The University of the State of New York

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

No. 20-196

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Peter G. Albert, Esq.

Judy Nathan, Special Assistant Corporation Counsel, attorneys for respondent, by Nathaniel Luken, 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 parent) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining her son's pendency placement during a due process proceeding challenging the appropriateness of 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

According to the parent, the student attended the ADAPT Community Network School (ADAPT), a State-approved nonpublic school (NPS), for the eight years prior to the student's 2019-20 school year (Tr. pp. 67, 73; IHO Ex. I at p. 3). On January 11, 2019 the CSE convened and determined that for the 2019-20 school year, the student was eligible to receive special education and related services as a student with multiple disabilities, and recommended a 12-month school year program consisting of a 12:1+4 special class placement at a State-approved NPS, along with receipt of three 30-minute sessions per week each of individual occupational therapy (OT),

physical therapy (PT), and speech-language therapy, and special transportation services utilizing an air-conditioned lift bus (Parent Ex. B at pp. 1, 8, 10, 11).[1] According to the parent's counsel, the student attended the International Institute of the Brain (iBrain) during the 2019-20 school year (Tr. p. 74; see IHO Ex. I at p. 5). On September 30, 2019, the parent filed a due process complaint notice concerning the 2019-20 school year and requested an impartial hearing.[2]

On May 27, 2020, the CSE convened and determined that for the 2020-21 school year, the student was eligible for special education as a student with multiple disabilities, and recommended a 12-month school year program consisting of a 6:1+1 special class placement in a district specialized school, along with receipt of five 60-minute sessions per week each of individual OT, PT, and speech-language therapy, two 60-minute sessions per week of individual assistive technology services, one monthly 60-minute session of parent training and counseling, full-time 1:1 health paraprofessional services, and special transportation services utilizing an air-conditioned lift bus and a 1:1 paraprofessional (Dist. Ex. 2 at pp. 1, 24-25, 28, 29, 30). The parent rejected this placement, and on June 19, 2020 signed an enrollment contract with the International Institute of the Brain (iBrain) for the student's enrollment for the 2020-21 school year (Parent Ex. E at pp. 1, 7). On June 26, 2020, the parent provided the district with a 10-day notice written notice of her intention to unilaterally place the student at iBrain for the 2020-21 extended school year (ESY) and seek public funding for that placement (Parent Ex. H).

The district provided the parent with prior written notice on July 7, 2020 of the CSE's recommendations and rejected related services and placement options contained within the May 27, 2020 IEP (Dist. Ex. 4). On August 13, 2020, the parent signed a transportation contract with a private transportation company to provide air-conditioned, wheelchair-equipped transportation for the student to and from iBrain during the 12-month 2020-21 school year (Parent Ex. G at pp. 1, 5). The student attended at iBrain for the 2020-21 school year (Tr. p. 74).

A. Due Process Complaint Notice

In a due process complaint notice dated July 6, 2020, the parent requested an impartial hearing, asserting that for the 2020-21 ESY the district failed to offer the student a free appropriate public education (FAPE), and requested that this proceeding be consolidated with the prior proceeding concerning the 2019-20 school year (Parent Ex. A at p. 1).[3] In the 2020-21 proceeding, the parent alleged that the district: failed to implement the May 2020 IEP by failing to identify a specific public school site before the start of the school year; failed to offer a public school site that was capable of implementing the IEP as of the start of the school year; and failed to offer

[1] While the January 2019 IEP does not list which NPS the student would attend during the 2019-20 school year, according to parent's counsel, the State-approved NPS was ADAPT (Tr. p. 67; see Parent Ex. B at pp. 8, 11).

[2] In response to a January 6, 2021 letter from the Office of State Review, the district provided a copy of the September 30, 2019 due process complaint notice as well as a copy of the July 27, 2020 IHO decision on pendency concerning the 2019-20 school year.

[3] In a July 27, 2020 interim decision regarding consolidation, the IHO—who at that time was assigned to resolve the disputes pertaining to the 2019-20 school year—declined to consolidate the cases (see July 27, 2020 Interim IHO Decision).

sufficient related services or assistive technology services on the student's May 2020 IEP for the 2020-21 school year (id. at pp. 3-5). As relief, the parent sought direct funding for the unilateral placement of the student at iBrain for the 2020-21 school year, prospective funding for 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 parent requested that the IHO issue an interim decision directing the district to directly fund the student's tuition, and costs for related services, and special transportation at iBrain as stay put during the pendency of the underlying due process proceeding (id. at p. 2). The parent asserted that the student's pendency program was found in the May 27, 2020 IEP, the IEP challenged by the parent (id.).

B. Impartial Hearing Officer Decision

While the administrative claims were pending 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 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 September 18, 24, and October 14, 2020, an impartial hearing was convened by the IHO for the purpose of addressing the student's pendency placement and thereafter the parties filed briefings on the issue (Tr. pp. 1-82; IHO Exs. I; II).[4] The parties made numerous oral and written arguments before the IHO, disputing which of the student's IEPs prepared by the district should be considered the basis for the student's pendency placement, and they contested numerous theories for stay put including the "substantial similarity" test, the operative placement test, and the relevance of school building closures, remote and/or hybrid learning due to the COVID-19 pandemic (Tr. pp. 29-58, 60, 61, 66-68, 72-80; IHO Exs. I and II).[5]

In an interim decision dated November 2, 2020, the IHO determined that the student's January 11, 2019 IEP was the last agreed upon IEP (Interim Decision at p. 2). Contrary to the parent's assertion that the student's pendency placement should be at iBrain, the IHO found that there was no evidence that the district agreed to fund or was ordered to fund the student's placement at iBrain for the 2019-20 school year (id. at p. 3). Regarding the parent's assertion that the last-agreed upon placement was not available due to COVID-19 related school closures, the IHO determined that the parent had not demonstrated that the last agreed upon program set forth on the

[4] No testimony was taken during the hearing (Tr. pp. 1-82).

[5] The parent also moved for IHO's recusal, then later withdrew the request (IHO Exs. III, IV; see Tr. pp. 29-61).

January 2019 IEP was unavailable, and that the District Court decision the parent cited to did not require the district to provide in-person pendency programs that conflict with health guidelines during a pandemic (id. at p. 3).

In the interim decision, the IHO reiterated the parent's argument that because the district did not offer a pendency program, iBrain should be considered the student's pendency placement as it was the operative program and alternatively, that it is substantially similar to the last-agreed upon program (Interim Decision at p. 3). The IHO found that, contrary to the parent's substantial similarity and operative placement assertions, it is the district's "prerogative to select a placement that comports with the pendency IEP," and it is the district, not the parent, who has the authority to decide how a last-agreed upon program is to be provided during the pendency of a dispute (id.). Therefore, the IHO determined it is "irrelevant" whether the programming at iBrain is substantially similar to the last-agreed upon program, and further that regardless, the programs were not similar as the iBrain program appeared "to be in a 6:1:1 class with different levels of related services" while "the pendency IEP [wa]s for a 12:1:4 class" (id. at p. 4). The IHO also found that contrary to the parent's assertion, footnote 65 found in Ventura de Paulino did not apply in this case as the district offered the student a pendency placement, the parent unilaterally placed the student at iBrain prior to filing her due process complaint notice, and the parent did not ask for a pendency placement according to the last agreed upon placement (id. at pp. 4-5). In conclusion, the IHO determined that iBrain was not the student's pendency program, and because he was unilaterally placed at iBrain and unavailable for any other pendency program in accordance with the last agreed upon IEP, she did not order the district to "provide any such program" (id. at p. 5).

IV. Appeal for State-Level Review

The parent appeals from the IHO's interim decision, asserting that the IHO erred in failing to find that the student's pendency placement for the 2020-21 school year is the educational program the student is receiving at iBrain. More specifically, the parent asserts that the IHO erred by failing to find that due to COVID-19 related district school closures for in-person services, the "last agreed-upon" placement is not available, and further argues that the assigned district public school site for the 2020-21 school year is also not available; therefore, the district has failed to offer or provide a program that would maintain the student's "educational status quo during the pendency of the due process proceeding." Next, the parent argues that the IHO erred in determining that the parent could only request injunctive relief from a court, and therefore improperly failed to determine that the student's pendency placement is at iBrain and award appropriate relief. The parent further asserts that the IHO erred in not finding that iBrain is the student's operative placement for purposes of pendency, and that the program and services at iBrain are also substantially similar to the last agree upon placement at ADAPT. The parent requests that this SRO vacate the IHO's interim decision and find that the student's pendency placement is at iBrain.

In its answer, the district responds to the parent's allegations set forth in the request for review with denials of the parent's material allegations, argues in favor of upholding the IHO's determinations and asserts among other things, that the undersigned is bound by the District Court's determination in Araujo because it found that the student was not entitled to a publicly funded

pendency placement at iBrain.[6] The district requests that the undersigned affirm the IHO's interim order and dismiss the parent's appeal with prejudice.

In a reply to the district's answer the parent asserts, among other things, 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.

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

[6] The district notes that there was no indication in the record below that the IHO was aware of the District Court's pendency determination in the federal action (Answer at n.2). I note that neither party, both of whom should have been aware of the Araujo decision at the time, informed the IHO of the District Court's determination in Araujo.

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 a Student with a Disability, Appeal No. 20-201; Application of a Student with a Disability, Appeal No. 20-178; Application of a Student with a Disability, Appeal No. 20-184; Application of a Student with a Disability, Appeal No. 20-194). 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 parent 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]]
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> (Araujo v. New York City Dep't of Educ., 2020 WL 5701828, at *4).

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 with a Disability, Appeal No. 20-178; Application of the Dep't of Educ., 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 cannot be collaterally attacked in an IDEA administrative due process proceeding. The parent's 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

[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.

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 parent's unilateral placement of the student at iBrain. The 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 defies logic.

To the extent that the parent cites to footnote 65 in Ventura de Paulino and argues that "a parent may exercise self-help and seek an injunction to modify the student's pendency placement," the parent 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 parent asserts 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 parent's unilateral placement of the student at iBrain.[9] 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:

> 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.
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> * * *
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> 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

[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).

[9] The parent attaches several exhibits to her request for review concerning availability of in-person services at both ADAPT and the assigned district public school site for the 2020-21 school year.

> applicability – that is, it applied equally to abled and disabled students. Such an order does not work a change in pendency.
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> * * *
>
> The two reasons discussed above are dispositive – and, indeed, require dismissal of the Plaintiff Students' pendency claims.
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> * * *
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> 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 parent's unilateral placement of the student at iBrain thereafter into the student's publicly funded pendency placement.

VII. Conclusion

Since the District Court's determination that the student was not entitled to stay put funding at iBrain, there are no new facts, such as a subsequent unappealed determination on the merits in favor of the parent granting reimbursement for a unilateral placement of the student at iBrain or a new agreement between the parties for stay-put purposes that would warrant funding at iBrain as a pendency placement. Based on the discussion above, there is no reason to disturb the IHO's determination that the student's January 2019 IEP was the basis of the pendency placement, and that the parent was not entitled to public funding of iBrain as the student's pendency placement, albeit I also reach the latter determination based upon information that the record does not show was provided to the IHO by counsel for the parties (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 APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 2, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER