The University of the State of New York

The State Education Department
State Review Officer
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No. 18-132

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

Appearances:
Brain Injury Rights Group, attorneys for petitioners, by Karl J. Ashanti, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, 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 son's pendency (stay put) 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 March 12, 2018, and denied the parents' 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 a nonpublic school, iHope, for the 2017-18 school year (see Parent Ex. B at pp. 3, 5). The parents' unilateral placement of the student at iHope for the 2017-18 school year was the subject of a prior due process impartial hearing (see Parent Ex. B). At the conclusion of the prior impartial hearing, an IHO issued a decision, dated

March 12, 2018, finding that the district conceded that it had failed to offer the student a free appropriate public education (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, for the 2017-18 school year (id. at pp. 3-5).

According to the parents,[1] a district CSE convened on March 14, 2018 to develop an IEP for the student for the 2018-19 school year, and the CSE recommended that the student be placed in a "12:1+(3:1)" special class in a district school (Parent Ex. A at p. 2). It appears that the parents did not accept the CSE's recommended placement because the student began attending a second nonpublic school, iBrain, on July 9, 2018 (Tr. p. 25).

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 FAPE for the 2018-19 school year (Parent Ex. A). As relevant here, the parents requested an interim order on pendency that the district fund the student's placement at iBrain for the 2018-19 school year based on the unappealed March 2018 IHO decision granting the parents tuition reimbursement for iHope for the 2017-18 school year (id. at pp. 1-2; 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. Pendency Hearing and Decision

The parties proceeded to an impartial hearing August 23, 2018 and concluded the portion of the hearing related to pendency that day (Tr. pp. 1-82).[2] At the hearing, the parents asserted that pendency lay in the unappealed decision of an IHO, dated March 12, 2018, which found that tuition reimbursement for the student's unilateral placement at iHope during the 2017-18 school year was appropriate (Tr. pp. 4-5; see Parent Ex. B at pp. 4-6).[3] Further, the parents asserted that the same educational program that the student had at iHope was being maintained at iBrain and that the "continuity and the substantial similarity" between iHope and iBrain was the basis for pendency (Tr. pp. 5-6). The district opposed the request for funding the student's pendency placement at iBrain, contending that the student's program at iBrain was not substantially and materially similar to the program that the student received at iHope (Tr. p. 6).

[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. 1-89; Parent Exs. A-B; Dist. Ex. 1; IHO Ex. I.).

[2] Prior to the IHO's decision on pendency, an additional status conference took place on September 27, 2018 (Tr. pp. 83-89).

[3] The district agreed that the March 2018 IHO decision established the student's placement for purposes of pendency (Tr. p. 62).

By interim decision dated October 12, 2018, the IHO noted that the district agreed that the student's pendency placement was established by the unappealed March 2018 IHO decision (IHO Decision at pp. 3, 4, 7). Initially, the IHO noted that the sole issue to be addressed was whether the student's program at iBrain was "'substantially and materially similar'" to the student's prior program at iHope, such that iBrain could be deemed the student's current pendency program (id. at p. 4). After review of the hearing record, the IHO found that the parents did not establish that the iBrain program was substantially similar to the iHope program (id.). First, the IHO found that the hearing record contained insufficient information about the actual programming that the student had previously received at iHope (id.). More specifically, the IHO noted that the parents' witness, the iBrain special education director (director), had minimal knowledge about iHope or the student's programming for the 2017-18 school year (id.). Next, the IHO noted that the hearing record lacked the student's iBrain and iHope IEPs such that the IHO was unable to compare the two programs by reviewing the IEPs (id.).

Upon considering even the limited evidence that was available in the hearing record, the IHO found that the program at iBrain was not substantially similar to the student's program at iHope (IHO Decision at pp. 5-7). With respect to the parents' assertion that the iBrain and iHope programs were "identical," the IHO found that, as of the filing of the due process complaint notice and the date of the pendency hearing, iBrain did not have the staff necessary to provide at least some of the services that the student received at iHope (id. at p. 5). Specifically, the IHO found that iBrain did not provide parent counseling and training during most of the summer, which precluded a finding that the two programs were substantially and materially similar (id.). Furthermore, the IHO found that iBrain failed to deliver vision services, "a critical component of [the student's] special education program," for the entire summer and the fact that a classroom teacher was trying to implement vision therapy services to the student in the classroom, was "not substantially and materially similar to having an appropriately licensed and trained service provider" (id.). With respect to the class size at the two programs, the IHO noted that the student's class at iHope was not reflected in the March 2018 IHO decision and, further, that the iBrain director failed to indicate what size class—a 6:1+1 or an 8:1+1—the student attended at iBrain (id.). The IHO further noted that, based on the testimony of the iBrain director that iBrain had six classes in three classrooms, the student's classroom was really a 10:2+2 or 11:2+2 special class with ten or eleven additional paraprofessionals in the room, thereby doubling the number of students, teachers, assistants, and paraprofessionals in the classroom, rendering iBrain not substantially and materially similar to the student's program at iHope (id. at pp. 5-6).

With respect to the actual physical location of iBrain, the IHO noted that the director testified that iBrain was moving out of its current location during the impartial hearing but that the director was evasive about the new address, indicating only that the school was moving to an "undisclosed location" (IHO Decision at p. 6). The IHO found that, "[a]lthough pendency does not lie in the bricks and mortar of a school location," the school "must have a location, and that location must be disclosed" (id. at pp. 6-7). Moreover, the IHO noted that, in the absence of a location, iBrain could not provide the student with special education programming and services (id. at p. 7).

Based on the foregoing, the IHO concluded that iBrain and iHope were not substantially and materially similar and that the parents' request for a finding that iBrain "was the Student's pendency program in this proceeding [wa]s denied" (IHO Decision at p. 7).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in denying their request for pendency at iBrain. Specifically, the parents contend that the IHO erred in finding that iHope and iBrain were not substantially similar. Further, the parents contend that the IHO erred in finding that the hearing record contained insufficient information regarding the student's program at iHope for the 2017-18 school year.[4] In a footnote in the request for review, the parents request that, if the SRO "finds that pendency relief should not be granted with respect to any portion of [the student's] current educational program or related support services," the SRO "grant pendency relief insofar as [the SRO] determines pendency is warranted for some services, as pendency relief is divisible by each individual service at issue."[5]

For relief, the parents request an order directing the district to pay for the student's full tuition at iBrain, including the services of a 1:1 paraprofessional, related services, and assistive technology, as well as the costs of special transportation accommodations.

In an answer, the district argues for upholding the IHO's decision that iHope and iBrain were not substantially similar. In addition, the district asserts that the student has no right to pendency because the parents "unilaterally discontinued the services constituting the [s]tudent's pendency placement" by removing the student from iHope and enrolling him in the parents' preferred placement at iBrain. The district further argues that the parents' failed to provide an explanation for moving the student from iHope to iBrain. Finally, the district objects to consideration of additional evidence submitted with the parents' request for review.

In a reply to the district's answer, the parents assert that the district's arguments that the parents cannot transfer the student from one private school to another and that the parents must establish unavailability of iHope are legally incorrect. The parents further reiterate that the programs at iHope and iBrain are substantially similar or, in the alternative, that the parents are at least entitled to a divisible portion of pendency services. Lastly, the parents request a remand of

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[4] The parents attach the iHope IEP for the 2017-18 school year and iBrain IEP for the 2018-19 school year to their Request for Review as additional evidence (Req. for Rev. Exs. AA; BB). As a general matter, private institutions which are not State-approved to provide special education services to students with disabilities—such as iBrain—are not required to develop their own IEP for students (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 13-14 [1993]), and are not mandated by the IDEA or State law to provide services in compliance with an IEP. Accordingly, the privately created IEPs are not dispositive of the issue whether the program provided to the student at iBrain is substantially similar to the stay put program provided to the student at iHope. The consideration 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). I find that the documents attached to the request for review as Exhibits AA and BB are not necessary to render a decision; accordingly, they will not be considered.

[5] While, as previously explained to parents' counsel in decisions involving other students (see Application of a Student with a Disability, Appeal No. 18-119; Application of a Student with a Disability, Appeal No. 18-116), arguments raised only in a footnote are considered waived at this stage of the proceedings (see, e.g., United States v. Quinones, 317 F.3d 86, 90 [2d Cir. 2003] [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]). However, since the parents may attempt to pursue the argument before the IHO and in order to put the issue to rest, the parents' argument is briefly discussed below.

this matter should the SRO find there is insufficient evidence in the hearing record to establish that the two programs are substantially similar, indicating that, otherwise, the student would be left without any pendency placement.

V. Legal Framework—Pendency

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]). 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 & Citizens for the Continuing Educ. at Malcolm X (PS 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"]).

An educational agency's obligation to maintain stay-put placement is triggered when an administrative due process proceeding is initiated (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 445, 452 [2d Cir. 2015]). When triggered, there are numerous ways that the terms of the stay-put placement may be established. First, a school district and parent may simply reach an agreement as to the services and programming that the student shall receive while a proceeding is pending (20 U.S.C. § 1415[j] ["unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child"] [emphasis added]). Where the parents and school district cannot agree upon the stay-put placement, the focus shifts to identifying the "last agreed upon" educational placement as the then-current educational placement (E. Lyme, 790 F.3d at 452; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906; A.W. v. Bd. of Educ. Wallkill Cent. Sch. Dist., 2015 WL 3397936, at *3 [N.D.N.Y. May 26, 2015]). 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; see E. Lyme, 790 F.3d at 452; Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 83 [3d

Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). In addition, 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]). Noting the inexact science of identifying a student's educational placement for purposes of pendency, the Seventh Circuit has noted that the inquiry necessarily requires a "fact-driven approach" (John M. v. Board of Educ. of Evanston Tp. High School Dist., 502 F.3d 708, 714 [7th Cir. 2007] [holding that "respect for the purpose of the stay-put provision requires that the former IEP be read at a level of generality that focuses on the child's 'educational needs and goals'], citing Concerned Parents, 629 F.2d at 754). 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).

Stay-put "is often invoked by a child's parents in order to maintain a placement where the parents disagree with a change proposed by the school district; the provision is used to block school districts from effecting unilateral change in a child's educational program" (Susquenita, 96 F.3d at 83). "Where the parents seek a change in placement, however, and unilaterally move their child from an IEP-specified program to their desired alternative setting, the stay-put rule does not immediately come into play" (M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 [3d Cir. 2014]). "[A]n administrative ruling validating the parents' decision to move their child from an IEP-specified public school to a private school will, in essence, make 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., 744 F.3d at 119; see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 484 [2d Cir. 2002]; see also Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 201 [2d Cir. 2002]). The purpose of the pendency provision is "to maintain the educational statuts quo while the parties' dispute is being resolved," and it "therefore requires a school district to continue funding whatever educational placement was last agreed upon for the child until the relevant administrative and judicial proceedings are complete" (T.M., 752 F.3d at 152, 170-71).

When a school district has been paying for a student's tuition at a nonpublic school pursuant to pendency as the then 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. v. New York City Dep't of Educ., 694 F.3d 167 [2d Cir. 2012]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *6 [S.D.N.Y. Mar. 17, 2010]). Parents can successfully secure stay put protection if they obtain an administrative or judicial ruling that validates their decision to move a student from an IEP-specified public school setting to a nonpublic school that they unilaterally selected without the district's input and this placement becomes the "then-current educational placement" for purposes of the stay-put rule, so long a proceeding is pending (Schutz, 290 F.3d at 483 [noting that "once the parents' challenge succeeds, . . . consent to the private placement is implied by law" and the funding of the private placement becomes the responsibility of the school district pursuant to stay put]).

The question in this case involves the circumstances in which the parent has already proceeded though due process at least once, during which the desired alternative setting was endorsed by an administrative determination, and the district does not question that iHope may serve as the student's stay put placement. However, since the March 2018 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 the parent is permitted to transition her child in this manner and still receive public funding under the protections of the stay put rule. The district argues that the unappealed March 2018 IHO decision established iHope as the student's then-current educational placement and that the parent is not entitled to transfer the student to a different nonpublic school and receive public funding for iBrain pursuant to stay put absent some indication iHope was no longer an available placement for the student. 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 the 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.

As for the development of the caselaw in the Second Circuit, Concerned Parents does not address the stay-put provision itself, but interprets the meaning of a change in "educational placement" which is used in another section of the IDEA, and the Court notes that the statute failed to define the term (629 F.2d at 753). When interpreting the stay-put provision in subsequent cases, the Second Circuit found that the interpretation of the term "educational placement" in Concerned Parents also guided the meaning of the term in the stay-put context, holding 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 while his administrative and judicial proceedings are pending. Instead, it guarantees only the same general level and type of services that the disabled child was receiving" (T.M., 752 F.3d at 171).[6] In T.M., the Court held that, where the school district initially refused to provide pendency services directly, the IDEA did not bar the school district from subsequently correcting its mistake and offering to provide the required pendency services directly and reversed the district court's holding that the district "was obligated to afford T.M. 'stability and consistency' by keeping him with the same private service providers" that the parents had selected to provide pendency services (id. at 171-72). The Court's opinion in T.M. emphasizes points previously stated in Concerned Parents, namely that "educational placement" in the stay-put

[6] This echoes sentiments expressed by other circuit courts (see D.M. v New Jersey Dept. of Educ., 801 F.3d 205, 216-17 [3d Cir. 2015] [holding "that, at least in some situations, a child's 'educational placement' does not include the specific school the child attend"]; White v. Ascension Parish 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)"]; DeLeon v. Susquehanna Cmty. Sch. Dist., 747 F.2d 149, 153 [3d Cir. 1984] [stating that "the touchstone in interpreting section 1415 has to be whether the decision is likely to affect in some significant way the child's learning experience"]).

context does not turn on the physical location of services or the identity of the provider. Instead, contrary to the district's position that educational placement for stay-put purposes can include the physical location of educational services, the Second Circuit has reaffirmed the holding in Concerned Parents that "the term 'educational placement' refers only to the general type of educational program in which the child is placed" (id. at 171, quoting Concerned Parents, 629 F.2d at 753 [emphasis added]; G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *6 [S.D.N.Y. Jan. 31, 2012] [explaining that the pendency provision does not require a student to remain at a specific brick-and-mortar school). 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 programming without jeopardizing the district's obligation to fund the placement pursuant to the stay put provision, 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 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 to provide a student special education and related services is an administrative decision within the discretion of the school 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 548, 549-50 [7th Cir. 1996] [in the case of a student who had been expelled from school, 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.

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

[7] While 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), the Seventh Circuit's description of the issue before it is similar and the Court's observations are instructive to the present context.

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 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). 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 parent sought a nonpublic school with different or additional services because of a change in the student's needs, such a transfer would in all likelihood amount to a change in the student's educational placement).

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). 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 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.

As noted above, in some circumstances parents can successfully secure stay-put protection if they obtain an administrative or judicial ruling that validates their decision to move a student from an IEP-specified public school setting to a private school that they selected without the district's input and this placement becomes the "then-current educational placement" for purposes of the stay-put rule, so long as a proceeding is pending (Schutz, 290 F.3d at 484). If "then-current educational placement" means only the general type of educational program in which the child is placed, then it appears that parents are not precluded from effecting alterations to a student's private programming without jeopardizing the district's obligation to fund the placement as stay put, so long as the alterations do not effect a change in educational placement. In order to qualify as a

change in educational placement, one district court has 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; N.M. v. Cent. Bucks Sch. Dist., 992 F. Supp. 2d 452, 464 [E.D. Pa. 2014]) and similarly, the District of Columbia Circuit has described it as "at a minimum, a fundamental change in, or elimination of a basic element of the education program" (Lunceford v. Dist. of Columbia Bd. of Educ., 745 F.2d 1577, 1582 [D.C. Cir. 1984]). The United States Department of Education's Office of Special Education Programs has 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). Thus, in order to continue to receive the protections of stay-put funding, parents who effectuate a change in the student's programming must not change the child's learning experience in a significant way by ensuring that the private programming that they select remains substantially similar to the private programming that was endorsed in the ruling granting the parents tuition reimbursement. With this background in mind, I turn next to the question to be answered in this case, whether the student's learning experience in the programs offered at iHope and iBrain are substantially similar or if the student's learning experiences have been changed in a significant way such that his transfer from iHope to iBrain constituted a change to his educational placement.

VI. Discussion

As noted above, the parties agree that the student's educational placement for purposes of pendency is based on the unappealed March 2018 IHO decision (see Parent Ex. B). Initially, with regard to the district's arguments on appeal, as set forth above, the parents are not precluded from transferring the student from one nonpublic school to another and seeking funding pursuant to pendency, so long as the programs provided by the nonpublic schools are substantially similar. Accordingly, the sole issue to be determined on appeal is whether the IHO erred in finding that the student's current program at iBrain was not "substantially and materially similar" to the student's prior program at iHope, such that iBrain could be deemed the student's current pendency program.

The IHO in the prior proceeding determined that the student's program at iHope for the 2017-18 school year was appropriate to address her needs (Parent Ex. B at pp. 3-4). The IHO described the student's program at iHope as a 12-month program that provided an extended school day with extended related services sessions and "all academic and related services with individual instruction" (id.). The IHO awarded reimbursement for the cost of the student's program at iHope for the 2017-18 school year (id. at p. 5). The iBrain director who previously worked at iHope offered little additional detail regarding the student's program at iHope (see Tr. p. 17).

With respect to the program at iBrain, the director explained that the school opened on July 9, 2018 (Tr. p. 27). The director described that iBrain offered a program for students ranging in age from 5 to 21 who presented with "brain injury or brain-based disorders" and who were "nonverbal and nonambulatory for the most part" (Tr. pp. 11, 12). The director indicated that iBrain was a 12-month program that offered an extended school day from 8:30 to 5:00 with four 6:1+1 classes and two 8:1+1 classes (Tr. pp. 11-13, 24-25). According to the director, all of the

students at iBrain were assigned 1:1 paraprofessionals (Tr. p. 12). 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, parent counseling and training, as well as services that were or would be provided by teachers for the deaf and hard of hearing and for the visually impaired, as well as by an assistive technology service provider (id.). The director described that the program used a "direct interaction model," whereby each student was seen by the teacher for a half of an hour on a one-to-one basis (Tr. p. 13). Additionally, the director indicated that related services were delivered in "a push-in and pull out model," which helped promote students' abilities to generalize skills across all environments (Tr. p. 13).

The director also testified with respect to her knowledge of the specific program the student received at iBrain for the 2018-19 school year. She indicated that the student had a 1:1 paraprofessional who was the same paraprofessional who worked with the student at iHope (Tr. p. 19). The iBrain director testified that the student was receiving individual PT, OT, and speech-language therapy, each at a frequency of five times per week for 60-minute sessions, as well as speech-language therapy in a group once per week for 60 minutes (Tr. p. 16). The director further testified that the student was receiving assistive technology services twice per week for 60-minute sessions (id.). In addition, the director testified that a vision therapist would be starting in September 2018 and the student would receive vision therapy services twice per week for 60 minutes (Tr. pp. 12, 16). The director also testified that parent counseling and training services were being provided once per month for 60-minute sessions as of August 2018 (Tr. pp. 16, 48).

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 "[t]he recommendations were, if not identical, extremely, extremely similar" (Tr. pp. 17-18). She indicated that iBrain follows "all the recommendations and goals that were provided . . . from [the student's] last IEPs at iHope" (Tr. p. 19). The director further described that, because of the student's success with the program at iHope, the staff at iBrain "carried on" with the same supports, strategies, modifications, and adaptations, so as to ensure a "seamless transition" for the student and so as not to "reinvent the wheel" (Tr. pp. 19-20).

There may be 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 most of the aspects of the student's programming at iHope. Notwithstanding the lack of evidence regarding the actual delivery of services under the students' plan at iHope for the 2017-18 school year, there is sufficient basis in the hearing record to conclude that the student's program at iBrain was not substantially similar thereto, at least at the time of the IHO's interim determination. As summarized above, the IHO identified four deviations in the student's iBrain program from the program provided to the student at iHope: that the student did not receive vision education services at the beginning of the 2018-19 school year; that the parent did not receive parent counseling and training at the beginning of the 2018-19 school year; that the student was placed in a classroom with ten or eleven students, two teachers, and several paraprofessionals; and that the new physical location of the school was undisclosed (see IHO Decision at pp. 5-7). In their request for review, the parents fail to grapple directly with the deviations in programming identified by the IHO, instead arguing in more general terms—based largely on the additional documentary evidence that

was not before the IHO—that the programs are substantially similar.[8] However, there is no basis in the hearing record to reverse the IHO's determination.

With respect to related services, the parents represent that the student's program at iHope included vision therapy services and parent counseling and training (Req. for Rev. at p. 6); however, as the IHO found, due to delays in hiring providers, iBrain had not implemented vision therapy services for the entire summer of 2018 or parent counseling and therapy until some point in August 2018 (see Tr. pp. 12, 16, 48). Although as noted above, the student began attending iBrain in July, the director testified that the social worker began providing parent counseling and training services to the student's parents in August 2018 (Tr. p. 48). The director further testified that the student's parents received these services once per month for 60-minute sessions (id.). With respect to vision services, the director testified that a vision teacher would begin working at iBrain in September 2018 (Tr. p. 12). The director further testified that, although iBrain did not have a vision therapist, they were following the vision recommendations (Tr. p. 53). In addition, she testified that they were implementing all the recommendations of the vision therapist within the classroom (Tr. p. 54). As the IHO found, having a classroom teacher implement vision therapy services to the student, is not substantially and materially similar to having an appropriately licensed and trained service provider (IHO Decision at p. 5).

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 presented here, 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 his program. Initially, the director testified that the student had a cortical visual impairment (Tr. p. 20). The director testified that students with cortical visual impairment "have very specific preferences" in terms of what their visual systems are able to process (Tr. p. 46). Although the director did not remember the specific vision recommendations for the student, she testified that, generally, students with cortical visual impairment have "specific preferences in terms of what their visual system is able

[8] With respect to the iHope IEP for the student's 2017-18 school year—which, as discussed above, the parents attached to their request for review and I have declined to consider—the parents argue that the IHO "refused to examine" the exhibit that was "attached" to the unappealed March 2018 IHO decision and "falsely claimed that that exhibit did not exist as part of the Hearing Record" (Req. for Rev. at p. 8). The parents' argument in this regard is not only unsupported, it is also manifestly unreasonable and legally untenable. State regulation provides parties with the means to present evidence at the impartial hearing and to develop the hearing record (8 NYCRR 200.5[j][3][xii]) and does not otherwise identify incorporation as a means of entering evidence into the record. Further, State regulation provides that an IHO "shall attach to the decision a list identifying each exhibit admitted into evidence," as well as "an identification of all other items the impartial hearing officer has entered into the record" (8 NYCRR 200.5[j][5][v] [emphasis added]). Neither State regulation, nor standard legal practice in any other area of law of which I am aware, contemplates that a formal written decision would have all of the actual evidentiary exhibits that were entered into the underlying administrative record incorporated into and made part of the written decision. To attach all of the evidence to every IHO's written decision would be incredibly burdensome and ultimately unnecessary, since the intended audience for the decision is the parties to the dispute the decision is addressing, and those parties have access to the exhibits (being the parties who presented the evidence to the decisionmaker). Rather the position of parents' counsel in this case amounts to his attempt to blame the IHO for his own failures to present to the IHO sufficient evidence to support his client's claim. If the parents wanted the IHO to consider certain documentary evidence, it was up to the parents to identify it and present it for the IHO's consideration in a timely manner.

to process," including some kind of visual range that is ideal for a student, as well as particular preferred items to which the student can attend (Tr. pp. 20, 46-48).

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. 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 found appropriate in the unappealed March 2018 IHO decision. Accordingly, the IHO did not err in her determination.

However, one additional aspect of the IHO's order denying the parents' request for pendency at iBrain "in this proceeding" requires further discussion (see IHO Decision at p. 7). While it was appropriate for the IHO to set forth an order denying the parents' request, it is clear from the evidence that the situation has continued to evolve over time as the 2018-19 school year has progressed and the language in the IHO's ordering clause, namely "in this proceeding," does not allow for the possibility that the student's program at iBrain could evolve to the point that it becomes substantially similar to what the student received at iHope's program for purposes of pendency prior to the completion of the proceedings in this matter. Accordingly, that portion of the IHO's order which found that the parents failed to establish that the student's educational placement at iBrain is substantially similar will be upheld, but will be modified to strike the language that precludes stay put relief at some later point in time if circumstances at iBrain change.

Should the parents attempt to advance before the IHO that the student's program at iBrain has become substantially similar to the student's program at iHope since the pendency hearing in this matter on August 23, 2018, the parents should ensure that the record is adequately presented to the IHO regarding the essential components of the student's programs at iHope and iBrain. The student's IEPs developed by each school, which the parents attempt to submit as additional evidence on appeal but which I have declined to consider at this juncture, may be relevant to the question of substantial similarity but they are unlikely to be dispositive without more. In particular, where, as here, it is the parents who are purporting to procure the student's stay-put placement, evidence of the implementation of the alleged substantially similar program is critical, especially given that unregulated entities such as iHope and iBrain are not required to formulate or adhere to written IEPs in the same manner as a public school district, and as the IHO's decision makes clear, iBrain appears to have struggled to initiate some services that were planned due to a lack of personnel.

Turning to the IHO's concerns over physical classrooms that were somehow used by multiple classes, according to the parents, the student attended a 6:1+1 special class at iHope (Req. for Rev. at p. 6). The iBrain director testified that iBrain has four 6:1+1 special classes and two 8:1+1 special classes (Tr. pp. 11-12), but I note that she failed to indicate which type of special class the student attended in this case. The director further testified that there was a total of three physical classrooms in the location that iBrain occupied before the pendency hearing on August 23, 2018 (Tr. p. 36). When asked by the IHO whether having three classrooms represented having 10 to 11 students in each classroom, the director of special education responded, "yes" (Tr. p. 53). While the IHO understandably found this testimony concerning, there is insufficient information in the hearing record at this point for me to determine whether or not the factual circumstance of

two classes sharing one classroom changed the basic character of the class ratio the student was supposed to attend. Putting aside that the hearing record does not establish definitively which class ratio the student was attending, information that might be relevant to the inquiry might include how the classes were separated in the room, if at all, and whether the students and staff from the two classes intermingled with one another. At least one court has passed upon a class ratio question that was not unlike the facts here, in which modifications regarding the interchangeability of 6:1+1 and 12:2+2 special classes were called into question (Kalliope R. v. New York State Dep't of Educ., 827 F. Supp. 2d 130, 141 [E.D.N.Y. 2010]). As a legal matter, the court determined that an administrative policy dividing 12:2+2 special classes into 6:1+1 special classes (if supported by evidence)[9] would be impermissible outside the CSE process (id.). As applied by analogy to this case, if facts tend to show that the 6:1+1 special classes at iBrain were intermingled in their functioning, it would likely constitute a change in educational placement of the type that, if being educated in a public school, would require a modification of a student's IEP.[10] If it is the type of educational placement change that required a modification of a student's public school IEP, it would likely be a change in educational placement for stay put purposes.[11] Accordingly, if the IHO is asked to revisit the question of pendency in this matter, she may also wish to revisit the question of the class ratio.

As to the physical location of iBrain, the director testified that iBrain was moving its location but the location had not been disclosed (Tr. p. 30). The director further testified that she had a "very good idea" regarding the new location but "didn't want to state it as a fact" (Tr. p. 52). In the parents' reply, counsel for the parents indicates that iBrain's address is 700 Columbus Avenue (Reply at p. 8). However, the director testified during the impartial hearing that 700 Columbus Avenue was iBrain's mailing address and "not the place where the school is physically located" (Tr. p. 51). The IHO correctly found that a school must have a location and, because it must, it is also reasonable that must be disclosed at the time of the impartial hearing; that is

[9] The court did not resolve the factual matters because it was resolving whether such a claim was permissible as a matter of law upon a motion to dismiss, thus it assumed the facts as pled by plaintiffs.

[10] In this case, the district actually engaged in a brief inquiry about the physical layout of iBrain during cross-examination and uncovered this concern (see Tr. p. 36); however, in another State-level appeal in which I am issuing a decision today, the district failed to explore the layout and physical limitations of iBrain's facility. In that proceeding, the conclusions I reach, based upon the evidence and the advocacy approach taken by the district in that case, are markedly different (see Application of the Dep't of Educ, Appeal No. 18-136). Frankly, I find that discord quite disturbing given the number of times administrative hearing officers have been asked to rely on this witness' testimony in the plethora of due process proceedings that have erupted involving iBrain.

[11] Whether it may be possible to implement a student's educational placement in one large room that has been utilized by dividing it for use into two smaller classes is a fact-driven inquiry involving the particular student in each case, not a legal axiom that requires no proof (see, e.g., Application of a Student with Disability, Appeal No. 18-010 [reversing a conclusion that under the facts presented an IEP could be implemented by placing divider in an existing 8:1+2 special class]; Application of a Student with Disability, Appeal No. 10-055 [finding that the student's programming could be implemented in accordance with the public school IEP even though the special education teacher described the recommended classroom as "two smaller rooms within one large room"]; Application of a Child with Disability, Appeal No. 97-074 [upholding a finding that a large room subdivided into three areas where various activities occurred constituted an environment that was too noisy and distracting for the particular child, who required a 2:1 instructional ratio in a class of no more than 6 children]).

because, in order for the educational services to be delivered at all, there must be a location (IHO Decision at pp. 6-7; cf. T.Y., 584 F.3d at 420 [noting that, while specific school location need not be placed on an school district's IEP, schools do not have carte blanche to assign a child to a school that cannot satisfy the special education programming requirements]). Accordingly, going forward, if the parents attempt to argue before the IHO that iBrain has, since the August 23, 2018 pendency hearing, become substantially similar to iHope, the parents should be prepared to present evidence about the new physical location for the school. It is left to the IHO's sound discretion as to how to schedule and structure the hearing to address any remaining stay-put matters.[12]

Finally, with regard to the parents' argument 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). 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 services would be appropriate.[13] 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 reject the parent's argument that a student's stay-put, the "then current educational placement," is a divisible, a-la-carte program that may change at any given time, which would undermine both the "status quo" concept so prevalent in stay-put jurisprudence as well as the substantial similarity approach put forth by the parents as the very test to determine whether they are entitled to public funding for the costs of the student's

[12] I am cognizant that the impartial hearing may become unwieldy if the parents were to be permitted to repeatedly return to the IHO seeking further stay put determinations. This may be a rare example of when, at this juncture, it would be more efficient to direct the parents to make their case on the merits with respect to the appropriateness of iBrain under the Burlington/Carter standard and expand that evidentiary presentation to include facts relevant to the substantial similarity of iBrain (or lack thereof) to the educational services that the student previously received at iHOPE. The parents should be prepared to make the needed fact-driven presentation in an expeditious, efficient manner, and I remind the IHO that she may order that the parents to present direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony be made available for cross-examination (8 NYCRR 200.5[j][3][xii][f]). It may be necessary for the parents to produce dated contemporaneous service delivery documents from the two schools if such business records exist, and it would be more probative to hear testimony from one or two individuals who worked with the student at iHOPE on a daily basis for the 2017-18 school year and iBrain on a daily basis for the 2018-19 school year.

[13] If this were a situation in which a district was directly responsible for the actual delivery of services pursuant to pendency and there was a lapse in services, the appropriate relief would be compensatory or make-up services to remediate the deficiency as the Second Circuit indicated (see E. Lyme, 790 F.3d at 456-57). However, that is not the circumstances present here; rather, the parents have intervened to maintain the status quo by selecting the private school that will deliver the student's special education services and are now seeking public funding under the stay-put rule. iHope and iBrain are not regulated public programs and I lack the authority to order such nonapproved, nonpublic schools to provide compensatory education to a student. Consequently, the parents assume the risk that there may be a lapse in funding for stay put services for those times that their preferred private school fails to deliver the "then current educational placement" that constitutes the student's stay-put.

placement at iBrain in the first place. Consequently, the parents' argument asserting the divisibility of a stay-put placement fails.

VII. Conclusion

Based on the above, the evidence in the hearing record supports the IHO's finding that the programming and related services the student was receiving at iBrain during the 2018-19 school year were not substantially similar to the programming and related services he received at iHope for the 2017-18 school year and, therefore, the IHO was correct in finding that iBrain was not the student's placement for the purposes of pendency. However, for the reasons discussed above, the IHO's order is modified by striking the words "in this proceeding."

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED

IT IS ORDERED that the IHO's interim decision on pendency, dated October 12, 2018, is modified, by striking the words "in this proceeding" from the IHO's ordering clause.

Dated: Albany, New York
December 21, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER