The IHO assigned to the impartial hearing pertaining to the 2018-19 school year denied the request to consolidate the two school years on July 15, 2019 (July 15, 2019 Interim IHO Decision).

[7] Due to the nature of the appeal, it is unnecessary to list all of the claims raised by the parent regarding the 2019-20 school year. However, it is noted that the parent's claims included, but were not limited to, allegations that the district impeded her right to participate in the decision nmaking process, the CSE was not properly composed, and the CSE failed to adequately describe the student's present levels of performance and management needs (Parent Ex. A at pp. 2-3).

In a decision entered on March 6, 2020, the district court dismissed the parent's request for pendency at iBrain for both the 2018-19 and 2019-20 school years (see Amended Memo. Opinion & Order, 19-cv-2937 & 19-cv-8519 [S.D.N.Y., entered Mar. 6, 2020]). In the decision, the district court adopted the reasoning and findings of prior district court decisions Hidalgo v. New York City Department of Education, 2019 WL 5558333, at *8 (S.D.N.Y. Oct. 29, 2019) and Neske v. New York City Department of Education, 2019 WL 3531959, at *7 (S.D.N.Y. Aug. 2, 2019) (Amended Memo. Opinion & Order, 19-cv-2937 & 19-cv-8519). Although, the district court noted that there had been different findings made on this same issue in several cases, many of which were pending appeal before the Second Circuit Court of Appeals, the court nonetheless stated that it was "persuaded by the thoughtful and well-reasoned decisions" in Neske and Hidalgo and found "that parents are not entitled to stay-put funding where, as here, they unilaterally change their child's pendency-funded school and a school district has not agreed to the switch, through an IHO or otherwise" (id.). Moreover, the district court noted that there was no suggestion or evidence in the record that "iHope was inadequate, unavailable, or chosen by the [the district] in bad faith" and, therefore, when the parent "unilaterally transferred [the student] to iBrain, she 'took responsibility for the costs of obtaining those services'" (id., quoting T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 172 [2d Cir. 2014]). Based on these findings, the district court denied the parent's motions for summary judgment and a preliminary injunction for both the 2018-19 and 2019-20 school years (Amended Memo. Opinion & Order, 19-cv-2937 & 19-cv-8519). The district court also granted the district's cross-motion for summary judgment for both school years (granting it sua sponte for 19-cv-8519 despite the absence of a formal cross-motion) (id.).

C. Impartial Hearing Officer Decision

In an interim decision on pendency dated March 17, 2020, the IHO initially indicated that "[w]hile a pendency program is not always a brick and mortar location, if a student's educational program changes, the new program must be 'substantially and materially the same' as the student's prior educational program" (Mar. 17, 2020 Interim IHO Decision at p. 5). The IHO went on to find that the student's program during the 2017-18 school year at iHope "consisted of 6:1:1 or 8:1:1 self-contained classes for an extended school day with a 1:1 aide, on a 12-month extended school year basis" (id.). Additionally, the IHO noted that iHope provided the student with OT, PT, speech language therapy, and vision education services (id.). Comparatively, the IHO found that the student's program at iBrain consisted of "6:1:1 or 8:1:1 self contained classes with related services of occupational therapy, speech language services, physical therapy and vision education services" (id.). Based on this, the IHO concluded that "the program at iHope and the program at iBrain are substantially similar[]" (id.).

The IHO noted that "'placement' is the student's program, not the location of services" and, therefore, that the parent was entitled to funding for the student's "placement at iBrain under pendency" (Mar. 17, 2020 Interim IHO Decision at p. 6). The IHO indicated that the district had asserted that iHope was the student's pendency placement but that "there [was] nothing in the record to suggest that the [district] did anything to facilitate the student's placement at iHope under pendency" and that, therefore, the student would not have had a pendency placement (id.). Moreover, the IHO held that the "fact that the student may [have] be[en] receiving more related services at iBrain, then he did at iHope, [wa]s insignificant and d[id] not change the fact that the programs [we]re substantially similar" (id.).

Finally, the IHO acknowledged that "the issue of whether the parent can unilaterally place a student in a different program under pendency" based on "the 'substantially similar' doctrine [was] still unsettled in the Second Circuit," but found that "without further direction, and under the specific facts of this case, that the parent may do so" (Mar. 17, 2020 Interim IHO Decision at p. 6). The IHO directed the district to fund the student's placement at iBrain for the 2019-20 school year under pendency, retroactive to the date of the due process complaint notice (id.).

IV. Appeal for State-Level Review

The parent appeals. The parent contends that the IHO correctly held that the program at iBrain for the 2019-20 school year is substantially similar to the 2017-18 program at iHope and that the district is required to fund the student's placement at iBrain for the 2019-20 school year pursuant to pendency. However, the parent argues that the IHO's decision must be modified to direct the district to immediately implement the pendency order and provide funding for the student's placement at iBrain. The parent asserts that "the function of pendency as an automatic injunction requires" the district to immediately fund the pendency placement, iBrain, regardless of whether the district appeals the IHO's decision. Therefore, the parent requests that the IHO decision be modified to require the district to immediately fund the student's placement at iBrain.

In an answer with cross-appeal, the district generally admits or denies the parent's allegations. Initially, the district asserts that the parent's request for review should be dismissed, as the parent did not raise an appealable issue and the request for review does not comply with State regulations. The district contends that the parent is not aggrieved by the IHO's order and that a request for review may not be used to enforce an IHO decision as SROs do not have authority to enforce prior decisions rendered by IHOs. Moreover, the district asserts that review of the parent's appeal should be denied because the parent has chosen to litigate her pendency claim in federal court.[8] The district argues that by filing a federal action "before any pendency hearing at the administrative level took place, the Parent selected her preferred method of recourse to address pendency." The district contends that the parent should not be able to obtain "multiple bites at the pendency apple" and that allowing the appeal to continue could open "the door to potentially conflicting simultaneous orders." The district requests the SRO overturn the IHO decision and allow the federal court action to proceed.

Additionally, the district argues that the IHO erred by finding the student's pendency was at iBrain. The district contends that the student's pendency is at iHope and that, because the parent moved the student from iHope to iBrain, the parent "unilaterally decided to terminate the services constituting the Student's pendency placement." The district notes that there is no evidence in the record that iHope is no longer available. Therefore, the district argues that the IHO erred in reaching the substantial similarity issue and the pendency order should be reversed. Further, the district argues that the IHO erred by faulting the district "for not securing iHope as the Student's pendency placement." The district contends that, when the parent filed the due process complaint

[8] The district submits a supplemental exhibit to support its argument regarding venue and jurisdiction arguing that the new exhibit "should be considered because it is necessary to make a determination in this appeal." The supplemental exhibit is the complaint filed by the parent in the U.S. District Court for the Southern District of New York and, as the civil matter is a public record, it is appropriate for the undersigned to consider the same (see Answer & Cross-Appeal Ex. 1; Answer & Cross-Appeal at pp. 12-20).

notice in this case, she had already enrolled the student at iBrain and, accordingly, "any attempt by the [district] to secure iHope as [the student's] pendency placement . . . would have been fruitless" because the parent had already rejected iHope. The district also asserts that the parent was required to demonstrate that iHope was no longer available as the pendency placement and that the IHO "erred in reaching the substantial similarity test without, at a bare minimum, evidence that the Student's pendency program was not . . . available at iHope."

Finally, the district argues that, should it be determined that the IHO properly applied the substantial similarity standard, the evidence in the hearing record does not support a finding that the two programs were substantially similar. The district asserts that State regulations "define a change in program as 'a change in any one of the components' of an IEP." The district argues that the student's 2019-20 program at iBrain was not substantially similar to the 2017-18 program at iHope as demonstrated by statements by the parent's counsel to the IHO that the student was not receiving services at iBrain. The district contends that the failure to implement related services constitutes a change in program. Moreover, the district argues that the programs were not substantially similar as the student's related services recommendations were modified for the 2019-20 school year at iBrain. The district asserts that the student was recommended for more OT, vision consultation services, and assistive technology devices and services and that these additional devices and services represent a change in the student's program. The district also notes that the student was "already receiving a paltry amount of direct academic instruction each week" before the addition of more related services. Lastly, the district asserts that there was insufficient evidence regarding "whether the Student was educated with nondisabled peers or had opportunities to participate in nonacademic or extracurricular services." The district requests that the IHO's finding that the 2019-20 program at iBrain was substantially similar to the 2017-18 program at iHope be reversed, its cross-appeal be sustained, and the parent's request for review be dismissed.

In an answer to the cross-appeal, the parent denies all of the district's allegations. The district also submitted a reply to the parent's answer to the cross-appeal.

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., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008];

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

Initially, in their pleadings in this matter, neither party addressed the effect of the district court's March 6, 2020 decision on the present administrative proceeding regarding the student's pendency placement.[9] Moreover, it does not appear that either party provided the IHO with the district court's decision, which was entered eleven days before the IHO rendered his decision (compare Amended Memo. Opinion & Order, 19-cv-2937 & 19-cv-8519 [S.D.N.Y., entered Mar. 6, 2020], with Mar. 17, 2020 Interim IHO Decision at p. 5). Due to the fact that neither party adequately or properly represented to the Office of State Review the status of the district court proceedings, the undersigned permitted the parties to submit letter briefs discussing the impact of the district court's March 6, 2020 decision (see 8 NYCRR 279.6[d] [providing that an SRO may, "in his or her discretion, . . . require[e] a party to . . . submit further briefing"]).

The district, in its brief dated April 20, 2020, argues that the district court decision is now binding and, therefore, the IHO's pendency decision should be overturned (Dist. Br. at p. 2). The district cites to the doctrines of law of the case, collateral estoppel, and stare decisis to support its position (id. at pp. 2-3). The parent, in a brief dated April 20, 2020, asserts that the district court decision should have no effect on the current matter and that an SRO should still render a decision (Parent Br. at p. 1). Specifically, the parent notes that the decision has been appealed to the Second Circuit Court of Appeals, that the facts of the district court case were distinguishable from the current matter, and that the district court did not rule that his decision would have "preclusive effect on the ongoing administrative proceeding" (id. at pp. 1-2). Based on this, the parent contends that the SRO should not "abstain from issuing a final administrative decision" (id. at pp. 2-3).

The parent, in her brief, does not provide a persuasive argument as to why the district court's decision, denying the parent's request for pendency at iBrain for the 2019-20 school year, should be ignored. The law of the case doctrine "'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case'" (Perreca v. Gluck, 262 F. Supp. 2d 269, 272 [SDNY 2003], quoting Arizona v. California, 460 U.S. 605, 618 [1983]). "Administrative agencies are no more free to ignore the law of the case doctrine than are district courts" (Ankrah v. Gonzales, 2007 WL 2388743, at *7 [D. Conn. July 21, 2007]). 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.

[9] The parent included a footnote in the request for review acknowledging that the district court dismissed the parent's claims in 19-cv-2937 and 19-cv-8519 but indicated that the decision had been appealed (see Req. for Rev. at ¶ 5 n.1). However, the footnote referenced a sentence in the body of the pleading that stated "the Student's pendency placement for the 18/19 school year is the subject of ongoing administrative, Federal District Court, and Second Circuit litigation" (id. at ¶ 5), making it seem that pending litigation referenced in the footnote only related to the 2018-19 school year. At best, the parent's reference was obfuscatory as to the status of the district court matter regarding the 2019-20 school year. The district's representation of the status of the district court proceedings was likewise unimpressive. As summarized above, on appeal, the district referenced the district court matter as pending—and argued that the IHO should have abstained (and an SRO should abstain) from reaching the pendency question as a result—but made no reference to the district court's decision in the matter, as the district's counsel was apparently, but inexplicably, unaware of its issuance (see Dist. Br. at p. 1).

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]). For the law of the case doctrine to be a bar, the issue must have been actually considered and decided by the higher court (see Ms. S. v. Regl. Sch. Unit. 72, 916 F.3d 41, 47 [1st Cir. 2019]).

First, to address the parent's assertion that the matter before the district court was factually distinguishable (see Parent Br. at pp. 1-2), although in 19-cv-8519 the parent originally sought judicial intervention due to an alleged delay in having an IHO assigned to the matter, she also sought relief relating to pendency (Answer & Cross-Appeal Ex. 1 at pp. 6-9). Further, the district court subsequently ordered that the parties' arguments in the summary judgment briefing related to pendency in the proceeding arising from the 2018-19 school year (i.e., 19-cv-2937) would be deemed to apply to the parent's motion for a preliminary injunction in the proceedings arising from the 2019-20 school year (Order, 19-cv-8519 [S.D.N.Y., entered Oct. 31, 2019]). In the final decision, the district court unambiguously specified that: "In Case No. 19-CV-2937, Plaintiff seeks pendency funding for the 2018-2019 school year. In Case No. 19-CV-8519, Plaintiff seeks pendency funding for the 2019-2020 school year" (Amended Memo. Opinion & Order, 19-cv-2937 & 19-cv-8519 [S.D.N.Y., entered Mar. 6, 2020]). Further, the district court concluded that "parents are not entitled to stay-put funding where, as here, they unilaterally change their child's pendency-funded school and a school district has not agreed to the switch, through an IHO or otherwise," thereby denying the parent's request for pendency at iBrain (id.). This is exactly the issue that was posed to the IHO during the impartial hearing (see generally Parent Pendency Br.; Dist. Pendency Br.). Moreover, the district court did not need to "rule that [the] decision had any preclusive effect on the ongoing administrative proceeding," as the parent proposes (see Parent Br. at p. 2), because it goes without saying that neither I nor the IHO may sit in review of a district court's determination. Further, to the extent the parent implies that the district court intended an outcome contrary to the "law of the case" doctrine with respect to the decision's preclusive effect, such assertion is unsupported by the text of the decision. Since it appears the parties apparently did not disclose it, the IHO did not have the benefit of the district court's decision when he issued his interim decision on pendency; however, as his decision directly contradicts the district court's decision, it must be reversed (see generally Mar. 17, 2020 Interim IHO Decision).

As a final matter, the parent cites no authority nor am I aware of any to support the proposition that, because the district court's decision has been appealed (see No. 20-911 [2d Cir., filed Mar. 13, 2020]), it is not controlling on the parties or administrative decisionmakers in the interim. Absent a determination from the Second Circuit Court of Appeals on this case or on the legal issues controlling this case, the district court's decision is binding.[10]

[10] 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 also currently before the Second Circuit in other similar matters, for which oral argument has already been heard (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]).

VII. Conclusion

Based on the foregoing, the district court's decision, entered March 6, 2020, denying the parent's request for funding at iBrain pursuant to pendency, is the law of the case. Therefore, the IHO's decision is reversed.

In light of these determinations, I need not address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's interim decision on pendency, dated March 17, 2020, is reversed in its entirety.

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

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CAROL H. HAUGE
STATE REVIEW OFFICER