The University of the State of New York

The State Education Department
State Review Officer
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No. 18-136

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Thomas W. MacLeod, Esq.

Brain Injury Rights Group, attorneys for respondent, by Moshe Indig, 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 district) 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 respondent's (the parent's) daughter's pendency (stay put) placement during a due process proceeding challenging the appropriateness of petitioner's recommended educational program for the student for the 2018-19 school year. The IHO found that the student's pendency placement was at the International Institute for the Brain (iBrain). 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 the International Academy of Hope (iHope) for the 2017-18 school year pursuant to a unilateral parent placement, which was the subject of a prior administrative hearing (Parent Ex. B).[1] At the conclusion of the prior impartial

[1] Due to the status of this matter as a dispute regarding a pendency determination, there has been little evidence entered into the hearing record and the factual background is derived from factual allegations in the parent's due process complaint notice and a prior IHO decision involving this student (see Parent Exs. A; B).

hearing, an IHO issued a decision, dated February 28, 2018, which ordered the district to fund the cost of the student's attendance at iHope for the 2017-18 school year, including related services, nursing services, and special transportation services (id. at pp. 9-10). According to the parent, a district CSE convened on May 10, 2018 to develop an IEP for the student for the 2018-19 school year, and recommended a 6:1+1 special class placement in a district special school (Parent Ex. A at pp. 2-3).

The parent initiated the instant administrative proceeding by filing a due process complaint notice dated July 9, 2018 (Parent Ex. A). The parent raised concerns about the adequacy of the CSE process and the student's IEP for the 2018-19 school year and asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (id.). As relevant here, the parent asserted that the student's right to a pendency placement was based on an unappealed February 2018 IHO decision (id. at p. 2; Parent Ex. B). The parent requested an interim order requiring the district "to prospectively pay for" the cost of the student's placement at iBrain, including "academics, therapies and a 1:1 professional" and a "private duty 1:1 nurse" during the school day, as well as special transportation services, including limited travel time (60 minutes), a wheelchair-accessible vehicle with air conditioning, a nurse, and a flexible pick up and drop off schedule (Parent Ex. A at p. 2).

After a prehearing conference held on August 10, 2018, the parties proceeded to an impartial hearing on October 12, 2018 and concluded the pendency portion of the hearing that day (Tr. pp. 1-89). At the hearing, the parties agreed that the unappealed IHO decision established the student's pendency placement (Tr. pp. 34-37). Counsel for the parent asserted that iBrain was capable of implementing the program set forth in the unappealed IHO decision and thus maintained the status quo (Tr. pp. 37-39). Counsel for the district contended that unless iHope was unavailable to the student, the parent was not permitted to unilaterally transfer the student to iBrain and receive public funding for that placement pursuant to pendency, regardless of whether it offered a substantially similar program to iHope (Tr. pp. 73-74).[2] Furthermore, counsel for the district asserted that the programs were not substantially similar (Tr. pp. 76-83; see Tr. pp. 8, 12). While counsel for the parent admitted certain disparities between the programs, he contended that they were not so great as to preclude a finding of substantial similarity in light of the student's overall program, argued that pendency was divisible, and conceded that the district would not be required to fund services not received by the student (Tr. pp. 76-86).

By interim decision dated October 15, 2018, the IHO found that the change in location from iHope to iBrain did not constitute a change in placement for purposes of pendency and directed the district to fund the student's placement (IHO Decision).[3] The IHO noted the parties' agreement that the student's pendency placement was established by the unappealed February 2018 IHO decision, and indicated that the program consisted of a "6:1:1 class; 1:1 full-time paraprofessional; 1:1 full-time nurse; 1:1 occupational therapy 3x60; 1:1 physical therapy 5x60;

[2] The district pointed to no authorities on point to support that argument that are consistent with the relevant authorities on the topic of stay-put, which are discussed in detail below.

[3] The notice at the end of the IHO's decision (see 8 NYCRR 200.5[j][5][v]) does not properly state the time to seek review of an IHO's decision by an SRO, instead stating the time to seek review under the practice regulations in effect prior to January 1, 2017 (compare IHO Decision at p. 5, with 8 NYCRR 279.4[a]).

1:1 speech and language therapy 4x60; vision education services 2x60; hearing education services 3x60; parent counseling and training 1x60 (per month); and, special transportation with limited time travel and a transportation nurse" (id. at p. 2; see Parent Ex. B at pp. 6-7, 9). Based on the testimony of the director of special education at iBrain (director), the IHO found that there were three "differences between the program mandated by [the unappealed IHO decision] and the program received by [the student] at iBrain": that the parent may have missed one session of parent counseling and training; that there were seven students in the student's classroom for a portion of the school day; and that the student "did not receive vision education services from a licensed provider" for the first three months she attended iBrain (IHO Decision at p. 3). The IHO indicated that the relevant inquiry was whether these differences were "fundamental to the placement and likely to materially and substantially affect the student's special education experience . . . within the context of the overall mandate" (id.). With respect to parent counseling and training, the IHO found the hearing record was unclear regarding whether one session was missed, but noted that the district agreed that this "was not, in and of itself, material to [the student's] placement" (id.). Regarding the number of students in the student's classroom, the IHO found that the director's testimony indicated that there was only an additional student for 30 minutes per day during morning meeting, which was not a material percentage of the school day and did not affect the student's educational experience (id.). With respect to iBrain's failure to provide vision education services by a licensed provider, the IHO found that "the vision education service is too small a component given the amount and variety of [the student's] mandated special education programming to constitute a fundamental change in her placement" (id. at pp. 3-4). Of particular relevance to the IHO was that the student's teacher and paraprofessional had worked with the student for several years, serving "to maintain stability and continuity for the student" (id. at p. 4). Accordingly, the IHO determined that because the "changes to [the student's] placement were not of a material nature so as to fundamentally alter her complex overall special education program, [the student's] current operative placement is her pendency placement as it substantially satisfies her last agreed upon placement based upon the" unappealed IHO decision, and directed the district to "continue to provide placement" for the student as specified by that decision (id.).[4]

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in directing the district to fund the cost of the student's placement at iBrain pursuant to pendency.[5] Initially, the district contends that, because the parent unilaterally removed the student from iHope to enroll the student in iBrain, the right to public funding pursuant to the stay put provision did not attach to the student's placement at iBrain absent evidence that iHope was no longer available. In addition, the district asserts that the hearing record does not establish that the student's program at iBrain is substantially similar to the student's program at iHope because iBrain did not provide parent counseling and training, a

[4] The IHO indicated that the district would "not be required to pay for the vision education services that were not received by" the student (IHO Decision at p. 4).

[5] The district failed to file and there is no indication it served a notice of request for review as required by State regulation, which serves the purpose of providing notice to the respondent of the requirements for preparing, serving, and filing an answer to the request for review (8 NYCRR 279.3). However, the parent was able to timely respond in an answer to the allegations raised in the request for review and there is no indication that the parent suffered any prejudice as a result of the district's noncompliance (see Application of a Student with a Disability, Appeal No. 17-068).

6:1+1 student-to-teacher ratio, or vision education services from the beginning of the 2018-19 school year.

In an answer, the parent generally argues that the IHO's decision should be upheld. In particular, the parent contends that there is no requirement that a nonpublic school be unavailable before she was permitted to transfer the student to a different nonpublic school providing a substantially similar educational program. Furthermore, the parent argues that the district failed "to secure a pendency placement that [could] implement [the] student's then-current educational placement," such as iHope, thus requiring the parent to identify a school to implement the student's current program. The parent next asserts that she established that the program provided to the student at iBrain is substantially similar to that provided to the student at iHope. Specifically, the parent contends that even if she did not receive some of the mandated parent counseling and training, that would not prevent the programs from being substantially similar. Regarding student-to-teacher ratio, the parent asserts that the fact that the class was oversubscribed did "not change the legal status of the class' ratio" as a 6:1+1 class "with a non-material 'variance.'" With respect to vision education services, the parent asserts that iBrain's failure to provide such services at the beginning of the school year was "already accounted for" by the IHO not awarding payment for those services prior to the time the student began receiving them. In any event, the parent asserts that the lack of vision education services did not prevent the programs from being substantially similar because it was "just one of myriad related services" provided to the student at iBrain and the student's teachers addressed her vision goals during instruction.[6]

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

[6] The parent submits as additional evidence the student's iBrain IEP for the 2018-19 school year and the student's iHope IEP for the 2017-18 school year (Answer Exs. AA; BB). As discussed further below, the iHope program constituting the student's pendency placement is set forth in the unappealed February 2018 IHO decision and is not in dispute (see Parent Ex. B). Similarly, the student's program at iBrain is described by the iBrain director's testimony (see Tr. pp. 48-52). The iBrain IEP was developed largely by the same professionals—including the director—who developed the iHope IEP for the prior school year, several months prior to the time iBrain began operating, and was "reviewed" by the director subsequent to issuance of the IHO decision and service of the district's request for review in this matter (compare Answer Ex. AA at pp. 1, 42, with Tr. pp. 12-13, 47, and Answer Ex. BB at p. 38). 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 IEPs are not dispositive of the issue of whether the program provided to the student at iBrain is substantially similar to the stay put program provided to the student at iHope.

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 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 February 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 unilaterally 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).[7] 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 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.,

[7] 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"]).

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];[8] 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 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).

[8] 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.

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. The Parent's Claim for Pendency Funding at iBrain

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. While the district acknowledges that a pendency program need not be implemented at the same brick and mortar location, it asserts that the program provided by iBrain is not substantially and materially the same as the program provided at iHope. The district identifies three deviations in the student's iBrain program from the program provided to the student at iHope: 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 class with seven students, and that the student did not receive vision education services at the beginning of the school year.

The district conceded at the impartial hearing that the student's pendency placement was established pursuant to the unappealed decision of an IHO in the prior 2017-18 school year proceeding (Tr. pp. 36-37). 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. 5-7). In the February 2018 decision analyzing the parents 2017-18 school year claims, the IHO described the student's program at iHope as a 12-month program in a 6:1+1 special class with the services of a 1:1 paraprofessional and a 1:1 nurse, "extended school hours," and related services consisting of three 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, four 60-minute sessions per week of individual speech-language therapy, two 60-minute sessions per week of vision education services in an unspecified ratio, and three 60-minute sessions per week of individual hearing education services (id. at pp. 6-7). The IHO in that proceeding awarded reimbursement for the cost of the student's program at iHope, individual nursing services, and the cost of transportation (including limited travel time and a nurse) (id. at p. 9).

In this case for the 2018-19 school year, the iBrain director testified that iBrain is "a school for students with acquired or genetic brain injury, or brain-based disorders" who are "essentially non-verbal and non-ambulatory" (Tr. pp. 44-45). With respect to the program provided for all students, the director testified that iBrain provides a 12-month school year program and an extended school day (Tr. p. 47). She further indicated that iBrain uses "a model that emphasizes one-on-one direct instruction in the classroom," with each student receiving "at least half an hour of direct instruction, one-on-one, with their teacher every day, in addition to paired in small-group instruction" (Tr. p. 45). The director testified that iBrain has classroom sizes of 6:1+1 and 8:1+1, and every student at iBrain has a 1:1 paraprofessional to assist in generalization (id.). The director testified that related services are provided in 60-minute sessions "on a push-in and pull-out model," with therapists providing approximately half of a student's services in the classroom to assist in generalization (Tr. pp. 45-47). In addition, iBrain has a school nurse and provides 1:1 nursing services to "a number of students" (Tr. pp. 46-47).

With respect to the student's program at iBrain, the director testified that the student was in a 6:1+1 class with the support of a 1:1 paraprofessional and 1:1 nurse, and that both the teacher and paraprofessional had "worked with [the student] for several years" at iHope (Tr. pp. 48-49). At the time of the impartial hearing, the student received related services at iBrain including three 60-minute sessions per week of individual OT; five 60-minute sessions per week of individual PT; five 60-minute sessions per week of individual speech-language therapy; two 60-minute sessions per week of individual vision services; three 60-minute sessions per week of individual hearing services; and one 60-minute session per week of individual assistive technology services; and the parent received one 60-minute session per month of parent counseling and training (Tr. pp. 49-50). With respect to transportation, the director indicated that the student received limited travel time (60 minutes) on a wheelchair-accessible bus with a lift and ramp, air conditioning, and a nurse (Tr. pp. 51-52).

However, on cross-examination, the director acknowledged that iBrain did not have a social worker on staff to provide parent counseling and training until August 1, 2018 (Tr. pp. 55-58). Furthermore, while the student was placed in a 6:1+1 class, the director indicated that the classroom included seven students (Tr. pp. 58-61). Finally, the director testified that iBrain did not have a vision therapist on staff to provide vision education services until October 1, 2018 (Tr. p. 55).

In response to a question from the IHO regarding whether there were any other services referenced by the director that the student was not receiving, the director responded, "No. She's received the services that she's been receiving" (Tr. p. 64). Upon inquiry from the IHO whether the student had "received everything [else] that you have listed for me since July 9th," the director replied, "To the best of my knowledge, yes" (id.). While less than explicit, the district does not on appeal assert any deviations from the pendency program other than the three identified above, and agreed at the impartial hearing that these three differences were the only ones identified in the director's testimony (see Tr. pp. 76-84). I find the director's testimony in this matter somewhat disturbing insofar as in a very similar proceeding involving a different student, which I am also addressing in a separate state-level determination today, Application of a Student with a Disability, Appeal No. 18-132, the director testifies that six special classes shared only three physical rooms, that iBrain's location is changing and the director refused to disclose the new location when testifying in that proceeding. In that proceeding, the conclusion I reach conflicts with the one I reach in this case. However, the discord is a product of the level of inquiry being conducted by the district on cross-examination and the differences in specificity of clarifying questions asked by the IHO in that case. While troubled by this, it is not my function to make the district's case for it in this proceeding.[9]

Regarding parent counseling and training, the director testified that the social worker reached out to all parents of students at iBrain "within his first week" or "first few days" but

[9] The greatest flaw with the standards articulated in this decision and the progression of the law on stay-put thus far on this topic is that without greater inquiry and advocacy by the district at all levels under the existing standards, the potential for abuse by a parent and inconsistent decisions in similar circumstances is enormous. I am cognizant that hundreds of thousands of dollars of public monies hang in the balance in each case, each year, for each child. Because the district did not challenge many of the facts asserted by the parent or cross-examine the witness in a similar manner, the outcome in this proceeding is very different.

acknowledged that she was unaware of when the parent began receiving services (Tr. pp. 66-67, 71-72). Accordingly, the hearing record does not reflect when the parent began receiving parent counseling and training. However, as conceded by the district, this alone would not preclude a finding of substantial similarity (Tr. p. 80).

With respect to class size, while a relevant inquiry when determining substantial similarity, upon review there is no indication in the hearing record that the addition of one student for 30 minutes per day beyond the maximum specified in the unappealed IHO decision establishing pendency is so significant a deviation as to make iBrain not substantially similar to iHope.[10] The director testified that there were no substantive differences with regard to the educational benefits received by the student in a classroom of seven students as opposed to six students (Tr. pp. 67-69). In particular, the director stated that the students in the classroom were "usually only all together in a group, maybe for half an hour a day, for like a morning meeting" (Tr. p. 67). As a result "of the amount of individualized services that the students receive," the larger class size would not "typically come into play because some of the students are pulled out for . . . their therapy services throughout the day," such that the number of students in the classroom "very rarely ever reaches even six, much less would there be all seven" (Tr. pp. 67-68). When asked to clarify by the IHO, the director stated that morning meeting was "pretty much the only time" the entire class would be in the classroom at one time and that the students "never see all the kids, other than that" (Tr. p. 68).[11] Accordingly, the hearing record does not reflect that the oversubscription of the student's class at iBrain by one student represents a fundamental change in a basic element of the student's educational programming.[12]

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[10] I acknowledge the seeming incongruity of the parent rejecting the recommended 6:1+1 program as insufficiently supportive (see Parent Ex. A at pp. 2-3) while simultaneously claiming that it is of no moment that the student's classroom at iBrain for the 2018-19 school year contains two more students than the student's classroom at iHope during the 2017-18 school year (compare IHO Decision at p. 3, with Parent Ex. B at p. 7). Nonetheless, that is a matter to be resolved in the merits determination in this proceeding because, as noted above, the automatic nature of a pendency placement is evaluated separately from the appropriateness of a recommended placement (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459), and so the parent's litigation position is not relevant to her pendency claim.

[11] State regulation defines a change in program as "a change in any one of the components" of an IEP, which includes, among other things, the size of the special class in which a student is recommended to receive services (8 NYCRR 200.1[g]; 200.4[d][2][v][a], [b][2]; see Letter to Fisher, 21 IDELR 992 [OSEP 1994]). However, State regulation also permits a district to seek a variance from the maximum special class sizes prescribed by regulation (8 NYCRR 200.6[h][6]). If a district were to implement pendency in a special class placement containing one student in excess of the maximum class size permitted by regulation and for which a variance had been granted, independent research has uncovered no authority for the proposition that such implementation would be impermissible, and I decline to hold the parent to a higher standard.

[12] The district does not raise any specific argument on appeal that the addition of one student for 30 minutes per day constituted a material change to this particular student's program such that it was no longer substantially similar for purposes of pendency, instead generally arguing that a classroom with seven students is not a 6:1+1 class (but see G.R., 2012 WL 310947, at *7-*8 [providing a exceptionally strict interpretation of the "comparable services" provisions in 8 NYCRR 200.4[e][8][i], 20 U.S.C. § 1414[d][2][C] [i][I] and 34 CFR 300.323[e] that are used when a student transfers from one school district to another, finding that a 6:1+3 special class and a 6:1+1 special class with a 2:1 shared aide are not sufficiently comparable services]). If a "comparable services" test were used in this case, the parent's case would probably fail under G.R., but the comparable services provisions

With respect to vision services, the director indicated that although iBrain did not have a vision therapist on staff until October 1, 2018, between the beginning of the school year on July 9 and October 1, "all of the providers, especially the teacher and the paraprofessional, work to implement the vision recommendations of the previous vision teachers" (Tr. pp. 69-70). In particular, "the teachers were all trained in working with students with critical vision impairment" (Tr. p. 71).[13] The director testified regarding the manner in which the student's teacher "modified and adapted" instructional materials "according to her specific vision needs" (Tr. p. 70). According to the director, implementation of these modifications, as well as the student's vision goals, addressed the student's vision needs "consistently" (Tr. pp. 70-71). However, she admitted that the student did not receive services from a certified provider (Tr. pp. 72-73).[14] I agree with the district's argument that the director's testimony that iBrain staff adequately addressed the student's vision needs does not suffice to establish substantial similarity for purposes of pendency and that the failure to provide vision education services constituted a material change in the student's educational program as set forth in the February 2018 IHO decision establishing pendency (Parent Ex. B at pp. 6-7). Nonetheless, it appears that at some point, iBrain began implementing vision education services in compliance with the student's pendency entitlement. The hearing record is unclear when the student began receiving vision education services on a twice weekly basis, although, as the director testified that the student was receiving the services at the time of the impartial hearing, it seems that the student was receiving these services by no later than October 12, 2018 (Tr. p. 50). Accordingly, it remains a matter for additional proof at which point iBrain began implementing the student's pendency program and the parent became entitled to public funding of the costs of the student's placement pursuant to stay put.[15]

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have not been advanced in any other case involving the stay-put context, at least to my knowledge.

[13] It is unclear whether this is a correct transcription, or if the director's testimony referenced cortical vision impairment.

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

[15] To the extent the district asserts on appeal that the director failed to "describe[] the school facility at iBrain, such as the classrooms, bathrooms, and pull-out therapy location[s], or how they compared to those at [iHope]," this argument was not raised at the impartial hearing and has accordingly been waived (Austin v. Fischer, 453 Fed. App'x 80, 82-83 [2d Cir. Dec. 23, 2011]; see R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "require[es] parties to raise all issues at the lowest administrative level" and that "a party's failure to raise an argument during administrative proceedings generally results in a waiver of that argument"]). In any event, it seems to contravene the principle, discussed above, that pendency does not concern itself with the bricks and mortar of a school location, but rather the program and services provided to a student. If the district is concerned that the physical plant of iBrain made it somehow incapable of delivering the student's pendency program (which would be a relevant inquiry), it was incumbent on the district to raise this argument at the impartial hearing (see M.K., 2006 WL 3193915, at *11).

VII. Conclusion

In light of the above, the hearing record reflects that at some point the program provided to the student at iBrain during the 2018-19 school year became substantially similar to the student's pendency program as set forth in the unappealed February 2018 IHO decision. Accordingly, the IHO's determination in favor of the parent's request that the district fund the student's attendance at iBrain must be reversed in part. Because iBrain has not consistently been able to implement all of the services constituting the student's pendency placement, I find it appropriate to require the parent to obtain contemporaneously created records from iBrain showing when iBrain began implementing each aspect of the student's pendency placement in full and the student's continued attendance at iBrain and receipt of educational programming in conformance with the student's stay-put placement. Upon the submission of such records to the district, the district shall reimburse the parent for the costs of the student's placement at iBrain while the proceedings are pending.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated October 15, 2018, is modified, by reversing so much thereof as directed the district to fund the student's placement at iBrain from the commencement of this proceeding; and

IT IS FURTHER ORDERED that the district shall fund the student's placement at iBrain—as described and consistent with the conditions and documentation requirements set forth in the body of this decision—from the time iBrain began fully implementing the student's pendency placement, as set forth in the unappealed IHO decision dated February 28, 2018.

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

JUSTYN P. BATES
STATE REVIEW OFFICER