The University of the State of New York

The State Education Department
State Review Officer
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No. 20-178

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:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Thomas W. MacLeod, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondent, by 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 2020-21 school year.[1] The IHO found that the student's pendency placement was at the International Institute for the Brain (iBrain). The 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];

[1] The student's father was named as a party in the due process complaint notice, however, in this State-level appeal, both the student's father and mother are identified as respondents.

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

As this student was 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 a Student with

a Disability, Appeal No. 20-051; Application of a Student with a Disability, Appeal No. 18-139). Briefly, however, the student was unilaterally placed in 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. 18-139). Following an 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 costs of tuition and related services at iHope for the 2017-18 school year (Dist. Ex. 1 at pp. 7-8).[2] The 2017-18 IEP from iHope recommended a 12-month program consisting of a 6:1+1 special class placement, 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,[3] and one 60-minute session of parent counseling and training per month (Parent Ex. F-B at pp. 29-30). Further, the iHope IEP provided that the student would have access to an "AAC device" throughout the school day and school nursing services as needed, have support from a full-time 1:1 paraprofessional, and receive special transportation services (id.).[4] The district did not appeal from the IHO's final decision on the merits for the 2017-18 school year.

The student was unilaterally placed by the parent in iBrain for the 2018-19 school year (see Parent Ex. F at p. 4; see also Parent Ex. B).[5] 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). The parent challenged the administrative determinations and sought damages and stay put funding for the student's

[2] During the impartial hearing related to the student's pendency, the parent's pendency brief was entered into the record as Parent Exhibit F (Tr. p. 37). Along with the pendency brief, the parent attached three exhibits which the IHO entered into the record as Parent exhibits F-A, F-B and F-C (Tr. pp. 36-37). Similarly, the district's pendency brief was entered to the record as District Exhibit 2 (Tr. p. 38). With the district's pendency brief, the district attached six exhibits which the IHO entered into the record as District exhibits 2-1, 2-2, 2-3, 2-4, 2-5, and 2-6 (Tr. pp. 37-38). The IHO noted that some of the attachments contained duplicative exhibits (Tr. p. 38).

[3] 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 Dist. Ex. 1 at p. 7, with Parent Ex. F at p. 53).

[4] In this context, the term "AAC" refers to augmentative and alternative communication and is used together with references to assistive technology devices and services (see e.g. Parent Exs. C at pp. 39-40; D at p. 35).

[5] An IEP for the 2018-19 school year was created by iBrain on April 24, 2018 (see Parent Ex. B). The student was recommended for a 12-month program consisting of a 6:1+1 special class placement together with 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. at p. 31). iBrain also recommended full-time 1:1 paraprofessional services and an AAC device to be used throughout the day (id.).

placement at iBrain in the United States District Court for the Southern District of New York (see F. v. New York City Dep't of Educ., 2020 WL 1158532, at *2 [S.D.N.Y. Mar. 6, 2020]).[6]

A private school IEP for the 2019-20 school year was created by iBrain on April 9, 2019 (see generally Parent Ex. C). The student was recommended for a 12-month program consisting of a 6:1+1 special class placement along with 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 session of assistive technology services per week (id. at pp. 39-40). The student was also recommended to receive access to assistive technology devices throughout the school day, special transportation and school nursing services, and support from a full-time 1:1 paraprofessional (id.).[7]

The student continued attending iBrain for the 2019-20 school year (see F. v. New York City Dep't of Educ., 2020 WL 1158532, at *2; Dist. Ex. 3; see also Parent Ex. C). On July 8, 2019, the parent filed a due process complaint notice and argued that the district failed to offer the student a FAPE for the 2019-20 school year and requested that the district fund the student's tuition at iBrain pursuant to pendency (see Application of a Student with a Disability, Appeal No. 20-051).

In a decision entered on March 6, 2020, the district court denied the parent's request for stay put funding of the student's placement at iBrain for both the 2018-19 and 2019-20 school years (see F. v. New York City Dep't of Educ., 2020 WL 1158532). 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) (id. at pp. 5-6). 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 seeking stay put funding of the student's placement at iBrain (id. at p. 8).[8]

[6] A copy of the Court's decision with respect to this student is also included in the hearing record (Parent Ex. E).

[7] 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. C at p. 40).

[8] The matter remains pending with the United States Court of Appeals for the Second Circuit (see No. 20-911 [2d

Subsequent to the district's court's March 2020 decision, the IHO who presided over the 2019-20 proceeding issued an interim order on pendency directing the district to fund the student's placement at iBrain for the 2019-20 school year as pendency based on the "substantially similar" doctrine (see Application of a Student with a Disability, Appeal No. 20-051). The SRO subsequently reversed the IHO's decision and denied the parent's request for funding at iBrain pursuant to pendency as the IHO's order directly contradicted the district court's March 2020 decision which constituted the controlling "law of the case" s with respect to pendency (id.).

For the student's 2020-21 school year, the student attended iBrain and a CSE convened on June 10, 2020 to develop an IEP for the student (see District Ex. 2-2 at p. 30). Finding that the student was eligible for special education as a student with a traumatic brain injury, the June 2020 CSE recommended a 12-month, 6:1+1 special class placement in a specialized school (id. at pp. 1, 25-27). Additionally, the CSE recommended five 60-minute individual sessions per week of OT, five 60-minute individual sessions per week of PT, five 60-minute individual sessions per week of speech-language therapy, two 60-minute individual sessions per week of vision education services, and one 60-minute session per month of parent counseling and training in a group (id. at pp. 24-25). The June 2020 CSE further recommended full-time 1:1 paraprofessional and 1:1 direct nursing services for the student (id. at p. 25).

A private IEP for the 2020-21 school year was created by iBrain on June 7, 2020 (see generally Parent Ex. D). The student was recommended for a 12-month program including a 6:1+1 special class placement (id. at p. 34). Additionally, the iBrain IEP provided five 60-minute sessions of individual OT per week, five 60-minutes sessions of individual PT per week, three 60-minute sessions of speech-language therapy per week, two 60-minute session of individual vision education services per week, one 60-minute session of parent counseling and training per month, and one 60-minute indirect session of assistive technology services per week (id. at pp. 34-35). The student was also recommended to receive access to assistive technology devices throughout the school day and support from a full-time 1:1 paraprofessional and 1:1 nurse (id. at p. 35).

A. Due Process Complaint Notice and Impartial Hearing

By due process complaint notice dated July 6, 2020, the parent asserted that the district failed to offer the student a FAPE for the 2020-21 school year. As an initial matter, the parent requested that the IHO consolidate her July 2020 claims for the 2020-21 school year into the ongoing due process proceeding that had been commenced in July 2019 for the 2019-20 school year, which was still pending on the merits (Parent Ex. A at pp. 1-2).[9] The parent also requested pendency for the student based on the March 2020 IHO interim decision regarding pendency for the student's 2019-20 school year, in which the IHO ordered the district to fund the student's placement at iBrain for the 2019-20 school year under pendency based on the June 2018

Cir., filed Mar. 13, 2020]).

[9] In an order of consolidation dated July 22, 2020, the IHO who was appointed to hear the matter involving the 2019-20 school year denied the parent's request for consolidation of this matter with a due process complaint notice filed regarding the student's 2019-20 school year, prior to recusing himself (see July 22, 2020 Interim Decision on Consolidation).

unappealed IHO decision and the "substantially similar" test (Parent Ex. A at pp. 8-10; Dist. Ex. 2-3 at pp. 1-7).

With respect to the merits of the parents 2020-21 school year claims, the parent alleged that the district failed to implement the student's June 2020 IEP and failed to recommend a placement prior to the start of the student's 2020-21 school year (Parent Ex. A at pp. 3-4). The parent also contended that the recommended program was not appropriate for the student and was not available for the student's extended school year (id. at p. 4). Further, the parent asserted that the district failed to recommend sufficient related services and supports and inappropriately denied the student access to assistive technology devices (id. at pp. 4-5). As relief, the parent requested that the district directly fund the cost of the student's tuition at iBrain for the 2020-21 school year, including 1:1 paraprofessional services in school, transportation and 1:1 paraprofessional services during travel, as well as to reconvene an annual review meeting for the student and an order compelling the district to provide assistive technology services and devices for the student (id. at p. 6).

B. District Court Decision

The parties proceeded to an impartial hearing on September 16, 2020 and October 2, 2020 to discuss the student's pendency placement (see Tr. pp. 1-60). However, while the administrative claims were pending for the 2018-19, 2019-20, and 2020-21 school years (Tr. 6), the parent filed another lawsuit. Along with 32 other parents of children at iBrain, the parent brought a proceeding against the district in the United States District Court for the Southern District Court of New York seeking damages and a preliminary injunction directing the district to fund iBrain as the student's pendency placement (Araujo v. New York City Dep't of Educ., 2020 WL 5701828, [S.D.N.Y. Sept. 24, 2020]]).

On September 24, 2020, the district court found that the district had agreed to fund thirteen of the students' placements at iBrain, but denied the remaining parents' request for stay put funding at iBrain, including the parent of the student in this case. With respect to the parent in this case, along with the request of four other students, the court held that the case fell squarely within the Second Circuit's recent holding that parents could not choose to place students at iBrain unilaterally, without input from the district, and then recover the costs of such placement under pendency(Araujo, 2020 WL 5701828, at *4, reconsideration denied, 2019 WL 6392818 [S.D.N.Y. Nov. 2, 2020]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]).

C. Impartial Hearing Officer Decision

It does not appear that the parties shared the Court's ruling in Araujo denying the parent's request for stay put funding at iBrain.[10] In an interim decision dated October 16, 2020, the IHO determined that the student's pendency placement was based on the June 2018 unappealed IHO decision which found that iHope was an appropriate unilateral placement for the student and that the parent was entitled to reimbursement for the costs of tuition and related services at iHope for

[10] The district also notified the IHO that an SRO and another district court had already denied the parent's request for stay put funding at iBrain (Tr. p. 45; see Application of a Student with a Disability, Appeal No. 20-051).

the 2017-18 school year (Oct. 16, 2020 Interim IHO Decision at p. 11; see Dist. Ex. 1 at pp. 7-8).[11] Initially, the IHO noted that the pendency provision prevents a school district from unilaterally modifying a student's educational program during the pendency of an IEP dispute (id. at p. 11). The IHO further noted that although the district argued that iHope is the student's current pendency placement, the district failed to provide evidence of its "continued existence" or acceptance of the student to the program (id. at p. 12). The IHO also found that the district attempted to alter the student's pendency program at iHope by offering an "existential program, which actually is no program at all" (id.). Furthermore, the IHO found that the district failed to offer a program capable of delivering the student's pendency services as defined in the June 2018 unappealed IHO decision, and without evidence that the district offered the student an appropriate pendency placement, the analysis moves to the "substantial similar analysis" (id.).

Instead the IHO the IHO compared the student's 2017-18 iHope IEP with the student's 2020-21 iBrain IEP using a "substantial similarity" test, and found that the IEPs contained substantially similar special education services and supports (Oct. 16, 2020 Interim IHO Decision at p. 11). Based on this, the IHO directed the district to fund the student's placement at iBrain for the 2020-21 school year under pendency, retroactive to the date of the due process complaint notice (id. at p. 13). The IHO further found that although there were some "slight modifications" between the two programs, it was "reasonable" these changes occurred over the years since establishing pendency (id. at p. 11). Therefore, the IHO found that the services in the 2020-21 iBrain IEP which "drift[ed] somewhat" from the student's 2017-18 iHope IEP "remain the obligation of the [p]arent until those services can be established as appropriate for the student" (id. at p. 12).

IV. Appeal for State-Level Review

The district appeals and requests that the IHO's interim decision be nullified because the IHO failed to accurately determine the student's pendency placement. Initially, the district argues that the SRO is bound to the district court's determination in Araujo which specifically rejected the parent's demand for stay put funding at iBrain. The district further argues that the IHO committed reversible error when he failed to accurately determine the student's pendency and ordered the district to provide pendency at iBrain for the 2020-21 school year. The district maintains that the student's pendency placement remains at iHope based upon the unappealed June 2018 IHO Decision; however, when the parent unilaterally moved the student to iBrain, the parent abandoned the student's pendency placement. The district argues that ordering it to fund iBrain as the student's pendency placement directly contradicts the Second Circuit's holding in Ventura de Paulino. The district also argues that the IHO committed reversible error in finding that the program at iBrain was substantially similar to the program at iHope because the "substantially similar test" does nothing to override the "preexisting and independent authority" of school districts to provide the last-agreed upon program as cited in Ventura de Paulino. The district also argues that the IHO erred in determining that the district failed to offer the student a program that could provide the services as set forth in the June 2018 unappealed IHO decision because the district had already agreed that pendency would remain at iHope and as such, the district did not need to "offer" the student a placement for the parent to avail herself of the student's pendency

[11] The October 16, 2020 IHO interim decision does not contain page numbers. For ease of reference in this decision, citations to the IHO's interim decision will reflect pages number "1" through "14" with the cover page identified as page "1".

program at iHope. For similar reasons, the district contends that the parent's argument that pendency can be implemented at iBrain because the district did not establish the availability of a program at iHope has no merit.

In an answer, the parent responds to the district's allegations and maintains that the IHO correctly found that the student's pendency placement is at iBrain. The parent also maintains that the IHO was correct in finding that the district failed to offer a program capable of delivering the student pendency services based on the unappealed June 2018 IHO Decision and that the program described in the unappealed June 2018 IHO Decision was substantially similar to the student's 2020-21 iBrain IEP. The parent argues that the SRO is not bound by the district court decision in Araujo because it has been appealed and is therefore not final. The parent further argues that the case is not related to the instant appeal. Lastly, the parent argues that he is entitled to injunctive relief because he can demonstrate a likelihood of success on the merits, can demonstrate irreparable harm, can show that the balance of equities favors injunctive relief and that an injunction is in the public interest.

In a reply, the district argues that the parent is not entitled to injunctive relief and that the undersigned has no authority to grant such relief.[12] The district also argues that the undersigned should disregard the additional evidence submitted by the parent in his request for review.[13]

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 Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. for 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

[12] While the SRO does not have jurisdiction over granting injunctive relief, the parent may obtain injunctive relief in a court of competent jurisdiction if he can demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief (Cosgrove, 175 F. Supp. 2d at 391).

[13] With his Answer, the parent submits as additional evidence three documents identified as Answer exhibits A-C (see Answer Exs. A-C). 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, the proffered documents were available at the time of the impartial hearing and are not necessary to resolve the issues presented on appeal, and, therefore, I decline to exercise my discretion to consider these exhibits as additional evidence.

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 (Ventura de Paulino, 959 F.3d at 532; 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 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 (Ventura de Paulino, 959 F.3d at 532; 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, 86 F. Supp. 2d at 366; 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).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).

VI. Discussion

Before turning to the crux of this appeal, it must be noted that the student's pendency placement has been the subject of several prior due process proceedings and litigation related to the student's 2017-18 through 2020-21 school years. As mentioned above, the June 2018 unappealed IHO decision, in which the parent was entitled to reimbursement for the costs of tuition and related services at iHope for the 2017-18 school year, was the last merits determination for the student's IEP (Dist. Ex. 1). In fact, although the parent sought pendency the following year for the student's 2018-19 school year, which was later denied, the merits determination for the 2018-19 school year proceeding is still pending. Similarly, the parent sought pendency for the student's 2019-20 school year which was denied by the SRO because of the district's court's ruling; however, the merits determination for the student's 2019-20 school year is still pending as well.

Turning to the parent's request for stay put funding for the student's placement at iBrain, and the district's argument that the IHO erred in finding that the district failed to offer a program capable of delivering the student's pendency services based on the unappealed June 2018 IHO Decision because the district did not establish the availability of a program at iHope, the Second Circuit Court of Appeals specifically rejected the requirement that the district obtain a seat for the student in the nonpublic school and held, under similar facts, that: "iHOPE became the student['s] pendency placement not at the [district's] instigation, but rather by operation of law after the [district] chose not to appeal the ruling[] of [an] impartial hearing officer[] holding that iHOPE

was an appropriate placement for th[is] student[]" (Neske v. New York City Dep't of Educ., 2020 WL 5868279, at *1 [2d Cir. Oct. 2, 2020]). Based on this, the Court stated that it "deemed the [district] to have implicitly chosen iHOPE as the pendency placement" (Neske, 2020 WL 5868279, at *1; see also Araujo v. New York City Dep't of Educ., 2020 WL 5701828, at *4 [S.D.N.Y. Sept. 24, 2020] [rejecting the parents' argument in that case that, because the district "had not yet provided the students with any pendency placement, Ventura de Paulino [wa]s inapplicable"]).[14] Therefore, the IHO failed to recognize that, as in Neske, it was the parent who unilaterally moved the student from the pendency placement at iHope to a new private school, the district did not instigate the placement at iHope, and the district merely implicitly chose iHOPE as the pendency placement when it did not appeal the June 2018 IHO decision.

Next, with respect to the district's claim that the IHO erred in finding that iBrain was the student's pendency placement because the unappealed June 2018 IHO Decision was substantially similar to the student's 2020-21 iBrain IEP, in Ventura de Paulino, the Second Circuit Court of Appeals was confronted with a set of facts similar to the present matter in that the IHOs had concluded that iHope was an appropriate unilateral placement for the students for prior school years and the district did not appeal those rulings, meaning that the district, by operation of law, consented to the students' placements at iHope (959 F.3d at 532). The issue presented was whether the parents could unilaterally move the student to iBrain and still receive pendency funding (id.). The Court concluded the parents could not effectuate this unilateral move since it is the district that is authorized to decide how (and where) the students' pendency services are to be provided as per the text and structure of the IDEA and given that the district is the party responsible for funding the pendency services (id. at 533-35). The Court observed that:

> If a parent disagrees with a school district's decision on how to provide a child's educational program, the parent has at least three options under the IDEA: (1) The parent can argue that the school district's decision unilaterally modifies the student's pendency placement and the parent could invoke the stay-put provision to prevent the school district from doing so; (2) The parent can

[14] In Neske, the Second Circuit also rejected the argument that the facts of that matter fell under a footnote in Ventura de Paulino, where the Court left open the question as to what would happen if a student's prior nonpublic school placement was not available to provide pendency services and the district either refused or failed to provide pendency services (Neske, 2020 WL 5868279, at *2; Ventura de Paulino,959 F.3d at 534 n.65). The Court in Ventura de Paulino cited a decision by the Fourth Circuit Court of Appeals, which held that 20 U.S.C. § 1415(j) does not impose any affirmative obligations on a school district to seek out alternative placements when a student's then-current educational placement is not functionally available (Wagner, 335 F.3d at 301 [finding that "the question of availability is entirely irrelevant to the task of identifying the child's then-current educational placement, and it is only the current placement, available or unavailable, that provides a proper object for a 'stay put' injunction"]). However, the Fourth Circuit noted two situations in which a student's pendency placement could be changed: either by an agreement of the parties or by "a preliminary injunction from the district court, changing the child's placement" (Wagner, 335 F.3d at 302). This follows the long-standing principle that "the stay-put provision in no way purports to limit or pre-empt the authority conferred on courts" (Honig, 484 U.S. at 327; see 20 USC 1415[i][2][C][iii]). These situations do not contemplate the parent's exercise of self-help, as the IHO characterized it (IHO Decision at p. 47). In any event, as with the facts in Neske, the current matter does not present such an instance, as the evidence in the hearing record does not support a finding that iHope was not available or that the district "refuse[d] or fail[ed] to provide pendency services as iHOPE" (2020 WL 5868279, at *2).

> determine that the agreed-upon educational program would be better provided somewhere else and thus seek to persuade the school district to pay for the program's new services on a pendency basis; or (3) The parent can determine that the program would be better provided somewhere else, enroll the child in a new school, and then seek retroactive reimbursement from the school district after the IEP dispute is resolved

(id. at 534). Therefore, the Court concluded that "[r]egardless of whether the educational program that the Students are receiving at iBRAIN is substantially similar to the one offered at iHOPE, when the Parents unilaterally enrolled the Students at iBRAIN for the 2018-2019 school year, they did so at their own financial risk" (id.).

Here, pendency consists of the unappealed June 2018 IHO Decision in the proceedings concerning the 2017-18 school year, which ordered the district to fund the student's unilateral placement at iHope (see Dist. Ex. 1). Applying the holding of Ventura de Paulino to the facts of this proceeding, when the parent unilaterally enrolled the student at iBrain for the 2020-21 school year, he did so at his own financial risk (959 F.3d at 534). Accordingly, even if the iHope placement ordered by the unappealed June 2018 IHO Decision was "substantially similar" to the student's 2020-21 iBrain IEP, the IHO erred and should have found that Ventura de Paulino, precludes the use of such a test to unilaterally establish pendency at iBrain. Therefore, the IHO erred in finding that iBrain was the student's pendency placement based on his application of the substantial similarity test.

If there was any doubt that the Second Circuit's reasoning in Neske and Ventura de Paulino should lead to the conclusion to deny stay put funding for the student's placement at iBrain, those doubts are laid to rest in light of the district court decisions issued in favor of the district on the issue of the student's pendency placement. The parent argues that the SRO is not bound to the district's court's decision because it is currently being appealed and the decision is not final, but that argument is specious because the only place that a decision issued by a court of competent jurisdiction can be legitimately challenged is either in that court or in a direct appeal to an appellate court of competent jurisdiction. The court decision cannot be collaterally attacked in an IDEA administrative due process proceeding.

As the SRO explained Application of a Student with a Disability, Appeal No. 20-051,

> 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. 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])

Application of a Student with a Disability, Appeal No. 20-051). As SROs have explained there may be instances when a parent pursues a pendency argument in both the administrative and judicial forums simultaneously and there is concurrent jurisdiction—however awkward that makes the proceedings—(see, e.g., Application of the Dep't of Educ., Appeal No. 20-033),[15] but once a court has issued a determination resolving the stay put issue, administrative hearing officers do not have the power to alter a court's stay put decision.

In the case of this student, the Judge Furman obliged the parent with a stay put determination in March 2020, denying the request for stay put funding of the student's placement at iBrain (F. v. New York City Dep't of Educ., 2020 WL 1158532). As the first district court decision was apparently not enough, Judge Schofield again denied the parent's request for stay put funding at iBrain in the second action (Araujo, 2020 WL 5701828, at *4), and on reheaing in the second action 2020 WL 6392818, at *3). Here, the Second Circuit's opinion in Ventura de Paulino is controlling law, and both F. v. New York City Dep't of Educ. and Araujo have disposed of the parent's stay put claims. The district court has repeatedly rejected the parent's claims regarding the student's pendency at iBrain and there are no intervening events such as a subsequent pendency agreement of the parties or a merits determination in favor of the parent's unilateral placement of the student at iBrain that would warrant a new result. I have no reason to depart from the district's court's prior holdings. Even assuming that the parent has appealed the district court's rulings, a higher court has not issued a contrary ruling, and the parent may not collaterally attack court decisions involving the student by relitigating them in the administrative forums. Accordingly, the IHO's decision—in contravention of all of the points above—is reversed.

As a final matter, as mentioned above, there have been no merits determinations regarding the student's special education programming since the unappealed June 2018 IHO Decision for the 2017-18 school year when the student was attending iHope. Each year, the parent pursued pendency claims seeking iBrain as the student's pendency under new theories, none of which, as of this appeal, have succeeded Indeed, given the outcome of the various proceedings both at the administrative level and in federal court, pendency funding at iBrain is unlikely to occur unless the parents achieves a favorable determination on the merits of their substantive underlying claims regarding FAPE and the appropriateness of iBrain as a unilateral placement. Accordingly, in the interests of the student's educational benefit and overall welfare, I strongly encourage the parents and their counsel to desist with the baseless pendency disputes on the same facts and advance the

[15] As the Second Circuit has explained the "'an action alleging violation of the stay-put provision falls within one, if not more, of the enumerated exceptions to' the IDEA's exhaustion requirement" Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 455 [2d Cir. 2015]). It should go without saying that it is incumbent on the parties to notify the administrative hearing officers of any ruling issued with respect to the student that is the subject of the administrative proceedings.

merits of the cases they have filed to their conclusion rather than accumulating additional unsuccessful pendency determinations for successive school years, particularly where the Second Circuit has essentially foreclosed the viability of a legal strategy premised on establishing pendency at iBrain through a parent's unilateral placement of a student at the school.

VII. Conclusion

Based on the foregoing, the district correctly argues that the IHO erred in applying the substantial similarity standard to determine the student's stay-put placement during the pendency of the present proceedings. Also, the district court's decisions denying the parent's request for stay put funding at iBrain pursuant to pendency are binding and foreclose further rulings on the matter in the administrative forums. The district court's rulings are not subject to collateral attack in a due process proceeding. Therefore, the IHO's decision is reversed.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's interim decision on pendency, dated October 16, 2020, is reversed in its entirety.

Dated: **Albany, New York**
December 23, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER