The University of the State of New York

The State Education Department
State Review Officer
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No. 20-201

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. and Sung Eun Lim, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Sarah Pourhosseini, 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

On May 17, 2017, and May 30, 2018, the CSE convened and determined that the student was eligible for special education as a student with multiple disabilities, and recommended a 12-month school year program consisting of a 12:1+4 special class placement at ADAPT Community Network (ADAPT), a State-approved, nonpublic school (NPS), along with receipt of three 30-minute sessions per week each of individual occupational therapy (OT), physical therapy (PT), and speech-language therapy, as well as the provision of full time 1:1 nursing services, and special

transportation services including a nurse during transportation times on a lift bus (Parent Ex. D at pp. 8, 9, 11-12; Dist. Ex. 1 at pp. 18, 19, 21-22). The student continued to attend ADAPT during the 2018-19 school year (Dist. Exs. 2; 3; see Tr. pp. 12-13).

While not placed into evidence, according to the parent, a CSE convened on May 17, 2019 to develop the student's 2019-20 school year IEP (see Parent Ex. F at p. 3). According to the parent, the CSE recommended the same program and placement as it had the prior years, which the parent subsequently rejected (id.). On or around September 9, 2019, the parent unilaterally enrolled the student at the International Institute for the Brain (iBrain) where during the 2019-20 school year he was placed in an 8:1+1 class and received OT, PT, speech-language therapy, vision education, hearing education, and assistive technology services, as well as the services of a 1:1 nurse, a transportation nurse, and 1:1 paraprofessional (Parent Exs. B at pp. 1, 50-52; C; see Parent Ex. F at pp. 2, 4).

The parent asserted that the student continuously attended iBrain since that time, and commenced an impartial hearing challenging the May 2019 IEP, a different case than the instant proceeding (Parent Ex. 5 at pp. 3-4). The parent also stated that beginning on March 18, 2020 the student started receiving in-home services from iBrain staff that included the services of a 1:1 nurse, a 1:1 paraprofessional, and individual therapy sessions with his related service providers (Parent Ex. F at p. 5). The parent indicated that, as of May 4, 2020, the student "returned to school at iBRAIN, where he continues to receive all of the services set forth in his 2019-20 and 2020-21 iBRAIN IEP - - notably including a 1:1 nurse" (id.).[1]

The CSE convened on May 11, 2020 to develop the student's IEP for the 2020-21 school year (Parent Ex. E). The resultant IEP shows that the CSE changed the student's classification to that of a student with a traumatic brain injury, and recommended a 12-month program consisting of an 8:1+1 special class placement in a district specialized school, together with five 60-minute individual sessions per week each of OT, PT, speech-language therapy, full time 1:1 school nursing services and full time 1:1 health paraprofessional services, group parent counseling and training, as well as special education transportation that included, among other things, an accompanying 1:1 nurse (Parent Ex. E at pp. 1, 22-23, 26, 27).

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 extended school year (ESY) the district failed to offer the student a free appropriate public education (FAPE), and requesting that this proceeding be consolidated with the prior proceeding concerning the 2019-20 school year (Parent Ex. A at p.1).[2] The parent alleged that the district failed to implement the May 2020 IEP, and violated State

[1] Although public schools buildings were not permitted to open pursuant to an executive order of the Governor of the State of New York, it appears that iBrain reopened the school on May 4, 2020, but the circumstances of that reopening are not clear.

[2] In a July 24, 2020 interim decision regarding consolidation, IHO De Leon—who at that time was assigned to resolve the disputes pertaining to both the 2019-20 and 2020-21 school years—declined to consolidate the cases (see July 24, 2020 Interim IHO Decision).

regulations for the functional grouping of students in the specialized school, the parent challenged the related services in the May 2020 IEP as inadequate, and asserted that the district denied the student access to assistive technology services (id. at pp. 3-5). As relief, the parent sought tuition reimbursement for the unilateral placement of the student 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 parent requested that the IHO issue an interim order of pendency directing the district to directly fund the student's tuition, and costs for related services, and special transportation at iBrain 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 district's May 11, 2020 IEP (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 October 7, 2020, an impartial hearing was convened before IHO Glasser for the purpose of addressing the student's pendency placement and thereafter the parties filed briefing on the issue (Tr. pp. 1-27; Parent Ex. F; Dist. Ex. 5).[3] During the impartial hearing, the district raised the defense that the parent was barred by the Araujo decision from having iBrain ruled as the student's pendency placement, and the IHO noted her awareness of the Araujo decision (Tr. pp. 12, 13-14). The parties also both agreed the May 30, 2018 IEP was the basis of the student's pendency placement, which during the 2018-19 school year had been implemented at ADAPT (Tr. p. 15).[4]

In her brief on the issue of pendency, the parent asserted that the district must publicly fund the student's placement at iBrain as a result of the closure of public school buildings due to the COVID-19 pandemic (Parent Ex. F at p. 5). The parent also argued that the student's iBrain

[3] On September 20, 2020 IHO Glasser was appointed to hear the instant matter (compare IHO Decision at pp. 1-2, with July 24, 2020 Interim IHO Decision; see Tr. p. 5). On October 7, 2020, IHO Glasser acknowledged IHO De Leon's decision not to consolidate the 2019-20 and 2020-21 school year proceedings (Tr. pp. 1, 5). No testimony was taken during the hearing (Tr. pp. 1-27).

[4] IHO Glasser asked the district to ascertain whether ADAPT (also referred to during the impartial hearing as UCP), which had implemented the student's May 2018 IEP, had availability for the student at the time of the impartial hearing (Tr. pp. 15, 16, 21, 23). At the time of the IHO's pendency decision, that information was not available to the IHO (IHO Decision at p. 9).

program was "more similar" to the May 2018 IEP than the programming offered in the May 2020 IEP, and furthermore, iBrain constituted the student's "operative placement" for the purposes of pendency as it was the student's school at the time the parent filed her due process complaint notice (id. at pp. 4-5, 9, 11).[5] The parent further asserted that the district had an affirmative duty to demonstrate that its pendency placement remained available (id. at p. 10).

In its brief on the issue of pendency, the district asserted, among other things, that the doctrines of res judicata and collateral estoppel prevented the IHO from finding that iBrain was the student's pendency placement (Dist. Ex. 5 at pp. 4-7). The district, citing Ventura de Paulino, also argued, among other things, that stay-put funding of the student's placement at iBrain was not required because the student was unilaterally placed at iBrain, the district did not agree to fund the student's placement at iBrain, and there were no administrative or judicial rulings that iBrain was appropriate for the student (id. pp. 7-13).

In an interim decision dated November 3, 2020, IHO Glasser recounted the Second Circuit's findings in Ventura de Paulino, and subsequently determined that it was "undisputed that the [s]tudent's pendency program [was] contained in his last agreed upon IEP dated May 30, 2018, a 12:1+4 class at [an NPS] along with the [s]tudent's related services, which the [district was] obligated to fund and provide *infra*" (IHO Interim Decision at pp. 8-9). The IHO emphasized language from Ventura de Paulino, "[i]t is up to the school district, not the parent, to decide how to provide that educational program [until the IEP dispute is resolved], so long as the decision is made in good faith" and 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. at pp. 7-8). The IHO noted that with respect to the availability of programming from ADAPT "to date this IHO has not received a response from the [the district]" (id. at p. 9). The IHO ordered the district to provide or fund the student's pendency program and services, pursuant to the last agreed upon IEP dated May 30, 2018, in a 12:1+4 special class in a State-approved NPS, day program, with the recommended related services contained within that IEP (id. at pp. 9-10; see Dist. Ex. 1 at pp. 18, 21-22).

IV. Appeal for State-Level Review

The parent appeals from IHO Glasser's interim decision, asserting that she erred in failing to find that the student's pendency placement for the 2020-21 school year is the education program the student is receiving at iBrain. Specifically, the parent asserts that the IHO erred by failing to find that the "last agreed-upon" placement was not available.[6] The parent asserts that the district's

[5] According to the parent, in September 2019, the student "began attending iBRAIN, and has been enrolled continuously since that time" specifying that at iBrain the student attended an 8:1+1 class and received OT, PT, and speech-language therapy as well as vision education, hearing education, 1:1 nurse, transportation nurse, and 1:1 paraprofessional services (Parent Ex. F at pp. 4, 5; see Parent Ex. C).

[6] The parent attaches several exhibits to her request for review concerning availability of in-person instruction and services at both ADAPT as well as the assigned public school site identified by the district for the 2020-21 school year (see Attachments A-E). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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

unilateral change from an in-person to a hybrid learning model, which combined remote learning with in-person instruction, constituted a unilateral change in the student's placement and renders the last agreed upon placement unavailable to the student, as his IEP did not provide for remote learning. The parent also asserts that the IHO's finding that there was no evidence that the school-based services were unavailable or that the district was unable to provide the services set forth on the last agreed-upon IEP was incorrect. The parent further asserts that the IHO erred in not finding that iBrain was the student's operative placement for purposes of pendency, and that the program and services at iBrain were also substantially similar to the last agreed upon placement. Finally, the parent argues that the IHO erred in recusing herself after her pendency order was finalized. The parent requests that the undersigned vacate IHO Glasser's decision and find that the student's pendency placement is at iBrain.

In an answer, the district denies each and every allegation 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 parent's allegations with respect to the IHO's recusal have no merit, and requests that the undersigned dismiss the request for review "in full".

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. The parent also asserts 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.

Together with a letter dated January 6, 2021 to the Office of State Review, the parent's counsel submitted a pendency and mootness determination from IHO De Leon, who continued to preside over the 2019-20 due process proceeding and the parent requested that the undersigned take notice of his decision, and utilize the decision in this instant matter.[7] In a January 7, 2021 letter to the Office of State Review, the district argued numerous reasons as to why the undersigned should reject or otherwise disregard the parent's January 6, 2021 letter and additional evidence.

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

(see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). I find that the additional evidence submitted by the parent with the request for review was first, available at the time of the impartial hearing, and second, is not necessary for a decision. Accordingly, these documents will not be considered.

[7] IHO De Leon's December 2, 2020 pendency determination, contrary to Ventura de Paulino and Araujo, found that iBrain was the student's pendency placement for the 2019-20 school year, and on that basis dismissed the parent's claims as moot.

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 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 Dep't of Educ., Appeal No. 20-178; Application of a Child 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 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:

> 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),[8] 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 that the student is not entitled to stay-put funding for iBrain 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 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" regarding the student's pendency placement and should issue a determination in conflict with the district court's determination based upon the same core of facts is outlandish.

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

[8] 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.

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.[9]

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. 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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> 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.
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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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> 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].

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[9] 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).

> 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.

Lastly, as noted above, following the parent's reply, the parent sent a letter together with IHO De Leon's decision dated December 2, 2020 from the other administrative proceeding related to the 2019-20 school year, in which he determined that the student's pendency placement was iBrain and, thereafter, finding the district in default, and accordingly dismissing the parent's claims as moot. First, the practice regulations provide that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered by a State Review Officer, except a reply to any claims raised for review by the answer or answer with cross-appeal" for any type of responsive pleading other than a request for review, an answer, and a reply (8 NYCRR 279.6). In this case, the January 6, 2020 submission by the parent violates the practice regulations, which do not permit counsel for the parent to wait to submit IHO De Leon's determination that should have been submitted with the parent's request for review so that the district could respond in its answer, especially when IHO De Leon's determination predates the parent's request for review by almost two weeks. Furthermore, even if IHO's De Leon's decision had been properly presented, it is not persuasive insofar as he did not find that iBrain was an appropriate unilateral placement for the student, and his pendency findings are in direct conflict with the district court's prior determination in Araujo that the parent was not entitled to pendency funding for the student's placement at iBrain. It was no more permissible to collaterally attack the Araujo decision before IHO De Leon than it was in this case.[10] Furthermore, as IHO De Leon's decision did not reach a determination on the merits of the student's unilateral placement at iBrain and it does not indicate that the district agreed to fund the student's iBrain placement, the preclusive effect of IHO De Leon's order is dubious at best.

VII. Conclusion

Based on the discussion above, there is no reason to disturb IHO Glasser's conclusion that the programming contained in the student's May 2018 IEP was the basis of the pendency placement, or her reliance on Ventura de Paulino, and I conclude that there is no basis to deviate from or collaterally attack the district court's determination that the parent was not entitled to pendency funding of the student's unilateral placement at iBrain (Araujo, 2020 WL 5701828 *3-

[10] It is not clear from IHO De Leon's decision if the parties advised him of the district court's determination in Araujo or if, similar to IHO Glasser, he was already aware of it. The timeline for challenging IHO De Leon's determination that the case was moot and ordering reimbursement has not yet expired.

*4 [Sept. 24, 2020] reconsideration denied, 2020 WL 6392818 [Nov. 2, 2020]; see Ventura de Paulino, 959 F.3d at 526, 536).

The parent's remaining argument, that the IHO's recusal after issuing the 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 21, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER