The University of the State of New York

The State Education Department
State Review Officer
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No. 18-147

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

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

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. 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 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

On August 17, 2016, a CSE convened to develop the student's IEP for the 2016-17 school year (see Parent Ex. B).[1] The August 2016 IEP reflects that, at the time of the CSE meeting, the student was receiving home instruction with related services of physical therapy (PT), occupational therapy (OT), and speech-language therapy (id. at p. 3). The August 2016 CSE determined that the student was eligible to receive special education services as a student with a traumatic brain injury (TBI) and recommended a 12-month school year program consisting of a 12:1+(3:1) special class placement in a specialized school with related services, including five 60-minute sessions per week each of individual OT, individual PT, and individual speech-language therapy (id. at pp. 1, 21-22, 24).[2, 3] The August 2016 CSE also recommended that the student receive full time 1:1 school nurse services and assistive technology in the form of a dynamic display speech generating device (id. at p. 22).[4] The August 2016 IEP further noted that the student required special transportation accommodations consisting of a "Lift Bus" with a 1:1 nurse, air conditioning, oxygen, walking aids and a wheelchair, and limited travel time of no more than 60 minutes (id. at pp. 22, 24). According to the IEP, the parent stated that a 12:1+4 special class in a specialized school was "the most restrictive setting" and felt that the student's needs "would be best served" in an 8:1+1 special class (id. at p. 25). The IEP and the subsequent prior written notice further documented that the CSE considered and rejected both an 8:1+1 and a 12:1+1 special class in a specialized school, as well as a day program in a State-approved nonpublic school (Parent Ex. B at pp. 25-26; Dist. Ex. 8 at p. 1).

In a letter dated August 17, 2016, the parent provided the district with notice of her intent to unilaterally place the student at International Academy of Hope (iHope) for the 2016-17 school year (Dist. Ex. 7 at p. 1). The letter noted that, based on the IEP and the information provided during the CSE meeting, the parent believed "there [wa]s no private school placement the [district] c[ould] recommend which would be appropriate" but that the parent would be willing to visit a

[1] The August 2016 IEP indicates that the CSE meeting occurred on October 13, 2015 (see Parent Ex. B at pp. 1, 24, 27); however, the parties do not appear to dispute that the IEP resulted from the August 2016 CSE meeting. Further, upon request from the undersigned that the district clarify the date, the district indicated that it believed the October 2015 date was a typographical error that occurred because the August 2016 CSE used a prior IEP as a template when developing the new IEP.

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

[3] State regulation provides that the "maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students. In addition to the teacher, the staff/student ratio shall be one staff person to three students" (8 NYCRR 200.6[h][4][iii]). This type of special class is referred to as a 12:1+(3:1) and as a 12:1+4 special class during the hearing (see Tr. pp. 27, 59).

[4] Although a recommendation for a 1:1 paraprofessional is not listed in the recommended programs and services on the August 2016 IEP (Parent Ex. B at pp. 21-22), the district points out that the annual goals reference that a paraprofessional would monitor the student (Answer ¶ 9 n.4; see Parent Ex. B at pp. 19-20).

possible placement if one were identified (id.). By school location letter dated October 18, 2016, the district notified the parent of the particular school location to which the student was assigned to attend for the 2016-17 school year (Dist. Ex. 8 at p. 4).

According to counsel for both parties, the student attended iHope for the 2016-17 school year pursuant to a stipulation agreement between the parties (see Tr. pp. 19-21).[5] Additionally, the student continued to attend iHope for the 2017-18 school year and the parent pursued an impartial hearing to secure district funding of the student's tuition for that year (see Dist. Ex. 6; see also Tr. p. 22).[6]

According to the parent, on June 12, 2018, a CSE met and developed an IEP for the student for the 2018-19 school year (see Parent Ex. A at p. 2). Subsequently, the student began attending iBrain for that school year (see Tr. p. 50; Parent Ex. A at p. 3).

A. Due Process Complaint Notice

In a due process complaint notice dated July 9, 2018, the parent raised concerns about the adequacy of the June 2018 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) during the 2018-19 school year (Parent Ex. A). The parent asserted the student's right to a pendency placement was established pursuant to the student's August 2016 IEP (id. at p. 2). The parent requested the district "prospectively pay for the student's Full Tuition at iBrain," including "academics, therapies and a 1:1 [para]professional during the school day," as well as a private duty 1:1 nurse during the school day and transportation accommodations including "limited travel time of 60 minutes, wheelchair-accessible vehicle, A/C, flexible pick-up/drop-off schedule and a nurse with ventilator" (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on August 17, 2018 and concluded the pendency portion of the hearing that day (see Tr. pp. 1-72). At the impartial hearing, counsel for the parent contended that the program provided at iHope in the 2016-17 school year was the

[5] Due to the status of this matter as an interim appeal disputing a pendency determination, at the time of the parent's request for review, there had been little testimonial and documentary evidence received at the impartial haring; accordingly, some of the factual background is derived from allegations in the due process complaint notice or representations made by the parties' counsel at the impartial hearing (see generally Tr. pp. 1-72; Parent Exs. A-B; Dist. Exs. 1-2, 4, 6-8).

[6] The matter pertaining to the student's 2017-18 school year is currently pending on appeal before the Office of State Review. With respect to that matter, an SRO may, as a matter within his or her discretion, take notice of records before the Office of State Review in other proceedings, especially those between the same parties and involving the same student in order to avoid unnecessarily confusing or conflicting factual determinations by the same administrative tribunal (see, e.g., Application of a Student with a Disability, Appeal No. 18-067). Accordingly, to the extent necessary, the hearing record in that matter has been reviewed.

student's last agreed-upon placement for the purposes of pendency pursuant to a settlement agreement and that the district should fund the student's program at iBrain for the 2018-19 school year because it was substantially similar to the iHope program (Tr. pp. 18-21, 29). With regard to the settlement agreement,[7] counsel for the parent acknowledged that it contained a provision that it could not be used as pendency but maintained that provisions in settlement agreements purporting to waive placements as pendency are against public policy (see Tr. pp. 20-21, 29-30). Alternatively, counsel for the parent argued that "there was no IEP offered for the [2017-18] or [2018-19 school years] that . . . would provide the services that the child needs" and, as a result, the August 2016 IEP was the last agreed-upon IEP (Tr. pp. 24-27). Additionally, parent's counsel argued that the program provided to the student at iBrain in the 2018-19 school year was substantially similar to the August 2016 IEP (Tr. pp. 29-31).

During the impartial hearing, the district did not argue that any one placement functioned as the student's pendency placement; rather, the district only maintained that the parent's positions regarding pendency were incorrect (see Tr. pp. 33-38). The district argued that a settlement agreement was not an admission of wrong-doing or an agreement on a placement for pendency purposes; the district also maintained that the settlement agreement was confidential and could not be used to establish pendency (Tr. p. 35). The district also argued that the August 2016 IEP could not be the last agreed-upon placement because it had been contested by the parent in a ten-day notice letter and it was never implemented (Tr. pp. 36-37). Finally, the district maintained that the program provided at iBrain for the 2018-19 school year was not substantially similar to either the August 2016 IEP or the program previously provided at iHope (Tr. p. 38).

In an interim decision dated November 12, 2018, the IHO denied the parent's request for pendency at iBrain (IHO Decision at p. 7).[8, 9] With respect to the parent's argument regarding the settlement agreement establishing pendency, the IHO determined that the parties agreed that the settlement agreement provided that it could not form the basis of pendency and that there was no basis to conclude the agreement was against public policy because the parent did not present evidence to show that she was coerced or misled by the district when she entered into the agreement (id. at pp. 4-5). With respect to the parent's arguments concerning the August 2016 IEP and whether the program at iBrain was substantially similar to the IEP, the IHO noted in a footnote that the parent's August 2016 "ten-day letter . . . effectively reject[ed] the August [2016] IEP" based on the parent's "belief that the [district] could not recommend an appropriate school placement" (id. at p. 3 n.1). Further, the IHO found that testimony regarding the program offered

[7] While the parties and IHO discussed the settlement agreement at the impartial hearing, this document was not offered into evidence by either party; moreover, the district's attorney contended that she knew "it [could not] be admitted" into evidence (Tr. pp. 20, 30, 35, 37).

[8] The IHO's interim decision is not paginated. For purposes of this decision, citations to the interim decision shall refer to the consecutive pages, with the cover as page one (see IHO Decision at pp. 1-10).

[9] Although the ordering clause in the IHO's decision indicates that the parent's request for pendency at iHope was denied, it appears that this was a typographical error as the context of the decision indicates that the IHO denied the parent's request for pendency at iBrain (IHO Decision at pp. 6-7).

at iBrain was "very limited" (id. at pp. 5-6). Without determining whether the August 2016 IEP was the last agreed-upon placement, the IHO determined that there remained "issues of fact relating to whether iBrain [wa]s substantially similar" to the program recommended in the August 2016 IEP, which could not be determined at that time (id. at p. 6). The IHO denied the parent's request for pendency (id. at p. 7). The IHO further noted that "the denial of pendency d[id] not deprive the child of her unilateral placement at iBrain," but noted that the costs of the tuition would depend on the merits of the parent's claims regarding the district's failure to offer the student a FAPE, the appropriateness of iBrain as the student's unilateral placement, and a weighing of equitable considerations (id.).

IV. Appeal for State-Level Review

On appeal, the parent argues that the student's August 2016 IEP went unchallenged and, as a result, the IEP is the student's then-current educational placement for purposes of pendency. The parent maintains that the district had not "[p]roposed any placement . . . for [the student]" and, as "it was the [district's] responsibility to secure [the student] a seat at a school" that could implement the terms of her pendency program, the district's failure to do so "left the parent with no choice" but to place the student at iBrain. The parent further argues that it would be "impossible for any [district] specialized school to implement the services outlined" in the August 2016 IEP. The parent also maintains that the services provided at iBrain are substantially similar to those in the August 2016 IEP and that the only difference between the two programs is that iBrain provides one of the student's speech-language therapy sessions in group, rather than all five sessions individually as recommended in the August 2016 IEP.

Next, the parent claims that the IHO erroneously found that the August 17, 2016 ten-day notice letter constituted a rejection of the August 2016 IEP. Rather, the parent maintains that she never filed a due process complaint notice and that the ten-day notice only expressed her concern about the location at which the program would be implemented. Moreover, the parent asserts that she would not have raised an issue with the implementation of the program if she did not already believe that the program itself was appropriate.

Finally, the parent argues that the IHO should be recused from this matter because the IHO had an interest in ruling against the parent due to a previous interim order on pendency and final determination issued by the IHO denying the parent's request for placement at iHope for the 2017-18 school year. The parent maintains that the IHO had a "professional interest" in ruling against the parent "as a ruling for the [p]arent w[ould] directly contradict her prior pendency ruling." The parent also argues that statements made by the IHO during the impartial hearing regarding parent's prior counsel and statements made by the IHO at the previous impartial hearing "raise significant questions about [the IHO's] ability to show integrity and impartiality."

In an answer, the district generally admits or denies the parent's allegations and argues to uphold the IHO's interim decision. The district asserts that the August 2016 IEP could not be the student's then-current educational placement as the IEP was rejected by the parent in a ten-day notice letter and the IEP was never implemented. As to the parent's claim that they never filed a due process complaint notice for the 2016-17 school year, the district maintains that this was

because they entered into a settlement agreement for that school year. In addition, even if the program in the August 2016 IEP was the student's pendency placement, the district contends that the parent failed to establish that the student's program at iBrain was substantially similar to the program recommended in the IEP. The district also claims that the director of special education at iBrain (director) did not have sufficient knowledge to testify to the pertinent aspects of the student's program at iBrain and failed to adequately describe the student's program, relying on conclusory statements. Furthermore, the district argues that the director's testimony addressed the similarities between iHope and iBrain but did not address the similarities between iBrain and the August 2016 IEP. In addition, the district contends that the August 2016 IEP recommended a 12:1+(3+1) special class while the student receives services in an 8:1+1 special class at iBrain, and that the August 2016 IEP recommends five sessions of individual speech-language therapy per week but iBrain only provides four sessions.

The district argues that there was no evidence that the IHO "was not impartial, or that her conduct created an appearance of impropriety or prejudice." Further, the district maintains that the record demonstrates the IHO was reasonable and impartial, and that her decision was supported by the law. In a footnote, the district also objects to the parent's submission of additional evidence with her request for review.[10]

V. Applicable Standards

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; 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

[10] In a footnote, the district also maintains that the parent abandoned her argument that the student's pendency placement is at iHope based on the settlement agreement for the 2016-17 school year because she failed to raise this argument on appeal.

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. IHO Bias and Request for Recusal

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

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. 1-72). As evidence of bias, the parent points to the IHO's determinations in the prior administrative proceeding involving this student's 2017-18 school year, including an interim order on pendency finding the student was not entitled to pendency at iHope and a final determination denying the parent's request for the costs of the student's placement at iHope for the 2017-18 school year.[11] The parent argues, without citation to any supporting legal authority, that an IHO would have a professional interest in ruling against a parent where the IHO previously found against the parent. The parent's claim is predicated on the assumption that, for purposes of consistency of outcome with past decisions that involved the same student, the IHO would overlook the legal arguments and evidence in matters going forward to the extent they supported a finding in the parent's favor. Beyond the mere existence of the IHO's decisions in the prior matter, the parent has not submitted any evidence to support her allegation of bias on this ground. Additionally, to the extent that the parent's claims could be read as disagreement with the conclusions reached by the IHO in her previous rulings, such disagreement alone 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

[11] The IHO denied the parent's request that the IHO recuse herself due to the "pending appeal of [the IHO's earlier] ruling on an identical issue" at the impartial hearing and further noted that "[j]udge shopping is not allowed" (Tr. pp. 6-7).

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).

Additionally, the parent attributes bias to the IHO's statement during the impartial hearing that she had ruled in favor of the district with respect to the parent's due process complaint notice for the prior school year "based on the fact that she had very poor legal counsel" (see Tr. p. 22).[12] While it would have been more prudent for the IHO to avoid such discourse, this statement does not indicate that the IHO ruled against the parent because she did not have a favorable opinion of parent's prior counsel. Rather, the statement could indicate that the IHO believed parent's prior counsel did not perform adequately in representing the parent's interests. Additionally, an appeal of the IHO's decision in the prior impartial hearing is pending before the Office of State Review, and there is no allegation or indication in that appeal that the IHO exhibited bias in that proceeding. Further, the parent is represented by a different attorney in the present matter and there is no indication that the IHO had an unfavorable opinion of the parent's current attorney. Accordingly, the IHO's statement during the hearing is not an indication of bias.

B. Additional Evidence

On appeal, the parent submits additional evidence for review and the district objects to its consideration. 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]). Exhibit AA to the request for review is a selection of testimony from the impartial hearing in the proceeding regarding the student's 2017-18 school year, which is currently on appeal in the Office of State Review. As noted above, an SRO may review records on file between the same parties in order to avoid unnecessarily confusing or conflicting factual determinations by the same administrative tribunal and I have done so to the extent necessary to complete my review. Exhibit BB to the request for review contains emails sent between the parent's attorney and the IHO wherein the parent's attorney requested that the IHO recuse herself. As referenced above, the IHO denied the parent's request for recusal on the record during the impartial hearing (Tr. pp. 6-7), and I do not find the additional evidence necessary to render a decision in this matter. Finally, exhibit CC to the request for review is a partially redacted interim order on pendency dated November 21, 2017 regarding another student but some similar issues. To the extent the parent offers the decision as persuasive

[12] In the request for review, the parent also references comments made by the IHO at the previous impartial hearing involving the student; in summary, the parent points to the IHO's inquiry as to whether the parent's attorney was a lawyer and how long he had been practicing law and her statements that attorneys should not "whip out memos of law in the middle of a pendency hearing" and that arguments should not be raised for the first time at an impartial hearing without the district's knowledge (see Req. for Rev. at p. 10). The examples the parent now references do not suggest bias; rather, they express, at most, the IHO's frustration with parent's prior counsel's lack of familiarity with the IHO's expectations for the impartial hearing procedures.

authority of a legal proposition, it is unnecessary to receive as evidence and, in any event, is distinguishable and without precedential value in this matter. As the documents submitted by the parent are not necessary to render a decision and also could have been offered for the IHO's consideration at the time of the impartial hearing, there is no reason to accept any of the additional evidence submitted by the parent at this time.

Nevertheless, additional evidence was necessary in order to make a finding regarding the student's pendency placement for the duration of this proceeding. 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, the undersigned determined that it was necessary to seek additional evidence from the district pursuant to 8 NYCRR 279.10(b). This was due, in part, because the parent and district, during the impartial hearing, argued and asserted facts based upon a stipulation agreement for the 2016-17 school year that was not submitted into evidence during the impartial hearing despite being in existence at that time (see Tr. pp. 20, 30, 35, 37).[13] More specifically, the parent argued that provisions in the settlement agreement waiving iHope as the student's pendency were against public policy and should have no effect on whether iHope was the student's pendency placement (see Tr. pp. 21-22, 29-30). The undersigned further determined it was necessary to seek additional evidence from the district, in part, because the IHO issued findings related to the stipulation agreement; specifically, the IHO found that the parties agreed that a settlement agreement provided for the student's attendance at iHope for the 2016-17 school year and provided that the settlement agreement could not serve as the basis for the student's pendency placement and that there was no basis to conclude that the settlement agreement was unconscionable or against public policy (see IHO Decision at pp. 4-5). Thereafter, the IHO failed to identify any pendency placement for the student (see id. at pp. 6-7).

Thus, in a letter to both parties dated January 7, 2019, the undersigned directed the district to provide copies of the stipulation agreement referenced at the impartial hearing, as this document had not been offered into evidence before the IHO. Given that the potential existed that the August

[13] 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 is of less weight in this instance, where both parties appeared to have some awareness of a stipulation of settlement related to the August 2016 IEP for the 2016-17 school year (see Tr. pp. 20, 30).

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 and 2015-16 school years, 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 an opportunity to submit a written argument no later than January 14, 2019 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 stipulation of settlement for the 2016-17 school year (Supp. Ex. 1); an August 4, 2014 IEP (Supp. Ex. 2); an October 13, 2015 IEP (Supp. Ex. 3); an October 27, 2015 IEP (Supp. Ex. 4); an April 7, 2016 IEP (Supp. Ex. 5);[14] an IHO decision entitled a "statement of agreement and order," dated April 27, 2015 (Supp. Ex. 6); an IHO's order of termination, dated May 30, 2016 (Supp. Ex. 7); and an IHO decision, entitled "order on consolidation," dated March 1, 2016 (Supp. Ex. 8).[15]

By letter dated January 11, 2019, the district objects to the SRO's consideration of the stipulation of settlement for the 2016-17 school year on the basis of the confidentiality provision in the agreement. The district asserts that the stipulation is not relevant because the instant matter does not involve the enforcement of the stipulation. The district also argues that the stipulation is not relevant to the student's pendency placement. The district asserts that the stipulation expressly states that iHope could not be considered as the student's then-current educational placement for the purpose of pendency. Next, the district argues that, because the parent's pendency arguments focus on the belief that the August 2016 IEP forms the basis for the student's pendency placement, a review of IEPs for the 2014-15 and 2015-16 school years is not necessary. However, the district maintains that, if they are considered, the IEPs "refute the parent's claim that pendency should be at iBrain, because the IEPs recommended individual instruction at home (with related services), which is not substantially similar to the program at iBrain." The parent did not submit any argument either in support or opposition to the consideration of the requested additional evidence.

As detailed below, because the August 2016 IEP may not form the basis for the student's pendency placement at iBrain, and given the fact that the hearing record lacks other documents or arguments that point to the correct last agreed-upon placement, I find that the additional evidence

[14] The three IEPs developed during the 2015-16 school year are all dated October 13, 2015 (see Supp. Exs. 3 at p. 14; 4 at p. 17; 5 at p. 18). However, the final signature pages reflect different dates apparently generated by the district's computer program, which correspond with the dates referenced in the district's cover letter accompanying its submission of the requested additional evidence (Supp. Exs. 3 at p. 16; 4 at p. 19; 5 at p. 20). While it is not entirely clear, as noted above with respect to the August 2016 IEP, it appears that the same typographical error—whereby the October 13, 2015 date was carried over onto a subsequently developed IEP—also occurred on the October 27, 2015 and the April 2016 IEPs.

[15] The documents provided by the district were not marked or otherwise identified by number or letter; the numbers assigned to the documents herein are based on the order in which they were listed on the district's January 10, 2019 cover letter accompanying the documents.

provided by the district in response to my request is necessary to resolve the dispute. Consequently, I accept the submitted additional evidence

Having determined that it is necessary to accept the stipulation of settlement and IEPs as additional evidence, I next address the objections to the consideration of these documents expressed by the district. The district argues that the stipulation of settlement is inadmissible in accordance with confidentiality provisions contained in the stipulation. 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 provision of the stipulation at hand does not, as the district suggests, preclude consideration of the stipulation in this proceeding (see Application of the Dept. of Educ., Appeal No. 16-017).

Here, the stipulation of settlement for the 2016-17 school year provides: "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 regarding this Student and for the limited purpose of enforcing the terms of this Stipulation" (Supp. Ex. 1 at pp. 5-6).[16] Even assuming the applicability of the confidentiality provision of the stipulation 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

[16] 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 the Dept. of Educ., Appeal No. 16-017, reflects the same meaning and content (compare Supp. Ex. 1 at pp. 5-6, 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'"]).

(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]).

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 stipulation of settlement for the 2016-17 school year, notwithstanding the district's belief that the stipulation should have been withheld from the administrative hearing officers. Similarly, to the extent that the student's IEPs prior to the August 2016 IEP and the submitted IHO decisions may contain evidence that would establish the student's pendency placement, the same rationale applies and weighs in favor of these IEPs as well, notwithstanding the district's objections.

C. Pendency

Turning to the substance of the parties' dispute, the parent maintains that she never contested the student's August 2016 IEP and only challenged the district's ability to implement the program. As a result, the parent asserts that the August 2016 IEP is the student's then-current educational placement. Further, the parent claims that the program offered at iBrain during the 2018-19 school year should be funded under pendency because it is substantially similar to the program recommended in the August 2016 IEP.[17]

As noted above, the Second Circuit has held that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child" and describes three variations concerning the definition of "then-current educational placement":

[17] The parent also maintains that the district did not propose a placement for the student that could implement the terms of her pendency program and, as a result, the parent had no choice other than to place the student at iBrain (Req. for Rev. at pp. 4-5). The parent further argues that it would be impossible for a district specialized school to implement the services recommended in the August 2016 IEP (id. at p. 5). The former allegation amounts to a claim that the parent should somehow be compensated for the student's attendance at iBrain as a remedy for the district's failure to implement a pendency placement; however, even if nonpublic school tuition could stand as a remedy for a pendency implementation failure as opposed to an award of make-up services (see E. Lyme Bd. of Educ., 790 F.3d at 456-57), the evidence in the hearing record is insufficient to reach such a question at this juncture. With respect to the latter allegation, as discussed below, the August 2016 IEP did not constitute the student's pendency placement so it is unnecessary to address whether the district could have offered a school location to implement the August 2016 IEP. However, in the event the parent seeks to have the district implement pendency, the district is required to do so.

(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). Examining the August 2016 IEP in light of this description does not support a finding that the IEP constitutes the student's then-current educational placement. First, the August 2016 IEP was not implemented IEP; the parties both confirmed that the student attended iHope for the 2016-17 school year and not the program recommended in the August 2016 IEP (see Tr. p. 20; Supp. Ex. 1). The hearing record also does not support finding that the August 2016 IEP was the student's the last agreed-upon IEP. Contrary to the parent's claims, the ten-day notice letter indicated that the parent disputed the August 2016 IEP (see Dist. Ex. 7). According to the letter, "it is [the parent's] understanding that there is no private school placement the [district] can recommend which would be appropriate for [the student]" (id. [emphasis added]). However, the August 2016 CSE recommended the student be placed in a district specialized school (Parent Ex. B at p. 24). Thus, the parent disputed the district's recommendation for a district specialized school, and the August 2016 IEP could not have been the last agreed-upon placement for purposes of pendency (see Parent Ex. B at p. 24; Dist. Ex. 7). Moreover, to the extent that the parent contends that the August 2016 IEP was not challenged because the parent did not file a due process complaint notice, the parent's concerns outlined in her ten-day notice were resolved as a part of the settlement agreement between the parties, which provided that the district would fund the student's tuition at iHope for the 2016-17 school year and which explicitly provided that the agreement could not be relied upon to establish the student's pendency placement (Supp. Ex. 1 at pp. 1-2, 5).[18]

Even if the August 2016 IEP was the last agreed-upon placement, the hearing record does not establish that iBrain was substantially similar to the August 2016 IEP. 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

[18] As a final point, the parent also argues that the record "strongly supports the conclusion that iBrain is [the student's] operative placement," and that the program that was actually functioning at the time pendency was invoked was iBrain (see Req. for Rev. at p. 5). The "operative placement" test tends to be one of the tests for stay-put that is employed when there is, for one reason or another, no valid IEP that is relevant to the stay-put issue (see Drinker, 78 F.3d at 867; Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625–26 [6th Cir. 1990] ["where . . . a dispute arises before any IEP has been implemented, the 'current educational placement' will be the operative placement under which the child is actually receiving instruction at the time the dispute arises"]; see Mackey, 386 F.3d at 163). As will be discussed in further detail below, based upon the district's submission of IEPs from the 2014-15 and 2015-16 school year, there is no need to determine at this time whether iBrain is the student's operative placement.

the student will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement is the same option on the continuum of alternative placements (Letter to Fisher, 21 IDELR 992 [OSEP 1994]).

As noted above, the August 2016 CSE recommended a 12-month school year program in a 12:1+(3+1) special class in a district specialized school, and five 60-minute sessions each of individual OT, PT, and speech-language therapy per week (Parent Ex. B at pp. 21-22). The CSE also recommended full time 1:1 school nurse services, a 1:1 nurse while the student is on the bus, and assistive technology—specifically, a speech-generating device—and referenced the provision of a 1:1 paraprofessional in the annual goals (see Parent Ex. B at pp. 19-20, 21-22). With respect to the program the student receives at iBrain for the 2018-19 school year, the director testified that the student was placed in an 8:1+1 special class, and that the student "still ha[d] her one-to-one paraprofessional" and "[wa]s continuing to get the nursing services, as well" (Tr. p. 52).[19] The director also testified that, at iBrain, the student received five 60-minute sessions each of individual OT and PT, and four individual and one group session of speech-language therapy per week (Tr. pp. 50-52). The student received these therapies in a push-in and pull-out model (Tr. p. 54). The student was also receiving "assistive technology, three times a week for 60 minutes," and "parent counseling and training one time a month, for 60 minutes" (Tr. p. 52). The director noted that the student "continue[d] to receive 30 minutes of direct instruction . . . in addition to paired and small group instruction that [went] on throughout the rest of the day" (Tr. p. 54). The director also testified that "all of [the student's] classmates [we]re the same as they were in her previous program" (Tr. p. 53).

While the program at iBrain provided the student with some of the same special education and related services as mandated in the August 2016 IEP, there were critical differences between the two programs. For example, the hearing record shows that iBrain was providing the student with an 8:1+1 special class while the August 2016 IEP recommended a 12:1+(3+1) special class (Tr. p. 56; Parent Ex. B at p. 21). Student-to-staff ratio is 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]). In addition, the August 2016 IEP included a recommendation to implement the IEP in a district specialized school (Parent Ex. B at p. 25), whereas iBrain is a nonpublic school

[19] The director testified that from April 2015 through December 2016 she worked at iHope and then worked as a part-time consultant for iHope from January 2017 through August 2017 (Tr. pp. 47-48, 55). While at iHope, the director taught in an 8:1+1 special class and worked as the IEP coordinator in charge of the intake process (Tr. p. 49). When the director worked as a consultant, she "help[ed] to consult with the IEPs," and she was familiar with the progress made by the student (id.). The director also assisted in planning for the student's upcoming school year (id.). The director began working at iBrain in June 2018 (Tr. p. 51). In discussing the student's "continuing" services, the director appears to be comparing the student's program at iBrain with the student's program at iHope during the preceding school year (see Tr. pp. 49-52).

that has not been approved by the Commissioner of Education as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7). Finally, the director testified that the student receives four sessions per week of individual speech-language therapy and one session of speech-language therapy in a group; however, the August 2016 IEP recommended five sessions per week of individual speech-language therapy (see Tr. p. 52).[20, 21] Thus, even assuming that the August 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 August 2016 IEP.

Therefore, the evidence does not support the IHO's finding that "there [we]re issues of fact relating to whether iBrain [wa]s substantially similar to the [district] recommended program . . . which c[ould not] be determined at th[at] time" (IHO Decision at p. 6). While the evidence provided in the record is sparse, there is sufficient information to determine that the program provided at iBrain was not substantially similar to the August 2016 IEP.

Having disposed of the parent's contentions that the August 2016 IEP formed the basis for the student's pendency placement as the last agreed-upon IEP or that the program offered at iBrain for the 2018-19 school year is substantially similar to the program in that IEP, the next inquiry focuses on what, then, constitutes the student's pendency placement. The parent has challenged all of the student's IEPs following the 2016-17 school year. However, amongst the documents sought from and provided by the district are several IEPs and IHO decisions that shed light on the state of the student's program and placement prior to the August 2016 IEP.

With respect to what the student's pendency placement is, in its letter following the submission of the requested additional evidence, the district asserts that "the last agreed-upon IEP may stem from" the April 2015 statement of agreement and order, which indicates that the parent had not challenged the student's August 2014 IEP and that, as a result, it appears that it is the last agreed-upon IEP. Additionally, the district maintains that, although the parent filed due process complaints pertaining to the school years preceding the August 2016 IEP, "the [p]arent was only seeking implementation" of the earlier IEPs. Accordingly, the district indicates that "the pendency placement lies in one of the prior IEPs from the 2014-2015 or 2015-2016 school years." The parent

[20] The director explained that the reason for this adjustment was "they had just seen an increase in her socialization and so had made the recommendation to have one of those sessions be with a peer who could model social use of [an assistive technology] device" (Tr. p. 57). The parent acknowledged the difference between the speech-language therapy services provided in the August 2016 IEP and those currently being provided at iBrain; however, the parent maintains that, even considering this difference, the programs are substantially similar (Req. for Rev. at p. 6).

[21] The hearing record is unclear as to whether the nursing services were similar as the August 2016 IEP recommended a full-time 1:1 nurse, but the director only described that the student received "continuing nursing services" at iBrain, seemingly in reference to the program provided to the student at iHope during the preceding school year (Tr. p. 52; Parent Ex. B at p. 21).

did not submit any argument outlining her position regarding the identification of the student's pendency placement if not the August 2016 IEP.

According to the documents provided by the district, an August 4, 2014 CSE recommended a home-based program for the student, which was the subject of an impartial hearing (Supp. Exs. 2 at p. 7; 6). An IHO decision dated April 27, 2015 (entitled a "statement of agreement and order") indicates that "[t]he [p]arties . . . agreed that the student's [August 2014 IEP] [wa]s the effective IEP and that the student [wa]s appropriately placed on home instruction with related services" at that time (Supp. Ex. 6 at p. 2).[22]

Subsequently, IEPs were developed for the student on October 13 and October 27, 2015, which also recommended home-based programs for the student (Supp. Exs. 3 at p. 9; 4 at p. 12). A May 30, 2016 order of termination issued by an IHO identifies that the parent filed two due process complaint notices on behalf of the student on November 2, 2015 and January 26, 2016, which were consolidated (Supp. Ex. 7 at p. 1).[23, 24] According to the May 2016 order of termination, three days of hearings and a pre-hearing conference took place between December 7, 2015 and March 29, 2016 before "the parents agreed to withdraw their due process complaint" once it was determined that "all requested services [were] reportedly in place" (id.). While the precise reason for withdrawal is unclear from the order of termination, it appears that a CSE convened on April 7, 2016, while the matter was pending, and that the parent was satisfied with the resultant IEP (see Supp. Exs. 5; 7 at p. 1).[25]

[22] The order additionally addressed the parent's difficulties with securing "related services through contract agents" (Supp. Ex. 6).

[23] State guidance defines an order of termination as "the written decision of the IHO as to the conditions of the withdrawal of the due process complaint notice" ("Questions Relating to Impartial Hearing Procedures Pursuant to Sections 200.1, 200.5, and 200.16 of the Regulations of the Commissioner of Education, as Amended Effective February 1, 2014," at p. 9, Office of Special Educ. [Revised Sept. 2016], available at http://www.p12.nysed.gov/specialed/dueprocess/documents/qa-procedures-sep-2016.pdf; see 8 NYCRR 200.5[j][6][ii]).

[24] An order of consolidation dated March 1, 2016 joined the two actions (see Supp. Ex. 8 at p. 1). The order of consolidation notes that the due process complaint notice filed on January 26, 2016 was virtually identical to the due process complaint notice filed on November 2, 2015, except that the January 2016 due process complaint notice "asked for an [AT] evaluation" (id.). The order of termination referenced an order of consolidation dated January 28, 2016; however, the March 2016 order of consolidation appears to be the order referenced in the order of termination (see Supp. Exs. 7 at p. 1; 8).

[25] The previous IEPs for the 2015-16 school year did not include recommendations for an assistive technology device (see Supp. Exs. 3 at p. 4; 4 at p. 5); however, the October 13, 2015, October 27, 2015, and April 2016 IEPs indicated the parent's concern that the student needed a communication device for help both socially and academically (Supp. Exs. 3 at p. 2; 4 at p. 3; 5 at p. 3). In contrast, the April 2016 IEP reflects that the CSE recommended the student receive assistive technology in the form of a "[d]ynamic display speech generating device" and further provided an annual goal relating to the student's use of the device (Supp. Ex. 5 at pp. 5, 11, 13).

Therefore, while the evidence in the record remains sparse, the student's pendency placement for the instant proceedings must be based on the student's April 2016 IEP as the last agreed-upon IEP. According to the April 2016 IEP, the CSE recommended that the student attend a 12-month school year program and that the student would receive five 60-minute sessions per week of individual home instruction (see Supp. Ex. 5 at p. 13). In addition, the CSE also recommended related services to be provided in the student's home, including two 45-minute sessions per week of individual OT, three 45-minute sessions per week of individual PT; and three 45-minute sessions per week of individual speech-language therapy (id.). Further, the April 2016 IEP also included a recommendation for an assistive technology device (id.).[26]

VII. Conclusion

For the reasons stated above, the evidence in the hearing record demonstrates that the student's April 2016 IEP constitutes the last agreed-upon IEP for the purpose of establishing the student's pendency services and placement in the instant matter.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's interim decision, dated November 12, 2018, is modified to the extent that the IHO did not determine the student's pendency services and placement; and

IT IS FURTHER 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 April 2016 IEP.

Dated: **Albany, New York**
January 23, 2019

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[26] To the extent that evidence is in any respect incomplete with regard to the parent's objection to the April 2016 IEP or the district's implementation thereof, the IEPs that predated the April 2016 IEP recommended almost identical home-based programs (with the exception of the assistive technology recommendation), the evidence indicates that the earlier IEPs were implemented, and—after the parent stated her agreement or withdrew the due process complaint notices as described in the April 2015 statement of agreement and order and the May 2016 order of termination, respectively—they were unchallenged (Supp. Exs. 2 at p. 7; 3 at p. 9; 4 at p. 12; 5 at p. 12; 6 at p. 2; 7 at p. 1). Accordingly, the home-based program, which remained consistent in the August 2014, October 17, 2015, October 27, 2015, and April 2016 IEPs, would form the basis of the student's pendency placement even if it arose from one of the student's IEPs that predated the April 2016 IEP.