The University of the State of New York

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

No. 18-119

Application of a STUDENT WITH A DISABILITY, by her 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, attorneys for petitioner, by Moshe Indig, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail Eckstein, 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 his daughter'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 2018-19 school year. The IHO determined that the student's pendency placement was the International Academy of Hope (iHope), the placement established pursuant to the unappealed decision of an IHO, dated April 30, 2018, and denied the parent's request for a determination that the International Institute for the Brain (iBrain) constituted the student's pendency placement. 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 hearing record reflects that the student attended iHope for the 2017-18 school year (Parent Ex. B). The parent's unilateral placement of the student at iHope for the 2017-18 school year was the subject of a prior administrative hearing (see Parent Ex. B). At the conclusion of the

prior impartial hearing, an IHO issued a decision, dated April 30, 2018, finding that the district denied the student a FAPE for the 2017-18 school year, that iHope was an appropriate unilateral placement for the student, and that equitable consideration weighed in favor of an award of the costs of the student's tuition at iHope, including related services and transportation (id. at pp. 9, 11-13).

According to the parent,[1] a district CSE convened on June 14, 2018 to develop an IEP for the student for the 2018-19 school year, and recommended a "12:1+(3:1)" special class in a district school (Parent Ex. A at p. 2). The student began attending iBrain on July 9, 2018 (Tr. p. 117).

A. Due Process Complaint Notice

In a due process complaint notice dated July 9, 2018, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (Parent Ex. A). As relevant here, the parent asserted the student's right to a pendency placement pursuant to an unappealed decision of an IHO (id. at pp. 1-2; see Parent Ex. B). The parent requested that pendency be determined to consist of prospective payment for the full cost of the student's tuition at iBrain (including academics, therapies, and a 1:1 paraprofessional during the school day), as well as special transportation (including a limited travel time of 60 minutes, a wheelchair accessible vehicle, air conditioning, a flexible pick-up and drop-off schedule, and a paraprofessional) (Parent Ex. A at p. 2).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on September 6, 2018 and concluded the pendency portion of the hearing that day (Tr. pp. 1-152). At the hearing, the parent asserted that pendency lay in the unappealed April 2018 IHO decision, which found that the parent's unilateral placement of the student at iHope for the 2017-18 school year was appropriate and awarded direct funding and/or reimbursement for the costs of the student's attendance (Tr. pp. 48-49; Parent Ex. B at pp. 5-7, 11-13).[2] Further, the parent asserted that the student was attending iBrain pursuant to a unilateral placement by the parent, which constituted a valid placement for purposes of pendency because it was substantially similar to iHope (Tr. pp. 49, 52-54; IHO Ex. II at pp. 7-8). The district did not consent to a change in the location of pendency and opposed the request for pendency at iBrain, contending that the parent did not have "unlimited authority" to unilaterally move the student from one nonpublic school placement to another nonpublic school preferred by the parent and assert a right to pendency (Tr. pp. 50-51, 54-55; IHO Ex. I at pp. 5-7). The district further contended that there was no evidence that iHope was no longer an available placement for the student such that it was necessary to find a substantially similar placement for purposes of pendency (Tr. p. 55; see Tr. pp. 59-60; IHO Ex. I at pp. 5, 7, 12). The district also asserted, in the alternative, that the parent could not show that iBrain was substantially similar to iHope because there were differences between the two programs, including iBrain's staffing and offered programs

[1] Due to the status of this matter as an interim appeal disputing a pendency determination, at the time of the parent's request for review, there had been very little evidence entered into the hearing record with respect to the student's educational history (see generally Tr. pp. 1-152; Parent Exs. A-B; Dist. Exs. 1-2; 4).

[2] The district conceded that the April 2018 IHO decision established the student's placement for purposes of pendency (IHO Ex. I at p. 12).

(Tr. p. 75; IHO Ex. I at pp. 8-12). Lastly, the parent asserted that, in the event the IHO found that the parent did not have to right to change the student's school pursuant to pendency or that the programs offered by the two schools were not substantially similar, the district should be required to fund the cost of the services provided at iBrain that were similar to those provided by iHope as "portions of a pendency that are not in dispute" (Tr. pp. 76-77; see IHO Ex. II at p. 8 n. 9).

By interim decision dated October 4, 2018, the IHO found that the basis for pendency lay in the unappealed April 2018 IHO decision (IHO Decision at p. 3). The IHO further found that, although a change in location does not necessarily constitute a change of placement, parents are not free to unilaterally transfer their child form one school to another, and that there had been no showing that iHope was unable to implement the student's pendency placement, such that iHope was the student's pendency placement (id. at p. 5).

IV. Appeal for State-Level Review

The parent appeals from the IHO's interim decision, asserting that the district is obligated to fund the cost of the student's attendance at iBrain pursuant to pendency. The parent asserts that the IHO erred in finding that the parent was not allowed to transfer the student from one nonpublic school to another for the purposes of pendency, even if the two placements are substantially similar. The parent also asserts that iHope and iBrain are substantially similar, and that the IHO erred in failing to address this question. Relatedly, the parent asserts that, because the issue of whether iHope and iBrain are substantially similar has been contested in multiple impartial hearings involving other students and resolved in the favor of parents in several of those matters, it would be inefficient to continue relitigating the same issue and therefore the district should be precluded from contesting the substantial similarity between iHope and iBrain in this matter. Finally, the parent asserts that the IHO should recuse himself or "be recused" from this matter because his conduct of the impartial hearing demonstrated that he cannot be fair and impartial.[3]

In an answer, the district denies the parent's allegations and argues that the IHO's decision should be upheld in its entirety. The district also argues that to the extent an SRO reaches the question of whether the student's programs at iHope and iBrain are substantially similar, the matter should be remanded to the IHO to make the determination in the first instance. The district asserts that the parent's collateral estoppel argument is without merit because preclusion from litigating a legal or factual issue already decided requires that the issue that was already decided must be identical, and here the details of each student's pendency placement are unique. Lastly, the district asserts that there is no basis for recusal of the IHO because the hearing record does not contain any indication that the IHO was not impartial or reveal any conduct creating an appearance of impropriety or prejudice.

In a reply, the parent responds to the assertions made in the district's answer, largely by rearguing the claims set forth in the request for review, which is beyond the permissible scope of a reply as permitted by State regulation, and accordingly the reply has not been considered (see 8

[3] The affidavit of service attached to the request for review indicates that service was effectuated on October 18, 2018; however, the request for review was stamped received by the district on October 17, 2018.

NYCRR 279.6[a]). Furthermore, the parent did not verify his reply as required by State regulation (8 NYCRR 279.7[b]).

V. Applicable Standards

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has

stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. 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 v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

VI. Discussion

A. IHO Bias and Request for Recusal

Turning to the parent's request for the IHO's recusal, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

The parent asserts that the IHO exhibited bias in several ways. First, the parent asserts that the IHO asked "accusatory" and irrelevant questions concerning the law office of counsel for the parent, its staff, and its corporate structure, and also "seemingly questioned counsel's integrity" when he was unable to answer those questions with complete confidence. There is conversation about these matters between the IHO and parent's counsel in the hearing record, and some of the information gleaned by the IHO is mentioned in the IHO's interim decision as follows, "[t]he backdrop to this controversy is that [the parent] was formerly the Chairman of the Board of [iHope] and as of recent has established [iBrain] on parallel concepts and services and is currently Chairman of the Board at [iBrain]" (IHO Decision at p. 3; see Tr. pp. 38-44). The parent asserts that the IHO therefore stated that the issue of pendency "revolved around the parent's current position at iBrain." Review of the hearing record and the IHO's decision does not support the parent's argument. The IHO used the word "backdrop" in reference to the parent's position at iBrain, and after a thorough review of the colloquy in question, it is apparent that the IHO's questioning was aimed at determining if there was a conflict of interest present between the Brain Injury Rights Group representing the parent and the student at the impartial hearing, and whether

that organization was affiliated with iBrain (see Tr. pp. 24-25, 41-42). This is a reasonable inquiry, not an indication of bias.

Next, the parent asserts that the IHO "made it very clear that he would allow unverified and unproven allegations from a federal complaint . . . affect his decision as to [the student's] right to pendency at iBrain" (see Tr. pp. 20-28). However, the IHO refused to accept the district's proffered evidence—the federal complaint—and it is apparent that this colloquy also concerned a potential conflict of interest present between the Brain Injury Rights Group representing the parent and the student at the impartial hearing and iBrain (id.). Lastly, regarding the parent's claim that the IHO's bias is evidenced in that he "refused to hear additional background information regarding iHope and iBrain" from parent's counsel that would have painted the parent in a more positive light, I find that this does not constitute evidence of bias because the IHO intended to limit the subject of the hearing to the student's pendency placement, and in any event the IHO never made a finding that there was any conflict of interest with respect to the parent's representation at the hearing (see Tr. 66-69).[4]

B. Collateral Estoppel

The parent contends that the district should be precluded from contesting the substantial similarity of iBrain to iHope because it has done so in numerous matters wherein the pendency of a student attending iBrain has been at issue and has not appealed rulings in favor of parents in several of those matters. The parent submits as Request for Review Exhibit BB a "sample of favorable decisions" to show that this issue has been contested in other pendency hearings between the district and other iBrain students and has been adjudicated in favor of the parents in those cases.[5] Initially, because the parent did not raise the issue of preclusion at the impartial hearing, they are barred from asserting it for the first time on appeal (Austin v. Fischer, 453 Fed. App'x 80, 82-83 [2d Cir. Dec. 23, 2011]; see R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "require[es] parties to raise all issues at the lowest administrative level" and that "a party's failure to raise an argument during administrative proceedings generally results in a waiver of that argument"]). Furthermore, it is unclear whether the parent is asserting that preclusion applies on the basis of res judicata (claim preclusion) or the related doctrine of collateral estoppel (issue preclusion).[6] However, even assuming this contention was not waived, and regardless of the theory on which the parent relies,

[4] The parent points to additional evidence in support of his allegations of bias based on determinations made by the IHO during a telephonic prehearing conference conducted on October 10, 2018 (see Req. for Rev. Ex. AA at pp. 1-2). However, that prehearing conference was conducted after issuance of the interim decision at issue on appeal in this matter and apparently concerned matters not related to the student's pendency placement, and is therefore not relevant to any determinations required herein (id.).

[5] While the request for review references this as Exhibit AA, the copy received by the Office of State Review was labeled Exhibit BB.

[6] The parent specifically argues that under the doctrine of defense preclusion, the "Second Circuit has held that a party may be collaterally estopped from raising a defense concerning an issue where" the elements of res judicata are met and efficiency concerns outweigh any prejudice to the defendant (see Marcel Fashion Group, Inc. v. Lucky Brand Dungarees, Inc., 898 F.3d 232, 241 [2d Cir. 2018] [explaining the elements of defense preclusion]; see also Grenon, 2006 WL 3751450, at *6).

he has not established that the district should be precluded from continuing to litigate the issue of whether the student's program at iHope was substantially similar to his program at iBrain.

The doctrine of res judicata "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B. v. Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *4 [S.D.N.Y. Jan. 13, 2012]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19, 2006]). Res judicata applies when: "(1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding" (K.B., 2012 WL 234392, at *4; see Grenon, 2006 WL 3751450, at *6). Claims that could have been raised are described as "issues that emerge from the same 'nucleus of operative fact' as any claim actually asserted in" the prior proceeding (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013], quoting Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86, 90 [2d Cir. 1997]). The doctrine of collateral estoppel "precludes parties from litigating a legal or factual issue already decided in an earlier proceeding" (Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]). To establish that a claim is collaterally estopped, a party must show that:

> (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits

(Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Boguslavsky v. Kaplan, 159 F.3d 715, 720 [2d Cir. 1998]).

Initially, both doctrines require a final ruling on the merits in a prior proceeding. In support of their claim, the parents submit as additional evidence three interim decisions on pendency issued by IHOs in proceedings involving other students. Each decision reflects that the parents in those matters filed a due process complaint notice on or around the same date as the due process complaint notice was filed in this matter (Req. for Rev. Ex. BB at pp. 1, 10, 14). Only one of the decisions on pendency is dated and it was issued on October 3, 2018, almost one month after the decision on pendency was issued in this matter (id. at pp. 3, 10, 14).[7] Because a party may seek review from an interim determination on pendency in an appeal from the IHO's final determination (8 NYCRR 279.10[d]), and the parent has not provided any indication that any of the matters for which pendency decisions have been submitted has reached a final decision, the record before me contains no basis to determine that the pendency decisions have become final.

Further, the parent's argument is without merit because, as the district points out, the pendency placement of each individual student will not be an "identical issue" to that of another student. In particular, the parent fails to establish the first element of collateral estoppel, that the identical issue was raised in a previous proceeding, and the third element of res judicata, that the

[7] In addition, although one of the undated decisions indicates that it was issued prior to August 10, 2018 (Req. for Rev. Ex. BB at p. 13 n.1), there is no suggestion in the hearing record that this decision was provided to the IHO in this matter as a basis to preclude the district from arguing that the programs were not substantially similar.

claim could have been raised in the prior proceeding because it arose from the same nucleus of operative fact. With respect to both elements, the program developed for each student is factually distinct as one of the purpose of the IDEA is to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]). Among other unique facts, each student's pendency placement will stem from individual circumstances, such as a different IHO decision establishing a distinct pendency placement. For example, the parent submits as additional evidence IHO decisions on pendency relating to proceedings involving other students which do not establish the same educational placement for purposes of pendency. The IHO decisions provided by the parent as Request for Review Exhibit BB do not establish that the identical issue has been resolved in any of the other matters or that those matters arose from the same nucleus of operative fact; rather, they tend to establish that the students at issue did not have identical programs. One student's program at iBrain included instruction in a 6:1+1 special class, occupational therapy (OT) four times per week, physical therapy (PT) five times per week, speech-language therapy five times per week, and parent counseling and training once per month; in addition, while the student had received vision therapy three times per week at iHope, he was "not yet" receiving vision therapy at iBrain (Req. for Rev. Ex. BB at p. 2). The second student's program—as described by the submitted interim decision on pendency—was less clear, indicating that iBrain included both 8:1+1 and 6:1+1 special classes but not identifying the ratio of the student's classroom placement, and reflecting that the student's program consisted of OT three hours per week, PT five hours per week, speech-language therapy five hours per week, vision therapy three hours per week, and parent counseling and training one hour per month, as well as the services of a paraprofessional (id. at pp. 8-10). However, the IHO's decision in that matter contains no specific information regarding the student's program at iHope (id.). The third decision contains no details regarding the student's placement at either iHope or iBrain (id. at p. 14). In this proceeding, the student's program at iBrain includes, among other things, a 6:1+1 class, a full-time 1:1 paraprofessional, individual OT three hours per week, individual PT five hours per week, and individual speech-language therapy five hours per week; additionally, the student was scheduled to receive vision therapy three hours per week at iBrain (Tr. pp. 15, 87-88, 91-95, 100-01, 137-38). Accordingly, the additional evidence submitted by the parent reflects that the program provided to students at iBrain consists of varying amounts of services and precludes a determination that the programs provided by iHope and iBrain are substantially similar as a matter of law.[8]

[8] To the extent the parent asserts that it "would be inefficient to relitigate this same issue over and over," there is no basis to conclude that the IHO decisions favoring his position should have preclusive effect, rather than IHO decisions on the same issue in favor of the district's position. The parent is reminded that, to the extent he finds it inefficient to bring this issue through the impartial hearing process, the IDEA's exhaustion requirement does not apply to pendency claims (Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199-200 [2d Cir. 2002]; see E. Lyme, 790 F.3d at 455 [noting that "[a]pplying the exhaustion requirement to stay-put claims would create a loop of marathon proceedings, since each new round of administrative proceedings would itself be subject to a fresh round of judicial review"]).

C. Pendency

Turning to the crux of the parent's appeal, the parties agree that the student's educational placement for purposes of pendency is based on the unappealed April 2018 IHO decision (see Parent Ex. B). As noted above, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]). However, the circumstances in the present case are such that, since the IHO decision from the prior proceeding, the parent has transferred the student from one nonpublic school setting that was unquestioningly a valid stay-put placement (iHope) to another nonpublic school setting (iBrain), and the parties sharply dispute whether parents are permitted to transition their child in this manner and still receive public funding under the protections of the stay put rule.

It appears that this particular nuance of stay put (the transfer of the student from one parentally-selected nonpublic school to another) has not been passed upon by a court. In examining this circumstance, which Congress assuredly did not contemplate, it is necessary to look to the primary purpose of the stay-put provision of the IDEA; to wit, to maintain the status quo (Zvi D., 694 F.2d at 906) and prevent unilateral action by the district to exclude disabled students from their educational programs during the pendency of proceedings under the IDEA (Honig, 484 U.S. at 323; Evans, 921 F. Supp. at 1187). Under these circumstances raised in this case, the unilateral action of the district that the stay-put provision would prevent would be the district's action of refusing to fund the student's attendance at a nonpublic school.

It is well settled that the pendency provision does not dictate that a student must remain in a particular site or location, or receive services from a particular provider; rather, "it guarantees only the same general level and type of services that the disabled child was receiving" (T.M., 752 F.3d at 171, citing Concerned Parents, 629 F.2d at 756; see G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *6 [S.D.N.Y. Jan. 31, 2012]; Child's Status During Proceedings, 71 Fed. Reg. 46,709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]).[9] If "then-current educational placement" means only the general type of educational program in which a student is placed, then it would appear that parents may effect alterations to a student's private programing without jeopardizing the district's obligation to fund the placement as stay put, so long as the alterations do not amount to a change in educational placement.

One arguable impediment to parents' ability to effectuate such alterations would be a district's general discretion to administratively implement students' stay-put placements, including by determining the location at which such placements are provided. Generally, the Second Circuit has held that the selection of a public school site for providing special education and related services is an administrative decision within the discretion of a district (R.E. v. New York City

[9] This echoes similar sentiments expressed by other circuit courts (see D.M. v New Jersey Dept. of Educ., 801 F3d 205, 216-17 [3d Cir. 2015] [collecting cases indicating "that, at least in some situations, a child's 'educational placement' does not include the specific school the child attend"]; White v. Ascension Par. Sch. Bd., 343 F.3d 373, 380 [5th Cir. 2003] [endorsing the view "that 'placement' does not mean a particular school, but means a setting (such as regular classes, special education classes, special schools, home instruction, or hospital or institution-based instruction)"]).

Dep't of Educ., 694 F.3d 167 191-92 [2d Cir. 2012]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). Similarly, in assessing whether a parent's selection of private service providers was reimbursable as part of the student's educational program under pendency, the Second Circuit noted that "[i]t is up to the school district to decide how to provide that educational program, at least as long as the decision is made in good faith" (T.M., 752 F.3d at 171).

However, the district's discretion to select a location at which to implement a student's pendency placement can, under certain circumstances, be forfeited (see Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook Cty., Ill. v. Illinois State Bd. of Educ., 103 F.3d 548, 549-50 [7th Cir. 1996] [in the case of a student expelled, examining "the power of the court and the parents, rather than the power of the school district, to effect [the student's] placement" when the district forfeited that power by not producing any placement alternatives];[10] Laster v. Dist. of Columbia, 439 F. Supp. 2d 93, 101-02 & n.10 [D.D.C. 2006] [noting that, "because the defendants failed to comply with IDEA provisions by not finding a substantially similar placement facility when the children's current facility became unavailable, the parents were entitled to act unilaterally"]). It would appear that one way in which the district might forfeit its discretion to select a location for the student's stay-put placement may arise as a result of the district's failure to provide the student a FAPE, resulting in "an administrative ruling validating the parents' decision to move their child from an IEP-specified public school to a private school [which], in essence, make[s] the child's enrollment at the private school her 'then-current educational placement' for purposes of the stay-put rule. Having been endorsed by the State, the move to private school is no longer the parents' unilateral action, and the child is entitled to 'stay put' at the private school for the duration of the dispute resolution proceedings" (M.R. v. Ridley Sch. Dist., 744 F.3d 112, 119 [3d Cir. 2014]; see Schutz, 290 F.3d at 484 [2d Cir. 2002]; see also Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 201 [2d Cir. 2002]). Where a school district has been paying for private school tuition pursuant to pendency as the student's current educational placement, "it must continue to do so until the moment when the child's educational placement changes" (E. Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 599 [S.D.N.Y. 2011], aff'd sub nom., R.E., 694 F.3d 167; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *6 [S.D.N.Y. Mar. 17, 2010]).

An additional query that may arise in instances where the parent moves a student from one nonpublic school to another is the underlying reasons for such a move and whether the original nonpublic school must be shown to be incapable of implementing the student's pendency placement. However, given the notion that a pendency placement does not mean a student must remain in a particular location, it would not appear that, in most circumstances, the reasons for a change in location would be accorded much weight in an examination of whether or not the new location constituted the student's then-current educational placement. In cases involving location changes precipitated by districts, the reasons for the transfers have not been deemed to effect a

[10] Cook County arose in the disciplinary context, which is governed by a different set of rules under the IDEA (compare 34 CFR 300.518, with 34 CFR 300.533). Nevertheless, the Court's observations are instructive to the present context.

change in placement so long as those reasons were broader (i.e., external factors, such as those based on policy or fiscal considerations) and did not relate to the particular student (i.e., a student's expulsion due to his or her behaviors) (see D.M. v New Jersey Dept. of Educ., 801 F.3d 205, 217 [3d Cir. 2015]; Hale v. Poplar Bluffs R-I Sch. Dist., 280 F.3d 831, 834 [8th Cir. 2002]; Cook Cty., 103 F.3d at 548-49 [7th Cir 1996]). Ultimately, while the reasons for a parent's decision to transfer a student from one nonpublic school to another may be relevant to the discussion, it is unlikely to be determinative except in an instance where the student's needs influenced the transfer, in which case the new nonpublic school would probably not meet the substantial similarity standard discussed below (i.e., if the student's needs changed and, as a result, the parent sought a nonpublic school with different or additional services, the student's educational placement would have changed).

Whether a student's educational placement has been maintained under the meaning of the pendency provision depends on whether the educational program is "substantially and materially the same" as the student's educational program for the prior school year (Letter to Fisher, 21 IDELR 992 [OSEP 1994]; see Application of a Student with a Disability, Appeal No. 16-020).[11] The United States Department of Education's Office of Special Education Programs identified a number of factors that must be considered in determining whether a move from one location to another constitutes a change in educational placement, including: whether the educational program in the student's IEP has been revised; whether the student will be educated with nondisabled peers to the same extent; whether the student will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement is the same option on the continuum of alternative placements (Letter to Fisher, 21 IDELR 992 [OSEP 1994]). Student-to-staff ratio is also a relevant factor in determining whether a student's program has changed (M.K. v. Roselle Bd. of Educ., 2006 WL 3193915, at *14-*15 [D.N.J. Oct. 31, 2006]; Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 60-61 [D.N.H. 1999]; Application of a Child with a Disability, Appeal No. 05-028). State regulations define a change in program as "a change in any one of the components" of an IEP, which include the size of the special class in which a student is recommended to receive services (8 NYCRR 200.1[g]; 200.4[d][2][a], [b][2]). While these factors, in many instances, are specific to district programs, they are instructive in this current circumstance.

Turning to the application of these principals to the present matter, the IHO based his denial of the parent's request for pendency at iBrain entirely on his finding that parents were not free to unilaterally transfer their child from one school to another under pendency, and that there had been "no showing of any inability of [iHope] to execute the unappealed prior Order" (IHO Decision at p. 5). Having found that the IHO erred in his analysis as set forth above, I turn to the question of whether iBrain provides a substantially similar program to the program provided by iHope during the 2017-18 school year which constitutes the student's placement under pendency, such that the

[11] In order to qualify as a change in educational placement, one district court held that the change "must affect the child's learning experience in some significant way" (Brookline Sch. Comm. v. Golden, 628 F. Supp. 113, 116 [D. Mass. 1986], citing Concerned Parents, 629 F.2d, at 751; see N.M. v. Cent. Bucks Sch. Dist., 992 F. Supp. 2d 452, 464 [E.D. Pa. 2014]). Similarly, the District of Columbia Circuit has described it as "a fundamental change in, or elimination of a basic element of the education program" (Lunceford v. D.C. Bd. of Educ., 745 F.2d 1577, 1582 [D.C. Cir. 1984]).

parent's unilateral placement of the student at iBrain for the 2018-19 school year does not constitute a "change in placement" for the purposes of pendency.[12]

Although the district asserts that the matter should be remanded to the IHO to allow the IHO to reach a determination in the first instance on the question of substantial similarity, this matter has been proceeding for over four months and it is in keeping with the purpose of the purpose of the stay put provision—to provide disabled students the equivalent of an automatic preliminary injunction upon the filing of a due process complaint notice (see Zvi D., 694 F.2d at 906)—to resolve the pendency dispute as quickly as possible (see Murphy, 297 F.3d at 199-200 [noting "the time-sensitive nature of the IDEA's stay-put provision"]; "Questions Relating to Impartial Hearing Procedures Pursuant to Sections 200.1, 200.5 and 200.16 of the Regulations of the Commissioner, as Amended Effective February 1, 2014," at p. 7, Office of Special Educ. [Rev. Sept. 2016] [noting that if there is a dispute regarding a student's pendency placement, it is incumbent upon the IHO "to render a written decision regarding pendency as soon as possible and prior to determining any other issue"] [emphasis added], available at http://www.p12.nysed.gov/specialed/dueprocess/documents/qa-procedures-sep-2016.pdf). Further, there is sufficient evidence in the hearing record to determine the specific academic and related services provided by both programs to reach a finding with respect to substantial similarity.

Beginning with the program provided by iHope during the 2017-18 school year, the unappealed April 2018 IHO decision set forth the components of the student's program as follows:

> iHope created an IEP for the student which recommended a 6:1:1 program with related services to include: physical therapy, individually, five times per week for 60 minutes, push-in or pull-out depending on the activity; occupational therapy, individually, three times per week, 60 minutes, push-in or pull-out, based on the activities; vision education services, individually, two times a week, 60 minutes per session, push-in and pull-out; speech language therapy individually, five times a week, for 60 minutes, push-in/pull out, depending on the school activity; assistive technology individually, two times per week for 60 minutes, push-in/pull-out based on activity . . . iHope also provides parent's counseling and training, once per month for 60 minutes.

(Parent Ex. B at pp. 6-7).

[12] In a footnote in the memorandum of law, the parent contends that, even if the two programs are not substantially similar for the purposes of pendency, the parent is entitled to an order of pendency for any services that overlap between iHope and iBrain. As this argument is raised only in a footnote, it must be considered waived at this stage of the proceedings (see, e.g., United States v. Quinones, 317 F.3d 86, 90 [2d Cir. 2003] [holding that raising an argument only in a footnote is insufficient to preserve an issue for review on appeal], citing United States v. Restrepo, 986 F.2d 1462, 1463 [2d Cir. 1993]; see also R.R. v. Scarsdale Union Free Sch. Dist., 366 Fed. App'x 239, 241-42 [2d Cir. Feb. 18, 2010]; 8 NYCRR 279.8[c]). Further, it has long been held that a memorandum of law is not a substitute for a request for review, which is expected to set forth the petitioner's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (8 NYCRR 279.8[c][3]; [d]; see, e.g., Application of a Student with a Disability, Appeal No. 15-070).

The April 2018 IHO decision also noted that iHope provided the student with a 1:1 paraprofessional, a 1:1 nurse, individualized 1:1 direct instruction, a certified special education teacher, and a 12-month program with an extended school day (Parent Ex. B at pp. 5-6, 11). The IHO directed the district to fund the student's placement at iHope, including special transportation services consisting of a 1:1 paraprofessional, limited travel time, a wheelchair ramp, and air conditioning (id. at pp. 5, 12-13).

The director of special education at iBrain (director), who had previously been employed by iHope, testified to her general knowledge of the program provided by iHope and her familiarity with the student's iHope IEP for the 2017-18 school year (Tr. pp. 81-82, 84-85, 100-01, 105-110, 136). The director explained that iBrain opened on July 9 and described iBrain as an interdisciplinary program for students ranging from age 6 to 19 "with brain-based disabilities or traumatic brain injury," who were "primarily nonverbal and nonambulatory" (Tr. pp. 86-88). She further explained that students attending iBrain "require extensive assistance in all areas including feeding, toileting, dressing, interacting at all with their educational environment" (Tr. p. 88). The director noted that iBrain offered "four 6:1:1 classes and two 8:1:1 classes at present," along with "a wide range of therapy services," including OT, PT, speech-language therapy, services for the deaf and hard of hearing, and parent counseling and training, which were delivered in a " push-in and pullout interdisciplinary model" (Tr. pp. 87, 100). She noted that iBrain would be "offering vision services" (Tr. p. 87). Further, according to the director, "[s]ome of [the iBrain] students [we]re very medically fragile and ha[d] one-to-one nurses to attend to their needs" and "all of [the iBrain] students ha[d] one-to one-paraprofessionals in order to . . . ensure that they remain[ed] engaged and progressing throughout their therapies and educational environment" (Tr. p. 88). The director also testified that all of the teachers at iBrain were certified, most of them by the State (Tr. p. 89).

The director also described the components of the program provided to the student at iBrain. She indicated that the student was a "12-month student" who began attending iBrain on July 9, 2018 (Tr. p. 117). Based on the director's "understanding," the student moved from iHope to iBrain because "administrative changes had occurred, whereby iHope "became affiliated with a larger organization," and there were concomitant "changes going on [with] student enrollment at iHope" and "concerns that there would be programming changes" (Tr. pp. 127-28). The director specified that, at iBrain, the student received individual PT five days per week for 60 minutes, individual OT four days (or three days) per week for 60 minutes, speech-language therapy five days per week for 60 minutes, assistive technology two days per week for sixty minutes, parent counseling and training one time per month for sixty minutes, and was scheduled to receive vision therapy three times per week for 60 minutes (Tr. pp. 92-93, 94-95).

When asked to compare the pendency program at iHope with the current program at iBrain, the iBrain director characterized that the programs were "as close as possible" to each other, "essentially identical," and "very nearly identical" (Tr. pp. 100-01). She testified that the student attended a 6:1+1 class at iBrain, as she did at iHope, and received "the same therapies" (id.). The director further explained that the student attended class with "some of the same . . . peers" and was assigned a paraprofessional that she worked with at iHope (Tr. p. 101). According to the director, the student's program at iBrain was modeled on the program developed for the student at iHope as memorialized in an IEP document, such as "the vision recommendation . . . and a lot of

instructional recommendation" (id.).[13] The director indicated that, rather than "reinvent the wheel," the staff at iBrain "ha[d] been doing everything [they] c[ould] to replicate [the student's iHope program] because she ha[d] clearly made significant progress there" (id.).

As set forth above, there are a number of similarities between the program provided at iHope and the program provided at iBrain. However, the hearing record reflects that some of the services provided at iHope have not been provided at iBrain. First, it is unclear from the hearing record if the student receives 1:1 nursing services at iBrain because the testimony only establishes that "some" of the students receive 1:1 nursing; nowhere is it established that the student is among that number (see Tr. pp. 87-88). Second, and more importantly, the hearing record establishes that vision therapy, which the student received at iHope, had not been implemented at iBrain at the time of the pendency hearing (see Tr. pp. 87, 91, 100, 116-117).[14] Accordingly, the student lacked vision therapy from the time she entered iBrain on July 9, 2018 until at least the date of the September 6, 2018 pendency hearing (Tr. pp. 1, 117).[15]

It may be that an omission of one related service may not result in a finding that a change of placement has occurred in some instances, but, under the facts of this matter, that is not the case for this student with respect to vision therapy. iBrain's director testified with personal knowledge as to the student's need for vision therapy and its importance to her program. The student has received a diagnosis of a cortical visual impairment, and vision services are incorporated into her overall program (Tr. p. 96). The special education director described cortical visual impairment as a vision problem that is not caused by a deficit in physical eye structure or functioning, but rather stems from the way the brain receives and processes information from the optical nerve (Tr. p. 97). The director stated that vision therapy is designed to help adjust and repair the failure to properly process information from the optical nerve through a "very systematic use of appropriate materials" and that each student had a unique therapy profile based on their specific impairment (id.). Further she testified that knowing the details of the student's specific impairment and how to help the student "process so she can accurately see things as best as she can throughout the school day is really important" and helps with academics (Tr. pp. 98-99). She testified that the

[13] According to the hearing record, the IEP to which the director referred was developed by iHope and not by a CSE convened by the district (see Tr. pp. 136-37). The hearing record in this matter did not include an IEP document for the student developed by iHope.

[14] In addition, although the iBrain director did not testify regarding the student's transportation to iBrain, as limited travel time was alleged to be a part of the student's educational placement at iHope, some courts have found that a change in the location of a school may impact the district's ability to provide limited travel time and may be considered as a factor in determining whether a change in location amounts to a change in educational placement (see DeLeon v. Susquehanna Cmty. Sch. Dist., 747 F.2d 149, 154 [3d Cir. 1984] [holding that although minor changes to method or schedule of transportation did not result in a change in educational placement, the Court acknowledged that under some circumstances, changes in transportation may have a significant enough effect on a student's learning experience to be considered a change in educational placement]; M.K. v. Roselle Park Bd. of Educ., 2006 WL 3193915, at *14-*15 [D.N.J. Oct. 31, 2006] [finding that the difference in travel time made two programs "significantly dissimilar" from each other]).

[15] According to the director, iBrain was "in the process of hiring vision teachers" at the time of the impartial hearing (Tr. p. 117). In a footnote in his memorandum of law, the parent asserts that, "[u]pon information and belief, [iBrain] currently offers vision education services." However, the parent provided no evidence in support of this statement, nor did he specify whether the student was receiving such services, or when the services began.

student's academic material, and how it was presented, was designed according to her visual preferences (Tr. p. 99). Although the special education director testified that the vision goals and recommendations were being implemented into academic work in the classroom at iBrain by a teacher who was not a certified vison teacher, she stated that a vision therapist would work with the student one-on-one specifically on her vision needs (Tr. pp. 117, 137-38). Accordingly, the evidence in the hearing record shows that vision therapy is an important component of the student's pendency program, and, accordingly, a program without that service is not substantially similar to one that provides vision therapy.

VII. Conclusion

In light of the above, the hearing record does not establish that, based on the evidence in the hearing record, the program implemented at iBrain—at the time of the impartial hearing—was substantially similar to the pendency program provided at iHope during the 2017-18 school year as set forth in the unappealed April 2018 IHO decision. Given the representations of the parent in his memorandum of law in this appeal that the student may have begun to receive vision services at some point since the pendency hearing (Parent Mem. of Law at p. 7 n.4), as the impartial hearing proceeds, the IHO should permit the parent to present evidence regarding the date on which vision services became available and, if the evidence supports it, find that the programs are substantially similar and enter an order directing the student to fund the student's stay-put placement at iBrain from the date that the programs became substantially similar. However, the evidence in the hearing record supports a finding that, at the time of the pendency hearing, the parent's unilateral placement of the student at iBrain constituted a "change in placement" for the purposes of pendency and, as such, there is no basis to reverse the IHO's denial of the parent's request that the district fund the student's attendance at iBrain.

I have considered the parties' remaining contentions and need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 21, 2018

SARAH L. HARRINGTON
STATE REVIEW OFFICER