The University of the State of New York

The State Education Department
State Review Officer
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No. 18-123

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

Appearances:
Brain Injury Rights Group, attorneys for petitioners, by Moshe Indig, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Mary H. Park, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining their 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 May 3, 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 sustained in part.

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 (see Parent Ex. B at pp. 5-6, 14-15). The parents' 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 May 3, 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 considerations weighed in favor of an award of the costs of the student's tuition at iHope, including related services and paraprofessional costs (id. at pp. 12-17).

According to the parents,[1] a district CSE convened on May 10, 2018 to develop an IEP for the student for the 2018-19 school year, and recommended an 8:1+1 special class in a district school (Parent Ex. A at p. 2). The student began attending iBrain on July 9, 2018 (Tr. pp. 37, 41).

A. Due Process Complaint Notice

In a due process complaint notice dated July 9, 2018, the parents 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 parents 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 parents 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 August 17, 2018 and concluded the pendency portion of the hearing on September 5, 2018, the second day of proceedings (Tr. pp. 1-67). At the hearing, the parents asserted that pendency lay in the unappealed May 2018 IHO decision, which found that the parents' 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. 6-7; Parent Ex. B at pp. 13-14, 17).[2] However, the parents sought funding under pendency at a different nonpublic school (iBrain) where the student had been unilaterally placed (Tr. p. 6; Parent Ex. A at pp. 1-2; IHO Ex. I at pp. 5-6). While the parents declined to present evidence regarding the availability of iHope (see Tr. pp. 6-7, 14-15), they asserted that the student was attending iBrain pursuant to a unilateral placement by the parents, which constituted a valid placement for purposes of pendency because it was substantially similar to iHope (Tr. p. 15; IHO Ex. I at pp. 4-6). The district did not consent to a change in the location of pendency and opposed the request for pendency at iBrain, contending that the parents did not "have the right" to unilaterally move the student from one nonpublic school placement to another nonpublic school preferred by the parents and assert a right to pendency (Tr. pp. 62-64; IHO Ex. II at pp. 2-6). 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 (id.). The district also asserted, in the alternative, that the parents could not show that iBrain was substantially similar to iHope because iBrain "was not fully

[1] Due to the status of this matter as an interim appeal disputing a pendency determination, at the time of the parents' 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. 1-67; Parent Exs. A-B; Dist. Exs. 1-4; IHO Exs. I-III).

[2] According to the IHO, the parties agreed that the May 2018 IHO decision established the student's placement for purposes of pendency (Tr. pp. 6, 14).

functional" and there were only four students in the student's class, rather than the 8:1+1 class provided at iHope (Tr. p. 64). Lastly, the parents asserted that, in the event the IHO found that the parents 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 (Tr. pp. 60-61).

By interim decision dated September 15, 2018, the IHO found that the basis for pendency lay in the unappealed May 2018 IHO decision (IHO Decision at pp. 2-3). The IHO further found that parents who "unilaterally change their student's placement during the pendency of review proceedings, without the consent of state or local school official, do so at their own financial risk" and denied the parents' request for tuition at iBrain during pendency (id. at p. 4). Further, the IHO found that there had been no showing that the student could not "remain in her program at iHope," which the IHO deemed fatal to the parent's request for pendency "in a school other than iHope" (id.). The IHO noted the she need not reach the issue of whether iBrain provided a program that was substantially similar to the program at iHope, but stated that there was no evidence that iBrain provided individual school nursing or parent counseling and training, which were components of the iHope program set forth in the April 2018 IHO decision (id.). Lastly, the IHO denied the parents' request that the district fund pendency services that were not in dispute, citing a lack of legal authority and a lack of evidence for such relief (id. at pp. 4-5).

IV. Appeal for State-Level Review

The parents appeal 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 parents assert that the IHO erred in finding that the parents were not allowed to transfer the student from one nonpublic school to another for the purposes of pendency, even if the two placements were substantially similar. The parents also assert that iHope and iBrain are substantially similar, and that the IHO erred in failing to address this question, and, to the extent the IHO reached the question, the parents argue that she erred in finding that the student was not receiving individual school nursing (as needed) or parent counseling and training at iBrain. The parents also assert that, in the event an SRO finds that iHope and iBrain are not substantially similar, they are entitled to, at a minimum, an order of "partial pendency" for services that overlap and are substantially similar between iHope and iBrain. Relatedly, the parents assert 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 parents assert that the IHO should recuse herself or "be recused" from this matter because she had ruled against parents in another matter on an issue of equity that will also arise in the present matter.

In an answer, the district responds to the parents' allegations and argues that the IHO's decision should be upheld in its entirety. The district also argues that, to the extent an SRO finds that the matter should not be dismissed for the reasons identified by the IHO, the matter should be remanded to the IHO to make the determination of whether the student's programs at iHope and iBrain are substantially similar in the first instance. Alternatively, assuming an SRO reaches the question of substantial similarity, the district argues that the parents failed to meet their burden to

establish that iBrain was substantially similar to iHope. Further, the district asserts that, in addition to the individual nursing and parent counseling and training flagged by the IHO as defeating substantial similarity, iBrain did not offer the same class ratio as iHope in that there were only four students in the student's class at the beginning of the school year. In a footnote in the answer, the district responds to the parents' claims that they are entitled to partial pendency, noting that the parents did not cite legal authority for the proposition. Also in a footnote, the district asserts that the parents' 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 parents respond 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 (see 8 NYCRR 279.6[a]).[3] However, in the reply, the parents do indicate their intent to "withdraw . . . with prejudice" their argument that the IHO should have recused herself from this matter; accordingly, the parents' argument on this point will not be further discussed. Additionally, assuming an SRO sustains the parents' appeal and reverses the IHO's determination that the parents could not move the location of the student's pendency placement, the parents have changed their position regarding their preferred outcome of this appeal. Rather than seeking a finding that iBrain is substantially similar to iHope and, therefore, constitutes the student's pendency placement, the parents join the district's request that the matter be remanded for the IHO to make that determination.

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

[3] Furthermore, the parents did not verify the reply as required by State regulation (8 NYCRR 279.7[b]).

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).

VI. Discussion

A. Preliminary Matters

1. Additional Evidence

The parents include three exhibits with their request for review (Req. for Rev. Exs. AA-CC). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a

Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). However, inclusion of additional evidence is a determination that rests solely within the discretion of the SRO (see 8 NYCRR 279.10[b]; L.K., 932 F. Supp. 2d at 488-89). Given the parents' withdrawal of their request for the IHO's recusal and given the disposition of the merits of the pendency matter, as discussed below, the documents attached to the request for review as Exhibits AA and BB are not necessary to render a decision. The document attached to the request for review as Exhibit CC purports to show that other IHOs have found the iHope and iBrain programs to be similar in matters before them regarding other students, and the parents suggest that the district should be collaterally estopped from arguing that, in this case, the programs are not substantially similar for this student. This document is considered for the limited purpose of addressing the parents' claim of collateral estoppel as discussed further below.

2. Collateral Estoppel

The parents contend 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 parents submit as Request for Review Exhibit CC 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. Initially, because the parents 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 parents are asserting that preclusion applies on the basis of res judicata (claim preclusion) or the related doctrine of collateral estoppel (issue preclusion).[4] However, even assuming this contention was not waived, and regardless of the theory on which the parent relies, the parents have 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 her 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

[4] 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 v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19, 2006]).

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 two 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. CC at pp. 11, 13). Only one of the decisions on pendency is dated and it was issued on October 15, 2018, about one month after the decision on pendency was issued in this matter (id. at pp. 4, 11). 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 parents have 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 parents' 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 parents fail 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 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 purposes 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] [emphasis added]; 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 IHO decisions provided by the parent as Request for Review Exhibit CC 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. Comparing the programs described in the IHO decisions to the student's program in this case reveals that the students attended classes with different student-to-teacher ratios and received different frequencies and/or durations of related services, as well as additional or other services (compare Req. for Rev. Ex.

CC at pp. 4, 9-11, with Tr. p. 24). The parents assert that the district should be precluded from relitigating the issue of substantial similarity "at least in regard to the general aspects of the educational programs at iBrain and iHope (i.e., the schools' teaching philosophies, physical structures, student compositions, etc.)"; however, the IHO decisions provided by the parent do not rest on such matters as a basis for their determinations of substantial similarity, looking instead to the individual students' specific programs (see Req. for Rev. Ex. CC at pp. 2-4, 9-10). Accordingly, the additional evidence submitted by the parents 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.[5]

B. Pendency

Turning to the crux of the parents' appeal, the parties agree that the student's educational placement for purposes of pendency is based on the unappealed May 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). 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.

[5] 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 the IHO decisions that determined 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"]).

46,709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]).[6] 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 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 545, 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];[7] 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'

[6] This echoes similar sentiments expressed by other circuit courts (see D.M. v. New Jersey Dep't of Educ., 801 F.3d 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)"]).

[7] 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.

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 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 Dep't 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). 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).[8] 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). Student-to-staff ratio is also a relevant factor in determining whether a student's program has changed (M.K. v. Roselle

[8] 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]).

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 her denial of the parents' request for pendency at iBrain entirely on her finding that parents were not free to unilaterally transfer their child from one school to another under pendency, and that there was "no evidence presented that she cannot remain at iHOPE" (IHO Decision at p. 4). Given the legal principals summarized above, I find that the IHO erred in reaching her conclusion on this basis. Accordingly, it remains to be determined whether iBrain provides a substantially similar program to the program provided by iHope during the 2017-18 school year—the student's placement under pendency—such that the parents' 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.

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

> During the current academic year (2017/18), the student receives direct instruction in an 8:1+1 special class setting and she is supported by a full-time, one-to-one paraprofessional daily. At iHOPE, the student also receives the following related services: individual physical therapy, three (3) times per week for forty-five (45) minutes per session; individual occupational therapy, five (5) times per week for sixty (60) minutes per session; individual speech/language therapy, three (3) times per week for sixty (60) minutes per session; group speech/language therapy, two (2) times per week for sixty (60) minutes per session; group parent counseling and training one time per month for sixty (60) minutes per session; and daily individual school nursing on an as-needed basis.

(Parent Ex. B at pp. 14-15 [citations omitted]). Additionally, 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. 19-21, 22-23, 25, 28-31).

With respect to the program at iBrain, the director explained that the school opened on July 9, 2018 (Tr. pp. 37-38). The director testified that the program at iBrain served students ranging from age 5 to 21 who presented "with brain injury and brain based disorders" and who were "primarily nonambulatory and nonverbal" (Tr. p. 21). The director indicated that iBrain offered an extended school day from 8:30 to 5:00 with 6:1+1 classes for "severely disabled students" and 8:1+1 classes for the "higher functioning" students (Tr. pp. 21-22). According to the director, all of the students at iBrain were assigned 1:1 paraprofessionals (Tr. p. 22). She further described the "extended therapy services," which were offered in durations of "up to 60 minute[s]" and included occupational therapy (OT), physical therapy (PT), and speech-language therapy, as well as services

that were or would be provided by teachers for the deaf and hard of hearing and for the visually impaired (id.). The director described the program as "very interdisciplinary" and explained that the related services were delivered in "a push-in and pull out model," which helped promote students' abilities "to generalize skills across all environments in the school and to get additional practice" (Tr. p. 22).

The director also testified with respect to her knowledge of the specific program the student received at iBrain. She indicated that the student attended an 8:1+1 class and had a 1:1 paraprofessional "who travel[ed] with her throughout the day" (Tr. p. 24). The director specified that the student received PT three days per week for 45 minutes, OT five days per week for 60 minutes, and speech-language therapy five times per week for 60 minutes (id.). In addition, the director indicated that the student used "a speech device" (id.). With regard to instruction, the director described the program as employing "a direct instruction model," which was "based around additional processing time, immediate correction of any errors, errorless learning based principals, [and] repetition of skills . . . in a one on one environment" (Tr. p. 25). Pursuant to this model, the director indicated that the student was working on her academic goals "with her teacher for at least a half hour every day one on one" and worked "on similar skills" with other students "in pairs [or] small group settings," which helped the student "generalize" skills and socialize with her peers (id.). Finally, the director noted that the student received "bussing services" and was assigned a transportation paraprofessional (id.).

When asked to compare the program provided to the student at iHope during the 2017-18 school year with that provided at iBrain during the 2018-19 school year, the director responded that the student attended a class with the same composition, had a 1:1 paraprofessional in each program, and that she received the same PT, OT, and speech-language therapy services, and used the same speech device (Tr. p. 29). The director further described that iHope and iBrain utilized the same "service delivery model" and elaborated that, in order to ensure the transition between programs "continual [and] seamless" and so as not to "reinvent the wheel," she directed the teachers at iBrain "to implement things as they were being done [at iHope]," including "what material, what kind of books they were using, [and] what words [the student] was practicing" (Tr. p. 30). When asked whether, based upon her experience and knowledge, she believed the programs were "very similar," she responded that, "[y]es, they're extremely similar" (Tr. pp. 30-31).

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 is unclear with respect to whether some of the services provided at iHope were provided at iBrain. The IHO acknowledged the same in her decision on pendency; however, she stopped short of finding that the potential discrepancies would defeat a finding of substantial similarity (IHO Decision at p. 4). First, as the IHO observed, it is unclear from the hearing record if the student received daily 1:1 nursing services as needed at iBrain because the testimony only established that nurses were present at the school; nowhere is it established that the student was receiving nursing services (see Tr. p. 44). Second, the director did not testify with respect to parent counseling and training at iBrain, which was a service that the student received at iHope (see Parent Ex. B at p. 15). The district has interposed at least one additional argument about substantial similarity, pertaining to the class ratio at iBrain.

The district asserts that the matter should be remanded to allow the IHO to reach a determination in the first instance on the question of substantial similarity. Generally, remand

would not be the preferred route, given that this matter has been proceeding for over five months and, further, in light 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)—pendency disputes should be resolved 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). However, in this case, the parents in their reply have joined the district in its request for a remand on the question of substantial similarity. Further, as noted above, there are evidentiary concerns with reaching the question at this juncture. On this point, the district requests remand with a directive that the IHO determine the issue of substantial similarity based on the hearing record developed as of the date of the parents' appeal and the parents not be permitted to submit any additional evidence. While the circumstances of the parents' pendency argument are unique, as discussed above, the pendency provision is in the nature of an automatic injunction and ordinarily requires no particular showing on the part of the moving party and no balancing of the equities (see Zvi D., 694 F.2d at 906; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 696 [2006]). While—as the present matter amply demonstrates—questions of pendency can become more factually intensive and legally complex, ultimately, a determination should be based on facts established based on a complete hearing record, rather than on findings of insufficient evidence. It is left to the sound discretion of the IHO on remand to determine whether additional evidence is required in order to make the necessary findings of fact relative to the question of substantial similarity and/or whether the parties should submit further evidence to otherwise fully develop the hearing record. Further, as this is an interim appeal, the hearing process should have continued, and, presumably the IHO has continued to receive evidence regarding the merits of the parents' claims. The IHO should not be precluded from considering such evidence, if relevant to the question of pendency.

Finally, the parents argue that, if the student's programming at iBrain is not found to be substantially similar to the programming at iHope, the district should be responsible for partial pendency amounting to the costs of services that do overlap between the two programs. In support of this proposition, the parents cite a Second Circuit case that provided that, if a district fails to implement a student's pendency placement, compensatory education in the form of reimbursement for services obtained by the parent is often considered as a potential remedy (see E. Lyme, 790 F.3d at 456-57).[9] However, here, absent a finding of substantial similarity, there is no lapse on the part of the district for implementation of pendency for which a remedy in the form of the costs of

[9] The remainder of the authority cited by the parents involves situations in which the district is deemed responsible to provide services deemed to be a part of a pendency placement (Application of the Dep't of Educ., Appeal No. 10-112; Application of the Dep't of Educ., Appeal No. 10-107), with the exception of one case, in which the aspects of the pendency placement were particularly severable, with the unappealed IHO decision specifying an agency for tutoring in addition to a nonpublic school placement (Application of a Student with a Disability, Appeal No. 08-050). Here, the parents do not seek services provided by the district and the iHope program described in the May 2018 unappealed IHO decision encompasses all academic, related services, and accommodations/modifications.

services would be appropriate. Rather, where, as here, the parent has unilaterally elected not to maintain the student's pendency placement at iHope, any lapse in services is attributable to the parent, not the district, and I decline the parents' invitation to treat the student's pendency placement as divisible, which would undermine the concept of substantial similarity put forth by the parents as the sole test to determine whether they are entitled to public funding for the costs of the student's placement at iBrain pursuant to pendency.

VII. Conclusion

Having found that the IHO erred in resting her denial of the parents' request for pendency at iBrain on her findings that parents were not free to unilaterally transfer the student from one school to another under pendency and that there was no evidence presented that the student could not remain at iHope, the matter is remanded to the IHO in accordance with this decision to render a determination as to whether the program at iBrain is substantially similar to that offered by the student's pendency placement established by the unappealed May 2018 IHO decision.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the matter is remanded to the IHO who issued the September 15, 2018 decision, who shall, in a manner not inconsistent with the body of this decision, reach a determination of whether there is substantial similarity between student's former educational placement at iHope and his current educational placement at iBrain no later than 20 days from the date of this decision.

Dated: **Albany, New York**
December 19, 2018

SARAH L. HARRINGTON
STATE REVIEW OFFICER