The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 20-194

Application of a STUDENT WITH A DISABILITY, by his 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 Jennifer Blackman, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Cynthia Sheps, 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 a second interim decision of an impartial hearing officer (IHO) determining their son'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 2020-21 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student in this appeal attended the John A. Coleman School (Coleman), a State approved, nonpublic school (NPS) for preschool during the 2018-19 school year in a 12-month program developed by the Committee on Preschool Special Education that consisted of a 10:1+3 special class placement along with four 30-minute sessions per week of physical therapy (PT), three 30-minute sessions per week of individual occupational therapy (OT), four 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of individual vision education services, and special transportation including a lift bus and air

conditioning (see Tr. p. 27; IHO Exs. III at pp. 1, 25, 26, 28; IV at p. 3). On March 21, 2019 a CSE convened to develop the student's school-age IEP for the 10-month 2019-20 school year beginning in September 2019 (Parent Ex. B at pp. 1, 17). Finding the student eligible for special education as a student with multiple disabilities, the March 2019 CSE recommended a 12-month program consisting of a 12:1+(3:1) special class placement in a district specialized school together with speech-language therapy, OT, PT, and vision education services, along with the provision of special transportation services via lift bus (id. at pp. 13, 14, 16).

The parents objected to the March 2019 CSE's recommendations and unilaterally enrolled the student at the International Institute for the Brain (iBrain) in September 2019 where he was placed in a 6:1+1 classroom (IHO Ex. IV at p. 3; Parent Exs. C at p. 1; D at p. 1). According to the parents, they filed a due process complaint notice on September 23, 2019 regarding the 2019-20 school year (amended on December 2, 2019), which in part, requested a pendency order requiring the district to fund the student's placement at iBrain during the pendency of that underlying proceeding (IHO Ex. IV at p. 3). The parents indicated that their administrative due process litigation from their 2019-20 school year claims remain pending before the IHO assigned to preside over that proceeding (id.).

On May 13, 2020, the CSE convened and developed the student's IEP with a projected implementation date of June 1, 2020 (IHO Ex. II at pp. 1, 25). The CSE continued to determine that the student was eligible for special education as a student with multiple disabilities, and recommended a 12-month program consisting of a 6:1+1 special class placement in a specialized school together with five 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, five 60-minute sessions per week of speech-language therapy, three 60-minute sessions per week of vision education services, full time paraprofessional services in a group, one session per week of individual assistive technology services, and one 60-minute session per month of group parent counseling and training, as well as special transportation services including a lift bus, 1:1 paraprofessional services, and limited travel time (id. at pp. 21-23, 25; see Parent Ex. B at p. 1).

In a June 26, 2020 letter, the parents provided the district with a 10-day notice of their intention to unilaterally place the student at iBrain for the 2020-21 school year and seek public funding for that unilateral placement (Parent Ex. F). The parents indicated that the student has been enrolled at iBrain since September 2019 (IHO Ex. IV at p. 4).

A. Due Process Complaint Notice

In a due process complaint notice dated July 6, 2020, the parents requested an impartial hearing, asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 extended school year (ESY), and requested that this proceeding be consolidated with the prior proceeding concerning the 2019-20 school year (Parent Ex. A at pp. 1-2).[1] Among other things, the parents' claims on the merits related to the district's asserted failure to properly implement May 2020 IEP, inappropriate IEP goals and related services, failure to

[1] According to the parents, the case involving the 2019-20 school year was pending before a different IHO, who in a July 24, 2020 interim decision regarding consolidation, declined to consolidate that case with the due process complaint for the 2020-21 school year (see July 24, 2020 Interim IHO Decision; IHO Ex. IV at pp. 2, 11).

recommend assistive technology, and an inappropriate 6:1+1 special class placement (id. at pp. 3-5). As relief, the parents sought tuition reimbursement for the student's unilateral placement at iBrain for the 2020-21 school year, special education transportation (or reimbursement for such), and an order compelling the district to provide the student with assistive technology services (id. at p. 6). As is relevant to this appeal, the parents request that the student's pendency placement consist of (a) direct payment of tuition and costs for related services at iBrain, and (b) and direct payment of special transportation services and support costs to and from iBrain (id. at p. 2). For purposes of pendency, the parents asserted that the student's pendency programming during the underlying due process proceeding was found in the program identified in the student's May 13, 2020 IEP (id.).

B. Impartial Hearing Officer Decision

While the administrative claims were pending the parents filed another lawsuit. Along with 32 other parents of children at iBrain, the parents 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 21, 2020, an impartial hearing was convened during which the parties addressed the student's pendency placement (Tr. pp. 1-60). During the impartial hearing, the district and parents disagreed on which IEP constituted the pendency IEP, with the district asserting that since the parents were in due process proceedings for both the 2019-20 and 2020-21 school years, the last implemented preschool IEP dated September 25, 2018 was the basis for pendency, while the parents asserted that since the school the student attended during the 2018-19 school year was not available, and the student had attended iBrain for the 2019-20 school year, and was attending iBrain at the time of the July 2020 due process complaint notice, the program as set forth in the May 2020 iBrain IEP—which included "substantially similar elements" as the district's May 2020 IEP—was the student's pendency placement (Tr. pp. 20-21, 27-28, 41-43, 50-51, 55; see Parent Ex. D).[2] At the close of the impartial hearing that day, the IHO indicated that she would issue an initial ruling addressing the issue of pendency, but explained that she would offer the parties an opportunity to brief the issue and revisit the matter by written request after the parties received her interim decision (Tr. pp. 57-58).

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 parents of the student in this case. With respect to the parents in this case, along with the request of fourteen other students, the court held that the argument for pendency funding at iBrain failed under Ventura de Paulino (Araujo, 2020 WL 5701828, at *3-*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]). On or about September 30, 2020, both parties submitted memoranda of law to the IHO on the issue of the student's stay-put placement (IHO Exs. IV; V).

[2] No testimony was taken during the hearing (Tr. pp. 1-60).

In an interim decision dated October 8, 2020, the IHO determined that the "base" of the parents' application for a pendency order was not the district's May 2020 IEP as the parents asserted, but rather the September 25, 2018 IEP, which was "the last agreed upon IEP" (IHO Ex. VI at pp. 2, 5, 8; see Parent Ex. A at p. 2). Furthermore, the IHO noted that the parents here were like the parents in Araujo in that they had "not shown that the [s]tudent's enrollment at iBrain in the instant matter was agreed upon by the [p]arents and the [district].[3] In this regard, I note that the [due process complaint] states that a due process complaint has been filed for the 2019/2020 school year for the [s]tudent, 'the merits of which has not been fully adjudicated'" (id. at p. 6). The IHO also determined that the parents' argument that iBrain was the student's 'operative placement' because he had attended iBrain since September 2019 and the placement recommended in the May 2020 IEP was not available due to COVID-19 closures "must fail," for the rationales the court provided in Araujo (id. at pp. 6-8). The IHO continued that "the inquiry then turn[ed] to whether the [s]tudent's program and services at iBrain [were] substantially similar" to the September 25, 2018 IEP, which the IHO determined "was not directly addressed by the [p]arents at the pendency hearing" (id. at p 8). Finally, the IHO ordered that the parents "may request a continuation of the pendency hearing" with limited discussion on substantial similarity (id. at p. 8).

In a letter to the IHO dated October 13, 2020, the parents requested a continuation of the pendency portion of the impartial hearing, asserting that Araujo was not a final decision, and as both parties had filed motions with the court to reconsider, reliance on Araujo was premature (Parent Ex. G). The parents' counsel also requested continuation of the pendency hearing in order to present evidence demonstrating the substantial similarity of the student's educational program and placement at iBrain to the student's last agreed-upon IEP (id.). In an email dated October 16, 2020, the IHO confirmed that the impartial hearing on the merits would reconvene on October 20, 2020; however, the hearing would first revisit the pendency issue (IHO Ex. VII).

A subsequent impartial hearing date convened on October 20, 2020 for the purpose of further hearing on the IHO's initial pendency determination, at which time the IHO noted that the parties' motions to the court to reconsider "does not affect the judgement's finality or suspend its operation" and also that the district court in Araujo had "issued an order regarding students in the case were not relevant to the holding that I cited in my pendency decision" (Tr. pp. 68-69). The remainder of the hearing date concerned discussion between the parties' counsel and the IHO regarding whether the student's programming at iBrain was substantially similar to the September 2018 IEP's programming, and to some extent the issue of placement availability and the applicability of footnote 65 found in Ventura de Paulino (see Tr. pp. 70-114).

In a second interim decision on pendency dated November 5, 2020, the IHO reiterated that iBrain was not the student's pendency placement for the 2020-21 school year (IHO Decision at p. 7). The IHO also addressed the parents' arguments as to why the student's program at iBrain and the September 25, 2018 IEP programming were "substantially similar" and determined that the parents failed to address certain factors, such as the change in class ratio outlined by the United

[3] It is not clear whether the IHO was made aware by the parties that the student in this case was not only "like" the plaintiffs in Araujo but was among the plaintiffs in Araujo that were denied stay-put funding at iBrain. The student in this matter was represented by the same counsel, Brain Injury Rights Group, as for the Araujo matter, but nothing in the hearing record demonstrates that Brain Injury Rights Group made such a disclosure to the IHO (see Tr. pp. 1-117; IHO Ex. IV).

States Department of Education Office of Special Education Program's (OSEP's) Letter to Fisher 21 IDELR 992 [OSEP 1994] (id. at pp. 5-7). Therefore, the IHO found that iBrain was not: the student's placement in the last agreed upon IEP, the student's operative placement, or substantially similar to the placement in his last agreed upon IEP dated September 25, 2018 (id. at p. 7). The IHO ordered that the student's pendency placement program and services were the last agreed upon IEP dated September 25, 2018 and denied the parents' request for district funding of the student's program at iBrain (id. at pp. 7-8).

IV. Appeal for State-Level Review

The parents appeal from the IHO's second interim pendency decision, asserting that the IHO erred in determining that the student's pendency programming during the underlying due process proceeding was found in the September 2018 IEP and that the student was not entitled a publicly funded stay-put placement at iBrain. More specifically, the parents assert that the IHO erred by failing to find that Coleman only served preschool students and was therefore unavailable to the student because he had "aged out."[4] Further, the parents argue that the IHO also failed to find the district closed all public school buildings in March 2020 for the remainder of the 2019-20 school year due to the COVID-19 pandemic and only offered instruction and related services via remote learning. Although in August 2020 the last placement proposed by the district (a district specialized school) began offering parents the option of fully-remote learning or part-time in-person instruction, fully in-person instruction was not an option, therefore the parents argue that the IHO should have determined that it constituted a unilateral change in the student's educational placement because the last proposed placement was also "unavailable" to the student. Additionally, the parents assert that the IHO erroneously focused on language from OSEP's Letter to Fisher to determine whether the student's current iBrain placement was substantially similar to the last-agreed upon placement, and she failed to find that iBrain was the student's "operative placement" at the time the due process complaint notice was filed.[5] Additionally, the parents seek a determination that the IHO's recusal after the second interim decision was issued is not supported by federal or State law. The parents request that the undersigned reverse the IHO's second interim decision and find that the student's pendency placement is at iBrain.

[4] As further described below, the alleged unavailability of Coleman is not a basis to overturn the IHO's second interim decision, but I note that there is no evidence in this case regarding Coleman in the hearing record, just bare allegations by the parents' counsel that the student "aged out". According to the Office of Special Education, Coleman is authorized by the Commissioner of Education to provide special education to school-age children (see http://www.p12.nysed.gov/specialed/privateschools/HVRO.htm).

[5] It is the parents who made a flawed argument to the IHO that a "substantial similarity" argument should apply and result in stay-put funding of the student's unilateral placement at iBrain (IHO Ex. IV at p. 10). The IHO cannot be faulted for being thorough and allowing the parents to make the argument, or rejecting that branch of their argument because she didn't think that a 10:1+3 classroom setting compared to a 6:1+1 classroom setting would meet the substantial similarity factors. All that the IHO was ruling was that if the substantial similarity test applied, iBrain would not be found substantially similar. The parents do not address the issue with the same level of specificity that the IHO did; however, it is of no consequence as the parents' continuing reliance on "substantial similarity" or "more similar" arguments related to iBrain are inapposite to this case, as further described below.

In an answer, the district denies the material allegations set forth in the request for review, and asserts among other things, that the undersigned is bound by the District Court's determination in Araujo that the student is not entitled to a publicly funded pendency placement at iBrain. Additionally, the district asserts that the parents' allegations with respect to the IHO's recusal have no merit. The district requests that the SRO dismiss the parents' request for review with prejudice.

In a reply to the district's answer the parents assert that the undersigned is not bound by that District Court's determination in Araujo because that determination is the subject of an appeal to the Second Circuit Court of Appeals. The parents also assert that an SRO has previously found that both administrative tribunals and the courts have concurrent jurisdiction regarding pendency and the undersigned is therefore not legally precluded from reviewing and determining the appeal.

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] cert. denied sub nom. Paulino v. NYC Dep't of Educ., 2021 WL 78218 [U.S. Jan. 11, 2021]; 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 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).

VI. Discussion

This appeal consists of a dispute that is almost identical to several others brought by counsel for the parent for other similarly situated students (Application of the Student with a Disability, Appeal No. 20-201; Application of the Student with a Disability, Appeal No. 20-178; Application of a Student with a Disability, Appeal No. 20-184). As a threshold issue, the district argues that the student's pendency placement was already ruled upon by the District Court, wherein it was determined that the student was not entitled to publicly funded pendency placement at iBrain (see Araujo v. New York City Dep't of Educ., 2020 WL 5701828 *3-*4 [Sept. 24, 2020] reconsideration denied, 2020 WL 6392818 [Nov. 2, 2020]). Counsel for the parents asserts in the reply that the determinations contained in Araujo are on appeal at the Second Circuit, and that the district court decision is not final, but that argument is improper 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. In this case the District Court has already ruled that

> Plaintiffs' theory fails because Plaintiffs have not shown that the enrollment of these fifteen students at iBRAIN was agreed upon between their parents and [the district]. A "parent cannot unilaterally transfer his or her child and subsequently initiate an IEP dispute to argue that the new school's services must be funded on a pendency basis," because permitting pendency on such grounds "effectively

> renders the stay-put provision meaningless by denying any interest of a school district in resolving how the student's agreed-upon educational program must be provided and funded." Ventura, 959 F.3d at 536. This accurately describes what has occurred with respect to these fifteen students. As such, Plaintiffs' arguments on this point are foreclosed by Ventura.
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> Plaintiffs attempt to distinguish Ventura on the basis that, in that case, [the district] had explicitly offered another school [iHope] to the parents, who nonetheless chose to send their child to iBRAIN. Plaintiffs argue that because Defendant has not yet provided the students with any pendency placement, Ventura is inapplicable. This argument is unpersuasive. If Plaintiffs' issue is that no timely pendency determination has been made, then they can move to obtain such relief. However, under Ventura, they may not unilaterally alter students' enrollments and then claim pendency funding on that basis:
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> > Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved....
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> Ventura, 959 F.3d at 526; see also Mackey v. Board of Educ., 386 F.3d 158, 160 [2d Cir. 2004] ["Parents should, however, keep in mind that if they 'unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local officials, [they] do so at their own financial risk.' "] [quoting Sch. Comm. v. Dep't of Ed., 471 U.S. 359, 373–74, [1985]]

(Araujo v. New York City Dep't of Educ., 2020 WL 5701828, at *4). The parents' counsel, Brain Injury Rights Group, made a similar stay-put argument on behalf of another student at iBrain to the district court—that a court decision was on appeal and therefore nonbinding—but that argument was squarely rejected by the district court, which explained "This Court will not engage in judicial forecasting. It takes the law as it finds it and will apply the controlling precedent of the Second Circuit" (Ferreira v. New York City Dep't of Educ., 2021 WL 76808, at *1 [E.D.N.Y. Jan. 8, 2021]).[6] The court's reasoning in Ferreira applies to the arguments here as well.

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 a Student

[6] Similarly, the parents argued before the IHO that Araujo should not be applied because they were seeking reconsideration (Parent Ex. G).

with a Disability, Appeal No. 20-184; Application of a Student with a Disability, Appeal No. 20-178; Appeal No. 20-033),[7] 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. The District Court's decision with respect to this student was based upon the same material facts and cannot be collaterally attacked in an IDEA administrative due process proceeding. The parents' assertion that the student should receive a publicly funded pendency placement at iBrain because the student's IEP was "being implemented" at iBrain is just rehashing the operative placement argument that was already rejected by the district court (see Araujo, 2020 WL 5701828 at *4). There is no evidence since the parties were before the district court that the district has agreed to provide public funding of the student's placement at iBrain or that there has been a final determination in favor of the parents' unilateral placement of the student at iBrain. The parents' argument that I am not bound to "one determination" of the student's pendency placement and should issue a determination in conflict with the district court's determination is ridiculous.

To the extent that the parents cite to footnote 65 in Ventura de Paulino and argue that "a parent may exercise self-help and seek an injunction to modify the student's pendency placement," the parents should have pursued that argument in district court because an administrative hearing officer does not have authority to issue a traditional injunction like a district court to order a change in a student's stay-put placement.[8]

To the extent that the parents assert that the district's closure of public school buildings and use of remote or hybrid learning processes as a result of the COVID-19 pandemic has violated the status quo and materially altered the student's programming, that argument does not shift the student's stay-put placement to the parents' unilateral placement of the student at iBrain. It is not the first attempt at this argument either. In a putative class action, brought by parents represented by the same counsel in this case, the District Court has ruled that:

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[7] As the Second Circuit has explained "'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.

[8] In footnote 65, the Second Circuit stated

> "[w]e do not consider here, much less resolve, any question presented where the school providing the child's pendency services is no longer available and the school district either refuses or fails to provide pendency services to the child. Those circumstances are not present here. We note, however, that at least one of our sister Circuits has acknowledged that, under certain extraordinary circumstances not presented here, a parent may seek injunctive relief to modify a student's placement pursuant to the equitable authority provided in 20 U.S.C. § 1415[i][2][B][iii]. See Wagner v. Bd. of Educ. of Montgomery Cty., 335 F.3d 297, 302–03 [4th Cir. 2003] [involving a situation in which the pendency placement was no longer available, and the school district had failed to propose an alternative, equivalent placement]"

(Ventura de Paulino, 959 F.3d 519, 534).

> First, the agency charged with administering the IDEA program has issued guidance indicating that the provision of remote services does not work a change in placement.
>
> * * *
>
> Second, plaintiffs are challenging a system-side administrative decision of general applicability – an order shutting schools to all students (abled and disabled) and all staff during an unprecedented and life-threatening health crisis. There can be no question that the order applied to the entire school system and that it was of general applicability – that is, it applied equally to abled and disabled students. Such an order does not work a change in pendency.
>
> * * *
>
> The two reasons discussed above are dispositive – and, indeed, require dismissal of the Plaintiff Students' pendency claims.
>
> * * *
>
> Because the court has concluded that [1] no change in pendency has been worked by the emergency closure of the schools, and [2] plaintiffs cannot complain about an administrative order of general applicability to all students [see supra pp. 66-73], Count IV, the count that seeks a stay-put injunction, must also be dismissed, for failure to state a claim on which relief may be granted. Fed. R. Civ. P. 12[b][6]. This dismissal does not preclude individual students from asserting in appropriately commenced lawsuits that something other than the closure of the schools and the provision of remote educational services during the pandemic worked a change in pendency.

(J.T. v. de Blasio, 2020 WL 6748484, at *37-*38, *40, *44 [S.D.N.Y. Nov. 13, 2020] [emphasis added]). Applying the Court's reasoning in J.T. v. de Blasio—which was far more extensive than the portions quoted above—the system-wide closure of the district's public school buildings due to the COVID-19 pandemic and resultant remote or hybrid learning was not a change in placement and in no way transformed the parents' unilateral placement of the student at iBrain thereafter into the student's publicly funded pendency placement.

VII. Conclusion

Based on the discussion above, there is no reason to disturb the IHO's determination that the student's September 2018 IEP was the basis of the pendency placement, or her finding that iBrain was not the student's pendency placement, albeit I reach the latter determination on the additional basis that the parents may not collaterally attack the district court's determination of the student's pendency placement in an administrative proceeding (Araujo, 2020 WL 5701828 *3-*4 [Sept. 24, 2020] reconsideration denied, 2020 WL 6392818 [Nov. 2, 2020]; see Ventura de Paulino, 959 F.3d at 526, 536).

The parents' remaining argument, that the IHO's recusal after issuing the second interim decision was impermissible is not a pendency determination and, therefore, is not subject to an interlocutory appeal for State-level review (see 8 NYCRR 279.10 [d]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 25, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER