The University of the State of New York

The State Education Department
State Review Officer
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No. 20-063

Application of a STUDENT WITH A DISABILITY, by her parents, 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 petitioners, by John Henry Olthoff, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, 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. Petitioners (the parents) appeal, 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 student's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2019-2020 school year. The IHO determined that the International Institute for the Brain (iBrain) constituted the student's educational placement for pendency purposes. The district cross-appeals the IHO's pendency determination. The appeal must be dismissed. The cross-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[a]). 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

As the subject of prior State-level administrative proceedings, the parties' familiarity with the facts and procedural history preceding this case—as well as the student's educational history—is presumed and will not be repeated herein unless necessary to provide context to the disposition of the issues presented in this appeal (see Application of the Dep't of Educ., Appeal No. 19-107;

Application of a Student with a Disability, Appeal No. 18-027).[1] Briefly, however, the student attended a nonpublic school, the International Academy of Hope (iHope), for the 2017-18 school year (see Application of a Student with a Disability, Appeal No. 18-027). During a prior impartial hearing, the parents sought tuition reimbursement for, and pendency at, iHope for the 2017-18 school year (id.). In that proceeding, an IHO issued an interim decision dated December 2017, finding that iHope was not the student's pendency placement (id.).[2] In April 2018, the IHO issued a final decision on the merits of the parents' claims related to the 2017-18 school year, which found that the district conceded it had failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year and that iHope was an appropriate unilateral placement; as relief, the IHO ordered the district to reimburse the parents for the costs of the student's tuition and expenses at iHope (see IHO Ex. I at pp. 8-10). Despite being aggrieved, the district did not appeal the IHO's final decision on the merits for the 2017-18 school year (id. at p. 10).

For the 2018-19 school year, the parents enrolled the student at iBrain beginning on or about July 9, 2018, and filed a due process complaint notice of the same date (July 9, 2018) seeking tuition reimbursement and pendency at iBrain (see Application of the Dep't of Educ., Appeal No. 19-107; IHO Ex. I at pp. 10-11). In the proceeding regarding the 2018-19 school year, an IHO issued an interim decision dated March 2019, finding that iHope was the student's pendency

[1] In light of the procedural posture of this matter, the evidence in the hearing record is sparse and contains very little, if any, information with regard to the facts leading up to the parents' due process complaint notice (see Tr. pp. 1-14). Therefore, the summary of facts has been gleaned from prior State-level administrative decisions, as well as additional, relevant documents the district included as part of the administrative hearing record submitted to the Office of State Review that were not formally entered into evidence as either a parent exhibit, a district exhibit, or an IHO exhibit (compare Cert. of Hr'g Record, with Tr. pp. 1-14). For example, the district's certification of the hearing record separately listed and identified a total of 11 documents as constituting the hearing record in this case (see generally Cert. of Hr'g Record). In contrast, the transcript of the pendency proceeding reflected that no documents had been entered into the hearing record as evidence, except for documents described as "unidentified [IHO] exhibits [that] were marked and admitted into evidence" (compare Tr. pp. 2, 8-9, with Cert. of Hr'g Record). While not explicitly identified or marked as IHO exhibits, it may be inferred from the transcript that these unidentified IHO exhibits consisted of the district's motion for recusal and the parents' response to the district's recusal motion (see Tr. pp. 2, 6-9), which the district included as part of the administrative hearing record provided to the Office of State Review (see Cert. of Hr'g Record at p. 1). In addition, the district also provided the Office of State Review with a copy of the parents' due process complaint notice and "IHO Exhibit I" as part of the administrative hearing record (see Cert. of Hr'g Record at pp. 1-2). Within the interim order on pendency, the IHO identified "IHO Exhibit I" as a 39-page preliminary injunction, dated June 13, 2019, and as a document entered into the hearing record as evidence by the IHO—even though the transcript did not specifically reflect the same, although it could have presumably been included within the batch of unidentified IHO exhibits marked and admitted into evidence (compare Interim IHO Decision at p. 4, with Tr. pp. 1-14). Assuming for the sake of argument that "IHO Exhibit I" was marked and admitted at the impartial hearing under the foregoing scenario, citations in this decision to that document will be denoted as "IHO Ex." For the additional documents submitted as part of the administrative hearing record but not otherwise marked or identified and not formally entered into the hearing record as evidence, those documents—for clarity and ease of reference—will be referred to in citations as administrative hearing record exhibits (Admin. Hr'g Ex.) and will thereafter reflect the number assigned to such document (i.e., 1 through 10) in the district's certification accompanying the administrative hearing record provided to the Office of State Review. Thus, a citation to the parents' due process complaint notice will be denoted as "Admin. Hr'g Ex. 9" (Cert. of Hr'g Record at pp. 1-2).

[2] The parents appealed the IHO's interim order on pendency related to the 2017-18 school year to the Office of State Review, and in a decision dated April 11, 2018, the undersigned dismissed the parents' appeal for the failure to timely initiate the appeal (see Application of a Student with a Disability, Appeal No. 18-027).

placement based upon the unappealed IHO's decision on the merits for the 2017-18 school year, dated April 2018, and denied the parents' request for interim funding for the student's placement at iBrain as pendency (see Application of the Dep't of Educ., Appeal No. 19-107; IHO Ex. I at pp. 11, 13-15). The parents appealed the IHO's interim decision, dated March 2019, directly to the United States District Court for the Southern District of New York (see IHO Ex. I at pp. 1, 16-17).

In the meantime, a CSE convened on May 29, 2019 to conduct the student's annual review and to develop an IEP for the 2019-20 school year (see Admin. Hr'g Ex. 9 at p. 2). The parents rejected the CSE's recommendations and continued the student's unilateral placement at iBrain for the 2019-20 school year (id.).

In an order dated June 13, 2019, the district court addressed the parents' appeal of the IHO's March 2019 interim order on pendency and granted the parents' preliminary injunction (see IHO Ex. I at pp. 1, 39). In granting the preliminary injunction, the court determined that, contrary to the IHO's finding, iBrain was the student's pendency placement based upon a "substantially similar" analysis and ordered the district to "fund [the student's] pendency placement at iBrain for the 2018-19 school year, until a final adjudication on due process complaint notice [was] complete[d]" (id. at pp. 28-34, 37-39). The district subsequently filed an appeal of the district court's order with the Second Circuit Court of Appeals and simultaneously sought a stay of the preliminary injunction, which the district court granted on June 13, 2019.

A. Due Process Complaint Notice

In connection with their rejection of the district's IEP and unilateral placement of the student at iBrain for the 2019-20 school year, the parents filed a due process complaint notice dated July 8, 2019 and alleged that the district failed to offer the student a FAPE for the 2019-20 school year based upon various substantive and procedural violations (see Admin. Hr'g Ex. 9 at pp. 2-3). As relevant here, the parents requested the immediate issuance of an interim order on pendency (id. at pp. 1-2). The parents initially asserted that an unappealed IHO's decision related to the 2017-18 school year formed the basis for pendency (id.). The parents also asserted that the district court's "unappealed" order granting their request for a preliminary injunction formed the basis for pendency (id. at p. 2). The parents indicated the following as the "specific pendency request": an order directing the district to "prospectively pay for the student's [f]ull [t]uition at iBrain (which include[d] academics, therapies and a 1:1 nurse during the school day), and [to] pay for her special transportation" with accommodations (i.e., "limited travel time of 90 minutes, wheelchair-accessible vehicle, A/C, flexible pick-up/drop-off schedule, and a para professional for transportation") (id.).

B. Impartial Hearing Officer Decision

On February 10, 2020, the parties proceeded to an impartial hearing, and on that date, completed the pendency portion of the proceedings (see Tr. pp. 1-6).[3] In conducting the day's

[3] The evidence in the hearing record reflects that the IHO was assigned to this matter on or about September 24, 2019, after the recusal of another IHO (see Tr. p. 3). The evidence in the hearing record also reflects that the IHO granted approximately nine extensions to the applicable timeframes, as requested solely by the parents, from September 30, 2019 through January 23, 2020 (see generally Admin. Hr'g Ex. 6).

proceedings, the IHO initially noted that, after being assigned to the case, he "reached out to the parties to ask what had taken place before" he had been assigned to the case (Tr. p. 3). According to the IHO, the parents "responded in some detail on September 27th," but the district "did not respond at all" (id.). Based upon the parents' response in September, the IHO summarized the procedural history leading up to the parents' request for pendency at iBrain, noting his understanding that a "pendency order denying pendency at iBrain [had been] appealed, ultimately, to the U.S. District Court" (Tr. pp. 3-4). In addition, the IHO indicated that the district court issued a decision finding iBrain constituted the student's pendency placement (see Tr. pp. 4-5). The IHO then asked the district representative at the impartial hearing if the district "ha[d] a different view of the procedural history," and the district representative responded "No" (Tr. p. 5). Next, and in light of the procedural history, the IHO stated that the parents' viewed the district court's decision as the "baseline for pendency here"—and again, directly asked the district representative if the district "ha[d] a different view from that"—with the district representative responding "Not at this time" (Tr. pp. 5-6). Consequently, the IHO stated that he would "issue a pendency order to that effect" and concluded the pendency portion of the impartial hearing (Tr. p. 6).

In an interim decision dated March 25, 2020 (corrected for the date), the IHO concluded that the "parties agree[d] (on the record, at the hearing held on 10 February 2020) that there [was] an outstanding USDC-SDNY-issued Preliminary Injunction with respect to the prior case litigated between the parties concerning the same student" in this case (Interim IHO Decision at p. 2). In addition, the IHO noted the parties' further "agree[d] that that matter [was] still the subject of ongoing litigation, and that pendency continue[d] to vest in that Injunction" issued by the district court "'until a final adjudication of the due process complaint notice [was] complete'" (id.). As a result, the IHO concluded that the "baseline for pendency for this student l[ay] in that Injunction and continue[d] until that matter [was] finally resolved or the parties agree[d] otherwise" (id.). Moreover, the IHO noted that if the "matter resolve[d] by virtue of a final judicial determination (or for that matter should there be an agreement between the parties), pendency in this matter w[ould] have to be revisited to determine the impact of that final determination or agreement on the student's pendency baseline" (id.). The IHO thereafter ordered the district to "provide these pendency services from the date of filing until this matter [was] finally resolved or the parties agree[d] otherwise" (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing initially to uphold the IHO's interim order on pendency finding that iBrain constituted the student's pendency placement for the 2019-20 school year "by virtue of the Preliminary Injunction" issued by the district court on June 13, 2019. The parents also argue to uphold that portion of the IHO's interim order on pendency that the district "shall fund [the student's] placement at iBrain under pendency until the adjudication of this matter [was] completed." However, due to the nature of pendency as an "automatic preliminary injunction," the parents seek to modify the IHO's interim order on pendency to "require [the district] to immediately implement the [interim order on pendency] and provide funding for [the student's] placement at iBrain through the pendency for the duration of the underlying due process proceeding." In the request for review, the parents specifically argue that the student is "entitled to immediate enforcement" of the IHO's interim order on pendency regardless of whether the district appeals or cross-appeals from the same order, and therefore, the district "should be required to fund [the student's] placement at iBrain during the pendency of any appeals." In addition, the

parents note the district's "policy of failing and refusing to implement pendency orders" during appeals to the Office of State Review notwithstanding Second Circuit precedent. As relief, the parents seek an order upholding the IHO's interim order on pendency finding iBrain as the student's pendency placement, ordering the district to "fund" the student's pendency placement at iBrain, and modifying the IHO's interim order on pendency to require the district to "immediately fund" the student's educational placement at iBrain until the adjudication of this matter is completed.

In an answer, the district initially responds to the parents' allegations and generally argues to dismiss the parents' appeal. In support, the district contends that the parents' request to modify the IHO's interim order on pendency to immediately implement it improperly seeks to enforce the IHO's decision, and an SRO has no jurisdiction to issue enforcement orders. Additionally, the district contends that the parents are not aggrieved by the IHO's interim order on pendency, which also warrants dismissal of the request for review.

As a cross-appeal, the district alleges that the district court decision granting the parents' request for a preliminary injunction—upon which the IHO found the parties agreed to as forming the basis for the student's pendency placement at iBrain—has been stayed. As such, the district contends that the preliminary injunction order cannot now form the basis for pendency, and instead, iHope remains as the pendency placement based upon an unappealed IHO decision related to the 2017-18 school year. As relief, the district seeks an order dismissing the request for review, overturning the determination that the preliminary injunction order established the pendency placement, and issue a finding that iHope constitutes the student's pendency placement.[4]

The parents, in an answer to the cross-appeal and a reply to the district's answer, seek to dismiss the district's cross-appeal in its entirety. Initially, the parents respond to the allegations in the district's cross-appeal, and argue that contrary to the district's contention, they are aggrieved by the IHO's interim order on pendency because the IHO failed to order the district to immediately fund the pendency placement at iBrain. The parents also assert that the request for review seeks to modify—not enforce—the IHO's interim order on pendency, and they are aggrieved by the district's failure to "immediately implement" the pendency order, which denies the student her statutory rights under the IDEA. With regard to the district's cross-appeal, the parents argue that the stay of enforcement granted against the preliminary injunction is irrelevant. More specifically, the district contends that the district court "stayed the implementation" of the preliminary injunction pending the appeal to the Second Circuit, "but did not stay the order itself." Consequently, the district argues that iBrain remains as the basis for the student's pendency placement and "simply awaits enforcement."[5]

Finally, the district responds in a reply to the parents' answer to the cross-appeal, and objects to the additional documentary evidence submitted by the parents for consideration on

[4] The district attached two documents to the Answer & Cross-Appeal as additional documentary evidence for consideration on appeal (see generally Answer & Cr. App. Exs. SRO 1-SRO 2).

[5] The parents attached one document to the Answer to the Cross-Appeal & Reply as additional documentary evidence for consideration on appeal (see generally Answer to Cr. App. & Reply Ex. SRO A).

appeal.[6] The district also argues that the parents' pleading fails to comply with practice regulations as a basis for dismissal.[7]

V. Applicable Standards

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 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 & 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

[6] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, all of the additional documentary evidence submitted by both parties was available at the time of the impartial hearing, but was not offered (compare Tr. pp. 1-11, with Answer & Cr. App. Exs. SRO 1-SRO 2, and Answer to Cr. App. & Reply Ex. SRO A). While this documentary evidence is not now necessary to render a decision, I will exercise my discretion and accept all of the proffered documents for the sake of completeness of the hearing record.

[7] The parents thereafter filed a Reply to the district's reply—or in other words, a sur-reply—which State regulations do not contemplate as an appropriate pleading; as such, the parents' sur-reply will not be addressed in this decision (see 8 NYCRR 279.6[a]).

level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

VI. Discussion

While the instant State-level review was pending, the Second Circuit Court of Appeals issued its opinion, dated May 18, 2020, which addressed the district's appeal of the district court order, dated June 2019, granting the parents' preliminary injunction and finding that iBrain was the student's pendency placement during the administrative proceedings for the 2018-19 school year (see Ventura de Paulino v. New York City Dep't of Educ., 2020 WL 2516650, at *2, *5-*6, (2d Cir. May 18, 2020). The Court ultimately concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 2020 WL 2516650, at *9-*11). In light of the Court's holding, the Court vacated the district court's order, dated June 2019, granting the parents' preliminary injunction that found iBrain constituted the student's pendency placement because it was substantially similar to the student's program at iHope (see Ventura de Paulino, 2020 WL 2516650, at *13). In addition to vacating the district court's order, the Court remanded the matter to the district court with instructions to dismiss the parents' complaint for failing to state a claim upon which relief can be granted (see Ventura de Paulino, 2020 WL 2516650, at *13).

Given the recent legal developments, the undersigned provided the parties with an opportunity to brief how, or if, the Second Circuit Court of Appeal's decision should be applied to the facts of this appeal. In a letter brief dated May 26, 2020, the parents' asserted that since they filed a petition for rehearing of the panel decision en banc, the Second Circuit's decision was stayed and not controlling in this case. The district also submitted a letter brief, dated May 26, 2020, arguing that—contrary to the parents' position—the Second Circuit's decision was controlling authority and thus, the IHO's interim order on pendency in this case must be overturned with a determination that iHope constitutes the student's pendency placement.

A. Jurisdiction

Turning to the parents' appeal, it is well settled that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a], [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent enforcement power and granting an injunction requiring the district to implement a final SRO decision]). In the event that a parent experiences difficulty with the district in implementing a final decision of an IHO or SRO reached through the impartial due process hearing process, such parent may file a State complaint against the district through the State complaint process for failure to implement an IHO or SRO's due process decision or may seek enforcement through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also A.R., 407 F.3d at 76, 78 n.13).

Here, while cloaked in terms of seeking a modification of the IHO's interim order on pendency, the parents' appeal ultimately seeks an order directing the district to "immediately implement"—or enforce—a favorable administrative order, which, as explained above, exceeds an SRO's authority. Notably, the parents' pleadings repeatedly reference the need to "immediately implement" the IHO's interim order on pendency (Req. for Rev. at pp. 1-2 [emphasis in original]), the student's entitlement to "immediate enforcement" of the IHO's decision (Req. for Rev. at ¶ 16 [emphasis in original]), the district's historic failure to "implement pendency orders" during the administrative appeal process (Req. for Rev. at ¶ 17), the IHO's failure to order the district to "immediately fund pendency" for the student at iBrain within the pendency order (Answer to Cr. App. & Reply at ¶ 13 [emphasis in original]), and that the district's failure to "immediately implement" the IHO's interim order on pendency "aggrieves" the student and parents of their statutory rights to pendency under the IDEA (Answer to Cr. App. & Reply at ¶ 14).[8] Overall, the

[8] To the extent that the parents' claims amount to an argument that the district's adherence to policy is a systemic violation, an impartial hearing under the IDEA is limited to issues "relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child" (34 CFR 300.507[a][1]; see 20 U.S.C. § 1415[b][6]). Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. School Dist., 2009 WL 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]).

parents' own arguments and specific choice of words far outweigh their simultaneous denials that the appeal seeks enforcement of the IHO's interim order on pendency. Moreover, the parents do not point to any evidence or to any language in the IHO's interim decision that would otherwise preclude its immediate implementation. Indeed, the parents' request for review—dated March 27, 2020—postdated the IHO's interim order on pendency—dated March 25, 2020—by only two days (compare Interim IHO Decision at p. 2, with Req. for Rev. at p. 6). In addition, the evidence in the hearing record reflects that the parents have already taken steps to enforce the IHO's interim order on pendency with a tribunal that has enforcement authority by filing yet another action in the United States District Court for the Eastern District of New York. In light of the foregoing, the parents' appeal must be dismissed.

With respect to the district's cross-appeal, the evidence in the hearing record demonstrates that when directly questioned by the IHO at the impartial hearing about the district's position on the student's pendency placement, the district representative clearly, and without hesitation, agreed that the preliminary injunction issued by the District Court for the Southern District of New York formed the basis for the student's pendency placement. Based upon its arguments, however, the district now attempts to be relieved of this agreement at the impartial hearing—an agreement that may have had the effect of superseding any reliance on a prior unappealed IHO's decision as the basis for the student's pendency placement (see Bd. of Educ., 290 F.3d at 483-84). At the impartial hearing, the district did not present any position with regard to the student's pendency placement—other than agreeing with the parents' position and the IHO's understanding of that position—and did not present any evidence in support of any other potential pendency placement at that time, even though the unappealed IHO's decision the district now relies upon for the student's pendency placement at iHope was available at the time of the impartial hearing. Accordingly, there is no evidentiary basis at this juncture to disturb the IHO's factfinding in this matter that was in part based upon statements of the parties' agreement the student's pendency placement was iBrain.[9] Moreover, this matter is or has been before no less than two district court judges and a panel of the Second Circuit, and I do not have the authority to review or alter their determinations. The Second Circuit vacated and remanded the matter regarding the student's pendency placement for the action brought in connection to the 2018-19 school year to the district court—all while the parents have sought enforcement of the IHO's determination regarding pendency in this matter with respect to the 2019-20 school year in another branch of the district court—and a judge of the district court is in a far better position to address the import of the Second Circuit's vacatur of the preliminary injunction and the parents' current attempts in the second action to enforce the IHO's administrative order.[10]

[9] Because the evidentiary record in the ongoing administrative proceeding is not closed and the Second Circuit has issued further guidance in this area, I will not preclude the IHO from revisiting the issue with the parties if he decides to do so as a matter within his discretion. He is in the best position to assess the district's "agreement" that iBrain was the student's pendency placement.

[10] The parent's arguments regarding a stay, a request for rehearing en banc, and the finality of the Second Circuit's opinion are not by themselves persuasive reasons to avoid applying the Second Circuit's holding in Ventura de Paulino. Instead, it is the unique confluence of the parent's improper attempts at enforcement in this forum, the statements by the parties about agreement for purposes of pendency in the hearing record that give me pause, and the poor evidentiary record thus far regarding the district's position that lead to the outcome of this decision.

VII. Conclusion

Having found that the undersigned lacks jurisdiction to enforce the IHO's pendency determination in favor of the parents, that the district did not provide an alternative position or evidentiary basis during the impartial hearing regarding the student's pendency placement, and that the student's pendency placement is currently the subject of multiple overlapping court proceedings in which I have no authority, there is no basis to overturn the IHO's interim determination.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 3, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER