The University of the State of New York

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

No. 18-134

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

Appearances:
Brain Injury Rights Group, attorneys for petitioner, 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. Petitioner (the parent) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining that the International Institute for the Brain (iBrain) was not the student'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 appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). 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

Given the limited scope of the instant appeal, a full recitation of the student's educational history is not warranted. Briefly, however, a CSE convened on March 30, 2016 to conduct the student's annual review and to develop an IEP for the 2016-17 school year (see Parent Ex. B at pp.

1, 25-27, 30).[1] Finding that the student remained eligible to receive special education as a student with a traumatic brain injury (TBI), the March 2016 CSE recommended a 12-month school year program in a 6:1+1 special class placement located within a State-approved nonpublic school (id. at pp. 1, 26-27, 29).[2] The March 2016 CSE also recommended the following related services as part of the 12-month school year program: three 60-minute sessions per week of individual occupational therapy (OT), five 60-minute sessions per week of individual physical therapy (PT), four 60-minute sessions per week of individual speech-language therapy, one 60-minute session per week of speech-language therapy in a small group (3:1), and three 60-minute sessions per week of individual vision education services (id. at pp. 26-27).[3] In addition, the March 2016 CSE recommended the services of a full-time, individual paraprofessional (health) to address the student's needs related to "ambulation, feeding, and toileting"; the CSE further recommended the services of a full-time, individual paraprofessional to address the student's transportation needs (id. at pp. 26, 29). The March 2016 CSE recommended assistive technology devices and services (communication board and tactile visual cards), as well as support for school personnel on behalf of the student ("[m]obile chair, prone stander, gait trainer, communication device with single or double switch pad, tactile visual cards, elbow splints, right hand splint, ankle foot orthotics, [and an] adaptive commode for toileting" and monitoring and adjusting of lighting in academic settings due to the student's "susceptibility to seizure in response to bright lighting") (id. at pp. 26-27). Finally, the March 2016 CSE's recommendation for special transportation included the following accommodations or services: a paraprofessional, a lift bus, air conditioning, limited travel time (less than 60 minutes), walking aids, and a regular size wheelchair (id. at p. 29).

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[1] According to the March 2016 IEP, at the time of the CSE meeting, the student was "parentally placed at the International Academy of Hope" (iHope) for the 2015-16 school year (Parent Ex. B at p. 1). The March 2016 IEP noted further that the student attended a 6:1+1 classroom at iHope with a 1:1 paraprofessional (id.). Given the student's date of birth he would, chronologically, have been a first grade student during the 2016-17 school year (id. at p. 1).

[2] The student's eligibility in March 2016 for special education programs and related services as a student with a TBI is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

[3] In the present levels of performance and individual needs section of the March 2016 IEP, the CSE described the student as "non-verbal," "non-ambulatory," and having received the diagnoses of "Spastic Quadriplegic Cerebral Palsy, Severe Global Psychomotor Delay and Generalized Epilepsy," as well as "brain hemorrhage, anemia, hydrocephalus, . . . and "Cortical Vision Impairment" (Parent Ex. B at pp. 1-2). According to the IEP, the student's "brain injury severely affect[ed] his level of independence, self-help skills, general problem solving, speech and language skills, vision, cognition, social and emotional skills and gross and fine motor function" (id. at p. 2). In the management needs section of the March 2016 IEP, the CSE described additional diagnoses the student had received, including "Retinopathy of Prematurity (ROP), history of orchiopexy meningitis, Failure to Thrive (FTT), abnormal renal ultrasounds, allergic rhinitis, microcephaly, and [Gastroesophageal Reflux Disease (GERD)]" (id. at p. 11). The March 2016 IEP included numerous strategies to address the student's management needs in the areas of health and medical, activities of daily living (ADL) skills, special education, OT, speech-language, and vision (including "Visual Field Preferences," "Lighting Conditions," "Latency," "Tolerance to Background Noise when Visually Focusing," "Complexity of the Array," "Application of a technique that involve[d]a Look first and then Reach approach," "Movement," "Visual Novelty," and "Distance") (id. at pp. 11-13).

A. Due Process Complaint Notice

In a due process complaint notice dated July 9, 2018, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (see Parent Ex. A at pp. 1-3).[4] Relevant to this appeal, the parent requested an interim order concerning the student's pendency (stay-put) placement (id. at pp. 1-2). The parent indicated that without such an order she would "suffer from lack of funding for the services and program" for the 2018-19 school year (id.). The parent asserted that the student's March 2016 IEP formed the basis for his pendency placement during the instant impartial hearing and requested that the district "prospectively pay" for the costs of the student's tuition at "iBrain (which include[d] academics, therapies and a 1:1 professional during the school day) and special transportation accommodations (which include[d] limited travel time of 60 minutes, wheelchair-accessible vehicle, [air conditioning], flexible pick-up/drop-off schedule and a Paraprofessional[])]" (id. at p. 2).

B. Impartial Hearing Officer Decision

On July 30, 2018, the parties proceeded to an impartial hearing and, over the course of three dates concluding on September 13, 2018, presented evidence concerning the student's pendency placement (see generally Tr. pp. 1-80; Parent Exs. A-C; Dist. Exs. 1-4; IHO Ex. I). Thereafter, in an email dated September 28, 2018, the parent requested that the IHO recuse herself "from the upcoming impartial hearing for this school year in light of . . . pending appeals" filed by the parent's attorney in two unrelated matters decided by the same IHO (IHO Ex. I at p. 1). The parent alleged that the IHO's "view that none of the parents who unilaterally transferred his or her child from iHOPE to iBRAIN for the 2018-2019 school year should have done so w[ould] inevitably color [the IHO's] judgment" of this student's request for pendency relief for the 2018-19 school year or, "at the very least, create the appearance of adverse bias in this regard" (id. at pp. 1-2). After referencing a third unrelated, previously decided matter involving the IHO, the parent characterized the IHO's view as a "troubling pattern of predetermined outcomes," which justified the request for the IHO's recusal in this matter (id. at p. 2). The district, via email dated September 28, 2018, opposed the parent's request for recusal (id. at p. 1). The IHO responded to the parent's email on September 30, 2018, and denied the parent's request that she recuse herself (id.). The IHO explained that she had "no vested interest in whether the appeals [were] sustained or dismissed" and that an appeal of an IHO's "interim pendency order d[id] not give rise to a conflict of interest or a personal/professional interest that would conflict with an IHO's impartiality" (id.). As a final note, the IHO indicated that the parent's "statements [were] inaccurate" and her "accusations [were] unfounded" (id.).

In an interim order dated October 8, 2018, the IHO denied the parent's request for a finding that iBrain constituted the student's pendency placement (see Interim IHO Decision at pp. 5-7). While agreeing with the parent's position that pendency was a program and not found in the '"bricks and mortar' of a particular physical location," the IHO noted that the parent failed to present any "legal authority" in support of the contention that allowed the parent to "transfer" the student's

[4] Testimony at the impartial hearing revealed that the student began attending iBrain on July 9, 2018—the first day of the 2018-19 school year at iBrain (see Tr. pp. 442-43).

pendency placement to a "different unilateral placement" (id. at p. 5). The IHO disagreed with the parent's position that the March 2016 IEP formed the basis for the student's pendency placement and services because the evidence did not establish that the IEP had ever been implemented (id. at pp. 5-6). Notably, the IHO found that the March 2016 IEP recommended the implementation of the student's IEP at a State-approved nonpublic school for the 2016-17 school year (id.). Moreover, the evidence in the hearing record revealed that for the 2017-18 school year, iHope—where the student had been attending since the 2015-16 school year—had developed and implemented its own IEP for the student (id. at p. 6). According to the IHO, the evidence in the hearing record further established that the district did not fund the student's placement at iHope, and therefore, iHope—as the parent's unilateral placement—could not form the basis for the student's pendency placement going forward (id.).

Next, the IHO determined that, even if the evidence in the hearing record demonstrated that the March 2016 IEP was the last agreed-upon IEP between the parties, the evidence did not establish that the "iBrain program [was] substantially similar to iHope or that iBrain [was] implementing the March 2016 IEP" (Interim IHO Decision at p. 6). The IHO noted, for example, that the iBrain program did not provide parent counseling and training services or vision education services when the student began attending iBrain (id.). The IHO found the vision education services to be a "critical service" for the student and an "important part of his IEP," which required the IHO to conclude that the iBrain program was not substantially similar to the iHope program and, moreover, that iBrain was not implementing the student's March 2016 IEP (id.). Based upon the evidence in the hearing record, the IHO also found that iBrain changed the delivery of one session per week of the student's recommended speech-language therapy from a group setting to an individual setting (id. at pp. 6-7). According to the IHO—and contrary to the parent's contention—the delivery change did not constitute a "positive benefit or an increase in services," but instead, "deprived [the student] of the benefits of group speech-language therapy (such as working on the pragmatic speech goals contained [in the] March 2016 IEP)" (id.). Finally, the IHO indicated that iBrain was not providing the student with the "adaptive physical education, assistive technology and [the] 'required equipment'" recommended in the March 2016 IEP or the services of a full-time, 1:1 "health paraprofessional" (id. at p. 7). In light of these additional findings, the IHO concluded that the iBrain program was not implementing the March 2016 IEP (id.). Consequently, the IHO concluded that iBrain could not constitute the student's pendency placement, and the IHO denied the parent's request for an ordering directing the district to fund the student's placement at iBrain as a pendency placement (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in finding that the parent could not transfer the student from one nonpublic school (iHope) to another nonpublic school (iBrain) for purposes of his pendency placement even if the student's current placement at iBrain was substantially similar to the program recommended in the last agreed upon IEP, dated March 2016. In support of this contention, the parent attaches additional documentary evidence to the request for review for consideration on appeal (see generally Req. for Rev. Ex. AA).[5] The parent also argues that the

[5] Turning to the parent's additional documentary evidence identified as "Supplemental Exhibit AA" submitted

IHO erred in finding that iBrain was not implementing the March 2016 IEP. Next, the parent contends that the IHO erred in failing to recuse herself from this matter in light of the IHO's pendency placement determination in this case, and attaches additional documentary evidence for consideration on appeal to support this contention (see generally Req. for Rev. Ex. BB).[6] As relief, the parent seeks an order directing the district to directly pay iBrain for the costs of the student's tuition for the 2018-19 school year, and to pay the costs of special transportation accommodations for the student for the 2018-19 school year.

In its answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.

In a reply, the parent responds to the assertions made in the district's answer, largely by rearguing the claims set forth in the request for review, which is beyond the permissible scope of a reply as permitted by State regulation (see 8 NYCRR 279.6[a]; compare Req. for Rev. at pp. 4-10, with Reply at pp. 1-8). The parent also attaches additional documentary evidence to the reply for consideration on appeal (see generally Reply Exs. CC-DD). Accordingly, neither the reply nor the additional documentary evidence submitted with the parent's reply will be considered on appeal (see 8 NYCRR 279.6[a]).[7]

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];

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with the request for review, 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]). Here, while it appears that the parent could not have offered a copy of the document identified as "Supplemental Exhibit AA"—a purported iBrain IEP for the 2018-19 school year dated November 19, 2018—at the time of the impartial hearing conducted for the pendency placement, the IEP is not now necessary in order to render a decision in this matter, and therefore, I decline to exercise my discretion to consider this document.

[6] On this point, the parent submitted a document identified as "Supplemental Exhibit BB," which, upon review, was already entered into evidence at the impartial hearing as "IHO Exhibit I": to wit, a copy of the email exchanges between the parties and the IHO regarding recusal. Thus, it is not now necessary to consider the parent's proffered document identified as "Supplemental Exhibit BB" into evidence.

[7] State regulation limits the scope of the parent's reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer, . . . , or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, neither the request for review nor the district's answer include any of the necessary conditions precedent triggering the parent's right to compose a reply.

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]; T.M., 752 F.3d at 170-71; 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 Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see T.M., 752 F.3d at 171 [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"], citing Concerned Parents, 629 F.2d at 756; see also 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).

Once a pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Schutz, 290 F.3d at 484-85; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; Murphy, 86 F. Supp. 2d at 366).

VI. Discussion

A. Request for Additional Evidence

Both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; see, e.g., E.T. v. Bureau of Special Educ. Appeals, 2016 WL 1048863, at *12-*13 [D. Mass. Mar. 11, 2016] [considering additional evidence regarding a purported settlement agreement not accepted by the IHO]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]). Upon review of the evidence in the hearing record—and notwithstanding the parent's proffer of documents as additional evidence with the request for review—the undersigned determined that it was necessary to seek further additional evidence from the district pursuant to 8 NYCRR 279.10(b). This was due, in part, because the parent, in the memorandum of law entered into the hearing record as evidence, argued facts and made assertions based upon documents that were not submitted into evidence during the impartial hearing despite being in existence at that time (see Interim IHO Decision at p. 3 n.2; see generally Parent Ex. C).[8] More specifically, to support the contention that the March 2016 IEP formed the

[8] While SROs have considered the factor of whether the additional evidence was available or could have been offered at the time of the impartial hearing, this factor is not necessarily dispositive in every case (Application of a Student with a Disability, Appeal No. 08-030). This factor serves to encourage full development of an adequate hearing record at the first tier to enable an IHO to make a correct and well-supported determination, and to prevent the party submitting the additional evidence from "sandbagging"—that is, withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Walkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). That factor

basis of the student's pendency placement as the last agreed-upon IEP, the parent argued in the memorandum of law that the district "mischaracterized the nature of the 10-day notice" related to the March 2016 IEP as a "rejection" of the IEP (Parent Ex. C at pp. 3-5). The parent also argued that the district "offer[ed] to settle with [her] based off the 10-day notice," and "through the settlement, the [district] ultimately agreed with the decision of [the parent] to have the IEP implemented at iHOPE and funded the tuition and related services" (id. at p. 5).

The undersigned further determined it was necessary to seek additional evidence from the district, in part, because the IHO—who noted in the interim decision that the parent referenced the aforementioned facts and assertions based upon documents not in evidence—ultimately concluded that iBrain did not constitute the student's pendency placement but thereafter failed to identify any pendency placement for the student (see generally Interim IHO Decision).

Thus, in a letter to both parties dated December 3, 2018, the undersigned directed that the district provide copies of the 10-day notice and stipulation agreement referenced in the parent's memorandum of law, as neither had been offered into evidence before the IHO. Given that the potential existed that the March 2016 IEP might not represent the last agreed-upon IEP, the undersigned further directed that the district provide copies of the student's IEPs for the 2014-15, 2015-16, and 2017-18 school years—as well as any stipulations or agreements between the parties, or any decision by an IHO or an SRO pertaining to the student's placement during those school years—as such documents might have some bearing on determining the student's pendency placement. The letter also offered both parties with an opportunity to submit a written argument no later than December 10, 2018 if either party supported or opposed the consideration of such evidence by the SRO.

In compliance with this request, the district provided copies of the following documents: a 2014-15 IEP (dated December 16, 2014) (Supp. Ex. 1); a 2015-16 IEP (dated May 10, 2015) (Supp. Ex. 2), a 2015-16 IEP (dated February 5, 2016) (Supp. Ex. 3), and a Stipulation of Settlement for the 2015-16 school year (dated March 24, 2016) (Supp. Ex. 4); a 2016-17 IEP (dated March 30, 2016) (Supp. Ex. 5), a 10-day notice letter (dated June 23, 2016) (Supp. Ex. 6), and a Stipulation of Settlement for the 2016-17 school year (dated March 3, 2017) (Supp. Ex. 7); two 2017-18 IEPs (both dated May 23, 2017) (Supp. Exs. 8-9)[9]; and a 2018-19 IEP (dated May 25, 2018) (Supp. Ex. 10). By letter dated December 10, 2018, the district articulated support for the SRO's consideration of the 10-day notice letter related to the 2016-17 school year, as it revealed the parent's intention to "enroll" the student at iHope for the 2016-17 school year, to challenge the 2016-17 IEP, and to reject the recommendation to implement the student's IEP in a State-approved nonpublic school.

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is of less weight in this instance, where both parties appeared to have some awareness of a stipulation of settlement related to the March 2016 IEP for the 2016-17 school year, but neither party—despite questioning by the IHO—could provide any level of concrete detail concerning the terms of the stipulation during the impartial hearing (see Tr. pp. 21-34).

[9] Although both of the 2017-18 IEPs reflect the same IEP meeting date of May 23, 2017, one IEP identified June 7, 2017, as the implementation date and the other IEP identified July 3, 2017 as the implementation date. For ease of reference, citations to the 2017-18 IEP to be implemented in June 2017 will be identified as "Supp. Ex. 8" and the 2017-18 IEP to be implemented in July 2017 will be identified as "Supp. Ex. 9."

Therefore, the district contended that the 10-day notice letter was relevant and should be considered by the SRO.

However, the district objected to the SRO's consideration of the Stipulations of Settlement for both the 2015-16 and 2016-17 school years on the basis of the respective confidentiality provisions in each agreement. The district asserted that neither stipulation was relevant because the instant matter did not involve the enforcement of either stipulation. The district also argued that the stipulations were not relevant to the student's pendency placement. The district asserted that the stipulations expressly stated that iHope could not be considered as the student's then-current educational placement for the purpose of pendency. Next, the district argued that, because the parent's pendency arguments focused on the belief that the March 2016 IEP formed the basis for the student's pendency placement, a review of IEPs for the 2015-16, 2016-17, 2017-18, and 2018-19 school years—which the parent had challenged—was not necessary. As a final point, however, the district indicated that it did not appear that the parent had challenged the student's 2014-15 IEP.[10]

Faced with the potential for finding, as the IHO did, that the March 2016 IEP may not form the basis for the student's pendency placement at iBrain, together with the unmistakable conclusion that the hearing record lacked any other document or argument—or, for that matter, any other basis upon which to determine the student's pendency placement—it becomes inescapable that the stipulations themselves, as well as the IEPs provided as additional evidence, are necessary to resolve the dispute. Consequently, I will accept the submitted additional evidence due to the necessity of reviewing the stipulations of settlement and IEPs in order to determine whether any of the documents would assist in establishing the student's then-current educational placement should the parent's contention about the March 2016 IEP fail. In particular, it is critical to examine the language of the settlement stipulations to determine if any of the agreements covering the 2015-16 and 2016-17 school years indicated the parties' intent to establish iHope—and thereafter, iBrain as a substantially similar program—as the student's pendency placement, or to otherwise limit the effect of the student's placement at iHope with regard to the IDEA's pendency provisions (see generally Supp. Exs. 1-10).[11]

Having determined that it is necessary to accept the stipulations of settlement and IEPs as additional evidence, it is now incumbent to address the objections to the consideration of these documents expressed by the district. The district argues that the stipulations are inadmissible in

[10] In a letter dated December 13, 2018 sent via facsimile only to the Office of State Review, the parent submitted written arguments in response to the district's letter of December 10, 2018. The parent's letter did not, however, include any objections or otherwise assert any position with regard to whether the SRO should or should not consider any of the documents requested as additional evidence. To the extent that the parent's letter could be construed as such, the parent was required to file such objections or position no later than December 10, 2018; in failing to do so in a timely manner, the parent's letter will not be considered for that purpose.

[11] As noted above, the pendency provision is in the nature of an automatic injunction and requires no particular showing on the part of the moving party and no balancing of the equities; thus, to base a determination of a student's stay-put placement on evidentiary technicalities would undermine this automatic and absolute nature (see Zvi D., 694 F.2d at 906; Arlington Cent. Sch. Dist., 421 F. Supp. 2d at 696).

accordance with confidentiality provisions contained in the stipulations of settlement. Initially, the formal rules of evidence applicable in civil proceedings generally do not apply in impartial hearings (Council Rock Sch. Dist. v. M.W., 2012 WL 3055686, at *6 [E.D. Pa. July 26, 2012]; see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 68 [2d Cir. June 24, 2013]; Cowan v. Mills, 34 A.D.3d 1166, 1167 [3d Dep't 2006]; Tonette E. v. New York State Office of Children & Family Servs., 25 A.D.3d 994, 995-96 [3d Dep't 2006]; Matos v. Hove, 940 F. Supp. 67, 72 [S.D.N.Y. Sept. 25, 1996], citing Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 [7th Cir. 1977]). In any event, the confidentiality provisions of the stipulations at hand do not, as the district suggests, preclude their consideration in this proceeding especially when the same argument (albeit interposed by the parent) was rejected by an SRO in a previous appeal initiated by the district (see Application of a Dept. of Educ., Appeal No. 16-017).

Here, the stipulations of settlement for the 2015-16 and 2016-17 school years contain the same language regarding confidentiality: "This stipulation is confidential and shall not be admissible in, nor is it related to any other litigation, proceeding, or settlement negotiation, except in a subsequent action, brought by either party, to enforce the terms of this stipulation" (Supp. Exs. 4 at p. 5; 7 at p. 5).[12]

Notwithstanding the confidentiality provisions of the stipulations of settlement, there are broader public policy concerns to be considered where an agreement between the parties can be used to interfere with the fact-findings obligations of the IHO and SRO in a proceeding relating to the identification, evaluation, or placement of a student with a disability (8 NYCRR 200.5[j][3][vii]; see 34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). While public policy does not have a precise definition, agreements which tend to injure the public good as determined through consideration of statutes or regulations are violative of public policy (Stamford Bd. of Educ. v. Stamford Educ. Ass'n, 697 F.2d 70, 73 [2d Cir. 1982]; see Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 149 [3d Cir. 2004]). Courts have stricken overreaching confidentiality provisions that violate public policy (see Lopez v. Ploy Dee, Inc., 2016 WL 1626631, at *3 [S.D.N.Y. Apr. 20, 2016]; Souza v. 65 St. Marks Bistro, 2015 WL 7271747, at *4 [S.D.N.Y. 2015 Nov. 6, 2015]). The conduct of impartial hearings under the IDEA serve important state interests (Does v. Mills, 2005 WL 900620, at *6 [S.D.N.Y. Apr. 18, 2005]; Blackwelder v. Safnauer, 689 F. Supp. 106, 117 [N.D.N.Y. 1988]).

[12] To be clear, the language used in this confidentiality clause, while not a verbatim recitation of the language used in the stipulations of settlement examined in Application of a Dept. of Educ., Appeal No. 16-017, reflects the same meaning and content (compare Supp. Ex. 4 at p. 5, and Supp. Ex. 7 at p. 5, with Application of the Dep't of Educ., Appeal No. 16-017 [identifying the confidentiality clauses, respectively, as stating that '"[e]xcept with respect to the enforcement of any of the matters stated herein, this [s]tipulation shall not be admissible in, and is no[t] related to, any other proceedings, litigation or settlement negotiations, whether between the parties or otherwise"'; '"[e]xcept with respect to the enforcement of any of the matters stated herein, or as provided in this paragraph, this stipulation shall not be admissible in, and is not related to, any other proceedings, litigation or settlement negotiations, whether between the parties or otherwise"'; and '"[t]his stipulation is confidential and shall not be admissible in, nor is it related to any other litigation, proceeding, or settlement negotiation, except in a subsequent action, brought by either party, to enforce the terms of this stipulation"']).

With respect to the question of the student's pendency placement, an important consideration is whether the parties came to an agreement as to the student's pendency placement superseding the last agreed-upon IEP (Arlington Cent. School Dist., 421 F. Supp. 2d at 696-97). Where there is evidence available regarding the parties' intention as to the student's pendency placement, it is incumbent upon the IHO and SRO to receive and analyze any agreement regarding the establishment or non-establishment of a pendency placement in order to make a determination regarding the student's then-current educational placement. A confidentiality agreement that is interpreted as withholding such information from an IHO or SRO and thus impeding the due process provisions of the IDEA is overbroad and violative of public policy in that it serves as an obstacle to the administrative hearing officer's fact-finding obligations and prevents the officer from making a correct and informed determination under federal and State law. Accordingly, I will consider the stipulations of settlement for both the 2015-16 and 2016-17 school years, notwithstanding the district's belief that the stipulations of settlement should have been withheld from the administrative hearing officers. To allow the confidentiality provisions of these stipulations to potentially be used as a means to hide important information regarding the circumstances of the student's placement from administrative hearing officers would interfere with the IHO's and SRO's duties to complete the hearing record and gather information necessary to render a decision. Similarly, to the extent that the student's IEPs either prior to or subsequent to the March 2016 IEP (i.e., for the 2014-15, 2015-16, 2017-18, and 2018-19 school years) may contain evidence that would establish the student's pendency placement if the March 2016 IEP failed to do so, the same rationale applies and weighs in favor of considering those IEPs as well, notwithstanding the district's objections thereto.

B. IHO Bias and Request for Recusal

The parent argues that the IHO erred in failing to recuse herself from this matter in light of the IHO's pendency placement determination. In addition, the parent asserts that, as evidence of the IHO's bias or inability to remain fair and impartial, the IHO "created new, albeit invalid, law for the explicit purpose of erecting her own personal legal hurdle for [the] [p]arent to stumble over" (Req. for Rev. at p. 10).[13] The parent also asserts that the IHO's creation of law, coupled with the IHO's failure to hold a pendency hearing for a "classmate" of the student's in an unrelated proceeding, warrants the IHO's recusal as relief.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest

[13] The parent's attorney made the same argument in a previous appeal, which an SRO expressly rejected as a basis upon which to conclude that the IHO demonstrated bias or would otherwise have warranted the IHO's recusal from that impartial hearing (see Application of a Student with a Disability, Appeal No. 18-116).

that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Initially, State regulations governing the practice of appeals for students with disabilities limit appeals from an IHO's interim determination to those involving pendency disputes (8 NYCRR 279.10[d]; see Educ. Law § 4404[4]). In an email dated September 30, 2018, the IHO denied the parent's request that she recuse herself (see IHO Ex. 1 at p. 1). To the extent that the parent appeals from the IHO's email/decision denying the parent's request for the IHO to recuse herself, State regulation does not allow for an interlocutory appeal on issues other than pendency disputes and that portion of the parent's appeal must be dismissed as premature (see Application of a Student with a Disability, Appeal No. 11-138).

However, State regulation also provides that a "party may seek review of any interim ruling, decision, or failure or refusal to decide an issue" in an appeal from an IHO's final determination (8 NYCRR 279.10[d]). Thus, since the parent, if necessary, may appeal the same issue of the IHO's recusal after the IHO closes the hearing record and issues a final determination on all the remaining issues in the proceeding, the issue will be addressed here out of an abundance of caution and for the purpose of judicial economy.

First, a review of the transcript reveals that both parties were treated fairly, with courtesy and respect by the IHO during the impartial hearing (see Tr. pp. 1-80). As to the parent's claim that the IHO intentionally created and applied an inappropriate legal standard to deny the student's pendency placement at iBrain, the hearing record and the IHO's interim decision show that the IHO, in making the decision, cited to pertinent legal authority relevant to the issue of pendency and attempted to apply it in a fair and neutral manner (see Interim IHO Decision at pp. 4-7).

Essentially, the only evidence of bias that the parent could point to is that the IHO did not issue a ruling in her favor that iBrain was the student's pendency placement. The parent's evidence and proffered argument fall markedly short of bias (see, e.g., Application of a Student with a Disability, Appeal No. 18-116). To the extent that the parent disagrees with the conclusions reached by the IHO regarding the pendency ruling, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083). In this case, even if the IHO misstated or misapplied the laws applicable to pendency, it would not be an appropriate basis to require the IHO's recusal (see Liteky, 510 U.S. at 555). Accordingly, the parent's claims with respect to IHO bias and the necessity for the IHO's recusal in the matter are dismissed.

C. Pendency

Turning to the crux of the parties' dispute, the parent continues to press the argument that the March 2016 IEP—as the last agreed-upon IEP—forms the basis to conclude that the student's current educational program at iBrain is substantially similar to the March 2016 IEP. In support of this, the parent asserts that the "mandates" of the March 2016 IEP are being implemented at iBrain. The parent further contends that, as such, she is entitled to a determination that iBrain constitutes the student's pendency placement and for an order directing the district to fund the pendency placement at iBrain.[14] As explained herein, the parent's assertion that the March 2016 IEP constituted the student's last agreed-upon IEP and therefore, his pendency placement, is without merit and must be dismissed.

As noted above, the Second Circuit has described three variations concerning the definition of "then-current educational placement": (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, 653 Fed. App'x at 57-58, quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71; see E. Lyme Bd. of Educ., 790 F.3d at 440; Susquenita Sch. Dist., 96 F.3d at 83; Letter to Baugh, 211 IDELR 481). Here, the parent's attorney argued at the impartial hearing that the student's pendency placement at iBrain arose from the March 2016 IEP (see Tr. pp. 21-23). The parent's attorney explained the basis for this argument, asserting that the student's placement at the "iHope school was based upon" the March 2016 IEP and because iBrain was "substantially similar to the iHope school," the student's pendency placement was at iBrain (id.). The IHO noted, however, that the March 2016 IEP "call[ed] for a New York State-approved [nonpublic school]" and asked the parent's attorney whether iHope was a State-approved nonpublic school (Tr. pp. 23-24). The parent's attorney admitted that iHope was not a State-approved nonpublic school, but stated that "[iHope] fulfilled all of the mandates of the March 30th, 2016 IEP" and those mandates were "currently" being provided "through iBrain" (Tr. p. 24). Next, the IHO asked whether the district had funded the student's placement at iHope; the parent's attorney stated that he "believe[d] there was a settlement . . . [b]ecause the placement created . . . a dispute" (id.).[15]

[14] In a footnote in the request for review and accompanying memorandum of law, the parent contends that, if the SRO finds that the "pendency relief should not be granted with respect to any portion of [the student's] current educational program or related support services," the parent is entitled to "pendency relief insofar as [the SRO] determines pendency is warranted for some services, as pendency relief is divisible by each individual service at issue" (Req. for Rev. at p. 9 n.1; see Parent Mem. of Law at p. 14 n.3). As this argument is raised only in a footnote, it must be considered waived at this stage of the proceedings (see, e.g., United States v. Quinones, 317 F.3d 86, 90 [2d Cir. 2003] [holding that raising an argument only in a footnote is insufficient to preserve an issue for review on appeal], citing United States v. Restrepo, 986 F.2d 1462, 1463 [2d Cir. 1993]; see also R.R. v. Scarsdale Union Free Sch. Dist., 366 Fed. App'x 239, 241-42 [2d Cir. Feb. 18, 2010]; 8 NYCRR 279.8[c]; see generally Application of a Student with a Disability, Appeal No. 18-119).

[15] When the IHO asked the parent's attorney about the status of any due process proceedings related to the 2017-18 school year, the parent's attorney stated that he "believe[d] there [was] an appeal pending," but could not otherwise inform the IHO of any specific information (Tr. pp. 24-25, 27-34; see generally Supp. Exs. 8-9).

Upon further questioning by the IHO in an attempt to discern whether the March 2016 IEP—which the parent's attorney claimed to be the last agreed-upon IEP establishing pendency—had actually been disputed by the parent, the parent's attorney indicated that the March 2016 IEP was a "cooperative effort" and not "something the parents developed on their own" (Tr. pp. 29-30). The parent's attorney then clarified that the "placement" was disputed, "not the actual IEP, not the mandates of the IEP" and specifically, the "placement at iHope" was disputed (Tr. pp. 30-32).

With respect to the district's position on pendency, the district's attorney argued that "iHope was a placement chosen by the parents for the [2016-17] and [2017-18] school year[s]" (Tr. p. 25).[16] The district's attorney continued, asserting that, to the extent the parent claimed the student's pendency placement was based upon the March 2016 IEP "and placement at iHope," the parent still had the option to continue the student's enrollment at iHope because the "institution" remained "in business" (id.). Moreover, the district's attorney argued that the parent was "not free to unilaterally transfer their child from [one] school to another" and additionally, "these programs [were] not necessarily substantially similar" (Tr. pp. 25-26). The district's attorney added that the parent's decision to enroll the student at iBrain constituted a "new unilateral placement," and the parent bore the burden to establish that it was an appropriate unilateral placement (Tr. p. 26).

However, upon review of the evidence in the hearing record, the parent did not provide any evidence to support her assertions that the March 2016 IEP was the last agreed-upon IEP or that iHope implemented the March 2016 IEP (see generally Tr. pp. 1-80; Parent Exs. A-C; Dist. Exs. 1-5; IHO Ex. I). Notably, the director of special education at iBrain (director), who had been employed at iHope for July through August 2017 and who had attended the CSE meeting to develop the student's March 2016 IEP, testified that iHope developed and implemented its own IEP for the student during the 2017-18 school year (see Tr. pp. 36, 38-39, 43, 48-50, 61; see generally Parent Ex. B).[17] Furthermore, the parent's attorney admitted at the impartial hearing that iHope was not a State-approved nonpublic school and the March 2016 IEP recommended the implementation of the student's IEP in a State-approved nonpublic school (see Tr. p. 24; Parent Ex. B at pp. 29, 31-32). In addition, the parent's 10-day notice letter related to the March 2016 IEP indicated that "it [was] [the parent's] understanding that there [was] no public or private school placement the [district] c[ould] recommend which would be appropriate for [the student]" (Supp. Ex. 6 at p. 1 [emphasis added]). Thus, contrary to the parent's claim on appeal that the March 2016 IEP was never in dispute, the parent's 10-day notice letter indicates that the parent directly disputed the district's recommendation for a State-approved nonpublic school, and as a result, the March 2016 IEP could not have been the last agreed-upon placement for purposes of pendency (see Tr. pp. 29-32; Parent Ex. B at pp. 29, 21-32; Supp. Ex. 6 at p. 1; see also Application of a Student with a Disability, Appeal No. 18-122).

While not necessary to this analysis, even assuming for the sake of argument that the March 2016 IEP was the last agreed-upon IEP to establish pendency, the hearing record does not establish

[16] Later, the parent's attorney admitted that both iHope and iBrain were "unilateral placement[s]" (Tr. p. 27).

[17] The director began working at iBrain in the "very beginning of June" 2018 (Tr. p. 50).

that iBrain could be found to be the student's pendency placement by virtue of being substantially similar to the March 2016 IEP program and services. 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 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). At the impartial hearing, the director's testimony revealed that, while iBrain provided the student with some of the same special education and related services mandated in the March 2016 IEP, the hearing record lacks evidence that iBrain was providing the student with vision education services, parent counseling and training (which appears to have become available in August 2018), the numerous strategies recommended for the student in the management needs section of the March 2016 IEP, a 1:1 paraprofessional (health), or adapted physical education (compare Tr. pp. 39-40, 43-46, 51, 59-60, with Parent Ex. B at pp. 3-7, 10, 12-14, 26). The hearing record also lacks evidence to establish, as noted by the IHO, that iBrain provided the student with the recommendations for assistive technology and devices or the supports for school personnel on behalf of the student mandated in the March 2016 IEP (compare Tr. pp. 39-40, 43-46, 51, 59-60, with Parent Ex. B at pp. 26-27, and IHO Decision at p. 7). Significantly, the March 2016 IEP includes a recommendation to implement the IEP in a State-approved nonpublic school, while iBrain is not a State-approved nonpublic school (compare Parent Ex. B at pp. 29, 31-32, with Tr. p. 24). And finally, the director testified at the impartial hearing that iBrain altered the delivery of the student's speech-language therapy services by removing the one group session per week of therapy and adding it as a fifth individual session per week of therapy (see Tr. p. 40). In sum, the evidence does not support a finding that the program offered at iBrain for the 2018-19 school year is substantially similar to the program offered in the March 2016 IEP. Thus, even assuming that the March 2016 IEP established the student's pendency placement, the hearing record lacks sufficient evidence that the program offered at iBrain for the 2018-19 school year was substantially similar to the March 2016 IEP.

Moreover, the hearing record contains no evidence establishing that the parties agreed to the student's educational placement at iHope during the due process proceedings or that a prior unappealed IHO decision established the student's current educational placement at iHope for purposes of pendency (see Schutz, 290 F.3d at 483-84; Murphy, 86 F. Supp. 2d at 366; Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197). Instead, a plain reading of the stipulations for both the 2015-16 and 2016-17 school years (see Supp. Exs. 4 at p. 4; 7 at p. 5) prevents the stipulation agreements from being employed to establish iHope as the student's pendency placement under relevant case law (see Zvi D., 694 F.2d at 906-08 [holding that a stipulation limited to a single school year did not constitute district placement of the student or establish that the placement stipulated to was the student's "current educational placement"]; Arlington Cent. Sch. Dist., 421 F. Supp. 2d at 696-97 [noting that "[a]n agreement in which a board

of education agrees to pay tuition to a private school makes that school the child's pendency placement unless the stipulation is explicitly limited to a specific school year or definite time period"], citing Zvi D., 694 F.2d at 908; Evans, 921 F. Supp. at 1187-89 [holding that an agreement to fund the student's attendance at a private school was not bound by a definite time limitation and therefore established pendency in the nonpublic school]; see also K.D. v. Dep't of Educ., 665 F.3d 1110, 1118-21 [9th Cir. 2011] [distinguishing a district's agreement to fund a student's nonpublic school tuition for a limited period of time from an affirmative agreement by the district to place the student at the nonpublic school]; Stanley C. v. M.S.D. of Southwest Allen County Schs., 2008 WL 2228648, at *7-*8 [N.D. Ind. May 27, 2008]; K.G. v. Plainville Bd. of Educ., 2007 WL 80671, at *2 [D. Conn. Jan. 9, 2007]; but see Gabel v. Bd. of Educ., 368 F. Supp. 2d 313, 324-26 [S.D.N.Y. 2005] [determining that a settlement agreement that was limited to a single school year nonetheless established the student's pendency in the nonpublic school, distinguishing its facts from those in Zvi D. and declining to follow its result]).

Having disposed of the parent's contentions that the March 2016 IEP formed the basis for the student's pendency placement as the last agreed-upon IEP or through its implementation at iHope (and that iHope cannot form the basis for the student's pendency placement), the next inquiry focuses on what, then, constitutes the student's pendency placement. Because the parent has challenged all of the student's IEPs beginning with the 2015-16 school year through the current 2018-19 school year and no other IHO or SRO decision has been issued establishing a pendency placement for the student, the evidence in the hearing record points to only one option: to wit, the student's 2014-15 IEP dated December 2014 as the only unchallenged IEP (see Supp. Ex. 1 at p. 1; see generally Tr. pp. 1-80; Parent Exs. A-C; Dist. Exs. 5; IHO Ex. I). In the district's December 10, 2018 letter to the Office of State Review, the district specifically indicated that the parent had not challenged the student's 2014-15 IEP, and the parent did not respond to this assertion.

According to the 2014-15 IEP, the Committee on Preschool Special Education (CPSE) recommended a 12-month school year program in a 6:1+2 special class placement with a 1:1 paraprofessional at an "Approved Special Education Program" (see Supp. Ex. 1 at pp. 1, 30-31, 33). The December 2014 CPSE also recommended four 30-minute sessions per week of individual speech-language therapy (school-based), three 30-minute sessions per week of individual OT (school-based), three 30-minute sessions per week of individual PT (school-based), two 45-minute sessions per week of individual vision education services (school-based), and three 45-minute sessions per week of individual PT (home-based) (id. at p. 30). A review of the present levels of performance and individual needs section of the student's 2015-16 IEP reveals that the student received the CPSE services as mandated in the 2014-15 IEP (compare Supp. Ex. 1 at pp. 1, 30-31, 33, with Supp. Ex. 2 at p. 1, and Supp. Ex. 3 at p. 1). Therefore, the evidence in the hearing record establishes that the student's pendency placement for the instant proceedings must be based on the student's 2014-15 IEP as the last-agreed upon and implemented IEP.

VII. Conclusion

In summary, the evidence in the hearing record supports the IHO's determination that iBrain does not constitute the student's pendency placement at the time the due process complaint notice challenging the student's special education program and placement for the 2018-19 school

year was filed. Rather, the evidence in the hearing record demonstrates that the student's 2014-15 IEP constitutes the last agreed-upon IEP for the purpose of establishing the student's pendency services and placement in the instant matter.

THE APPEAL IS DISMISSED.

IT IS ORDERED that, unless the parties reach a different agreement, the student's pendency services and placement are the educational placement and program set forth in the student's 2014-15 IEP dated December 2014.

Dated: **Albany, New York**
December 26, 2018

CAROL H. HAUGE
STATE REVIEW OFFICER