The University of the State of New York

The State Education Department
State Review Officer
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No. 19-006

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 Theresa Crotty, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining her daughter's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended education program for the student for the 2018-2019 school year. The IHO found that the student's pendency placement was the placement established pursuant to the student's March 20, 2015 individualized education program (IEP). The appeal must be remanded for further proceedings.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an 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

Given the limited nature of the instant appeal, a full recitation of the student's educational history is not warranted. However, briefly, it appears that the student last received services from the district under a IEP developed by the Committee on Preschool Education (CPSE) dated March 20, 2015 and implemented by the district in a 6:1:2 special class with following related services: three 30-minute sessions per week of individual speech-language therapy, four 30-minute sessions per week of individual physical therapy (PT), three 30-minute sessions per week of individual occupational therapy (OT), two 45-minute sessions per week of individual vision education

services, and a 1:1 health paraprofessional for a 12-month school year (District Exhibit 1). For the 2015-16 school year, the CSE developed an IEP in May 2015, however the parent unilaterally placed the student at the International Institute Academy of Hope (iHope) in September 2015 and the IEP was not implemented (Tr. pp. 11-12, 14-15). On September 29, 2016, the CSE convened to develop the student's IEP for the 2016-17 school year, however, the parent again challenged the IEP and it was not implemented (id.). It appears that the district and parent settled the 2015-16 and 2016-17 school year claims and paid for the student's tuition at iHope (id.).

The hearing record reflects that the student continued to attend iHope for the 2017-2018 school year pursuant to the parent's decision to again unilaterally place the student and seek tuition reimbursement from the district, which dispute was the subject of a prior administrative hearing that was initiated by the filing of the parents' due process complaint notice dated November 15, 2017 (see Parent Ex. C). The student's pendency (stay-put) placement was addressed during the course of that impartial hearing (the 2017-18 proceeding) (id.). During the 2017-18 proceeding, the parent maintained that the student's placement at iHope was substantially similar to the September 29, 2016 IEP and the district did not contest the parent's request that pendency lay at iHope (Parent Exs. B, C). The IHO appointed to preside over the 2017-18 proceeding (IHO I) issued an interim decision on the issue of pendency on May 22, 2018 (Parent Ex. C). Citing, among other things, the district's failure to contest the parent's request for pendency at the impartial hearing, IHO I found there was "no dispute that the student's last agreed upon placement, funded by the [d]epartment, is that which is described in [the September 29, 2016 IEP] which was and is being substantially implemented at iHope" and formed the basis for pendency at iHope during the 2017-2018 school year (id.).

IHO I memorialized the services to be provided by iHope to the student (id.).[1] The interim decision on pendency was not appealed. On June 5, 2018, IHO I rendered her decision on the merits in the 2017-18 proceeding in which she found, among other things, that the parent had not met her burden of establishing that iHope was appropriate to meet her daughter's unique needs. IHO I further denied the parent's request for prospective tuition reimbursement for iHope. The parent appealed the IHO decision to the Office of State Review by request for review dated July 16, 2018. During the period between the issuance of IHO I's June 2018 final decision and the appeal of that decision for State-level review, the parents filed the due process complaint notice in the instant proceeding, dated July 9, 2018 as noted below, challenging the 2018-19 school year. The parties subsequently settled the State-level appeal by agreement dated October 4, 2018 and duly withdrew the appeal thereafter.

[1] IHO I described the pendency placement as follows: placement at iHope in an 8:1+1 special class with the services of a "[h]ealth paraprofessional daily/full time," and related services consisting of five 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, one 60-minute session per week of speech-language therapy in a "small group no larger than 3," and two 60-minute sessions per week of "individual" vision education services (Parent Ex. C at p. 5). IHO I also provided that the pendency placement include transportation to and from iHope from the student's home and a transportation paraprofessional daily (id.). Finally, the IHO stated that the pendency placement is effective as of November 15, 2017, the date of the (due process complaint notice) request for the hearing (id.).

A. Due Process Complaint Notice

The parent initiated the instant administrative proceeding by filing a due process complaint notice dated July 9, 2018 in which she raised concerns about the adequacy of the CSE process and the student's IEP for the 2018-2019 school year (Parent's Ex. A). The parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-2019 school year (id. at p.2). Relevant to this proceeding, the parent asserted that the student's right to a pendency placement was based on an unappealed interim order in which the September 29, 2016 IEP was determined to be the basis for pendency (id.). The parent requested an interim order on pendency requiring the district to "prospectively pay" for the costs of the student's tuition at the International Institute for the Brain (iBrain) where the student transferred for the 2018-2019 school year (which include[d] academics, therapies and a 1:1 professional during the school day) and special transportation accommodations (which include[d] limited travel time of 60 minutes, wheelchair-accessible vehicle, [air conditioning], flexible pick-up/drop-off schedule and a paraprofessional[])]" (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing conducted before IHO II on September 20, 2018 and concluded the pendency portion of the hearing on October 30, 2018, after two days of proceedings (see Tr. pp. 1-84). At the impartial hearing, the parent maintained that pendency lay in the September 29, 2016 IEP underlying IHO I's interim order establishing pendency at iHope (Tr. pp. 8, 44-47, Parent Ex. C). The parent further argued that the student's placement should be in a program at iBrain that is substantially similar to the program she attended at iHope during the 2017-2018 school year (Tr. p. 8-9). The district maintained that pendency was established by the March 20, 2015 IEP (Tr. 11, 14-15). The parties, over the course of the hearing, presented evidence concerning the student's pendency placement (see generally, Parent Exs. A-D; District Ex. 1; IHO Ex. I). Two witnesses appeared telephonically on behalf of the parent; the director of special education at iBrain, testified generally about her prior position at iHope, her present position at iBrain, and about programs at iBrain, and the clinical director at iBrain, was cross-examined regarding her affidavit submitted on behalf of the parent (Tr. pp. 66-79). In her affidavit, the clinical director at iBrain provided a brief, general description of the iBrain program as well as the details of the individual iBrain program for the student (Tr. pp. 55-59, Parent's Ex. D).[2] Both witnesses testified that it was their understanding that the parent transferred the student from iHope to iBrain for the 2018-2019 school year due to a change of management at iHope (Tr. pp 59, 76). The district did not call any witnesses on its behalf at the pendency hearing (see Tr. pp. 1-84).

In an interim decision dated December 4, 2018, IHO II denied the parent's request for pendency at iBrain and determined that pendency lay in the March 20, 2015 IEP (IHO decision at p. 8). IHO II found that since the iHope program, which the student attended in the 2017-2018

[2] For the 2018-2019 school year at iBrain, the student has an 8:1+1 special class with the services of a "full-time 1:1 paraprofessional" and related services consisting of five 60-minute sessions per week of OT, five 60-minute sessions per week of PT, four 60-minute sessions per week of speech-language therapy, three 60-minute sessions per week of vision education services, two 60-minute sessions per week of assistive technology service, and one 60-minute session per week of parent counseling and training (Parent Ex. D at p. 2). The student also receives special transportation, consisting of a bus with a wheelchair lift, adequate wheelchair space, air conditioning, a bus paraprofessional and travel time limited to sixty (60) minutes (id.).

school year, was still in existence there was no need to reach the issue of substantial similarities between programs at iHope and iBrain (id.).

IV. Appeal for State-Level Review

The parent appeals from IHO II's interim decision, asserting that he failed to adhere to, or even cite, the unappealed interim decision of IHO I as the basis for pendency and that the district is obligated to fund the cost of the student's attendance at iBrain pursuant to pendency. The parent asserts that the IHO erred in finding that the parent was not allowed to transfer the student from one nonpublic school to another for the purposes of pendency, even if the two placements are substantially similar, unless the parent can first prove that the first private school (iHope) is no longer available to the student. 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 and asserts that IHO II erred in precluding her from establishing that the program provided to the student at iBrain was substantially similar to the program provided to the student at iHope. The parent argues that her daughter's current educational program at iBrain is substantially similar to the program IHO I directed the district to pay at iHope for the 2017-2018 school year.

In an answer, the district maintains the IHO II correctly decided that pendency lies with the March 20, 2015 IEP. The District further maintains that the test of similar similarities between the iHope and iBrain programs need not be addressed since the iHope program the student attended in 2017-2018 still exists. The district asserts that the continued availability of the iHope program in the 2018-2019 school year precluded the parent from receiving funding for her daughter's tuition at iBrain.

V. Discussion

A. Additional Evidence

I will first address the additional evidence issues arising in this interlocutory appeal. The parent submitted two exhibits with her Request for Review (Req. for Rev. AA-BB). The documents attached to the Request for Review as Exhibits AA and BB purport to be a proposed IEP for the 2017-2018 school year developed by iHope, and, similarly, a proposed IEP for the 2018-2019 school years developed for the 2018-2019 school year. Generally, documentary evidence not presented at an impartial hearing may be 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]). As discussed further below, the special education services that the student received at iHope and at iBrain were described in affidavit testimony that was subject to cross-examination in this proceeding (Parent Ex. D), and the parties agreement regarding stay-put services for the student was also memorialized by IHO I in her May 22, 2018 interim decision (see Parent Ex. C). The private school IEP documents may be helpful in determining what iHope had intended and iBrain now intends to provide to the student, but in this context, it is not necessary. 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. What is important for purposes of pendency in this context is evidence that assists the finder of fact in rendering a determination by describing the services that have been delivered to the student previously and are actually being delivered to the student at iBrain. 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. The best use of these documents may be as an aid in refreshing the recollection of a witness who is familiar with each element of the student's programming that has actually been delivered, but that did not occur in this case. Both of the private IEPs were available for inclusion into the hearing record, but are not necessary to render a decision in this interlocutory appeal. If relevant to some aspect of the parties' dispute, the documents should be presented to the IHO in the first instance. As such, I exercise my discretion and decline to consider the evidence in this appeal.

However, the undersigned, by letter dated January 24, 2019, requested a copy of IHO I's June 5, 2018 Finding of Fact and Decision as additional evidence and offered the parties an opportunity to be heard regarding whether the document should be considered. This was in part due to the pleadings submitted on this appeal in which reference was made to the June 2018 final determination by IHO I. The parent requested that I not consider the June 2018 decision and instead submitted a stipulation for the 2017-18 school year which was intended to "supercede [IHO I's decision] dated June 5, 2018 … and the [a]ppeal [Parent's SRO Appeal No. 18-087] for all purposes, and the [d]ecision shall be considered null and void" "while leaving intact the interim [o]rder on [p]endency issued by IHO [I] dated May 22, 2018.[3] The district supported consideration of the June 2018 decision and such due process decisions can be relevant when making subsequent pendency determinations. In order to provide the context in which my decision in this matter is rendered, I will exercise my discretion and accept the June 2018 decision into evidence.

VI. Legal Framework—Pendency

Turning next to the merits of the parties' pendency dispute in this case, 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.

[3] The IHO's final order may be "null and void" as between the parties' legal relationship, but I am not bound to ignore that a final decision was rendered and the fact that it was appealed by the parent. The parents and the district may decide to act differently than envisioned under the order, but parents cannot "unring the bell" regarding historical events. Had the parents not appealed the June 2018 order it might have become final and binding as of June 5, 2018, and the outcome of this decision could have been very different. These kinds of determinations must be made on an adequate record, if nothing else than for the sake of the fact that it may be the subject of a judicial review proceeding and the court is entitled to understand the full picture.

2d 449, 455-56 [S.D.N.Y. 2005]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]).

An educational agency's obligation to maintain stay-put placement is triggered when an administrative due process proceeding is initiated (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 445, 452 [2d Cir. 2015]). When triggered, there are numerous ways that the terms of the stay-put placement may be established. First, a school district and parent may simply reach an agreement as to the services and programming that the student shall receive while a proceeding is pending (20 U.S.C. § 1415[j] ["unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child"] [emphasis added]). Where the parents and school district cannot agree upon the stay-put placement, the focus shifts to identifying the "last agreed upon" educational placement as the then-current educational placement (E. Lyme, 790 F.3d at 452; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906; A.W. v. Bd. of Educ. Wallkill Cent. Sch. Dist., 2015 WL 3397936, at *3 [N.D.N.Y. May 26, 2015]). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71; see E. Lyme, 790 F.3d at 452; Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). In addition, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Noting the inexact science of identifying a student's educational placement for purposes of pendency, the Seventh Circuit has noted that the inquiry necessarily requires a "fact-driven approach" (John M. v. Board of Educ. of Evanston Tp. High School Dist., 502 F.3d 708, 714 [7th Cir. 2007] [holding that "respect for the purpose of the stay-put provision requires that the former IEP be read at a level of generality that focuses on the child's 'educational needs and goals'], citing Concerned Parents, 629 F.2d at 754). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171).

Stay-put "is often invoked by a child's parents in order to maintain a placement where the parents disagree with a change proposed by the school district; the provision is used to block school districts from effecting unilateral change in a child's educational program" (Susquenita, 96 F.3d at 83). "Where the parents seek a change in placement, however, and unilaterally move their child from an IEP-specified program to their desired alternative setting, the stay-put rule does not immediately come into play" (M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 [3d Cir. 2014]). "[A]n administrative ruling validating the parents' decision to move their child from an IEP-specified public school to a private school will, in essence, make the child's enrollment at the private school her 'then-current educational placement' for purposes of the stay-put rule. Having been endorsed by the State, the move to private school is no longer the parents' unilateral action, and the child is entitled to 'stay put' at the private school for the duration of the dispute resolution proceedings" (M.R., 744 F.3d at 119; see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 484 [2d Cir. 2002]; see also Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 201 [2d Cir. 2002]). The purpose of the pendency provision is "to maintain the educational status 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 the 2017-18 proceeding before IHO I. However, since the IHO I's May 22, 2018 interim decision was rendered in the 2017-18 proceeding, the parent has transferred the student from one nonpublic school setting (iHope) to another nonpublic school setting (iBrain), and the parties sharply dispute whether 1) pendency would lie at iHope in this proceeding and 2) if so, whether the parent is permitted to transition her child to iBrain and still receive public funding under the protections of the stay put rule. The parent argues that the district's proposed September 29, 2016 IEP was recognized by IHO I in her May 22, 2018 interim decision as the "last agreed-upon [IEP]", which the parent argues was then implemented by iHope during the 2017-2018 school year. Those events, the parent argues, provide a basis to then conclude that the student's current educational programing at iBrain which, according to the parents, now provides services for the 2018-19 school year in a substantially similar to those listed in the September 29, 2016 IEP. To that end, the parent maintains that the program specific provisions of the September 29, 2016 IEP are being implemented at iBrain. The parent further contends that, as such, she is entitled to a determination that iBrain constitutes the

student's pendency placement and she seeks an order directing the district to fund placement at iBrain as the student's stay-put placement. Contrary to the parent's positions, the district maintains that the March 20, 2015 that was created by the CPSE and the services implemented under the auspices of the district/public agency was the last "agreed-upon IEP," because the May 22, 2018 interim decision by IHO I was an interim decision that cannot form the basis of pendency.[4] Alternatively, the District argues that if it is determined that the September 29, 2016 IEP established pendency at iHope, pendency must continue at iHope, not iBrain for the 2018-2019 school year. The district argues that because iHope still exists, substantial similarity between the programs does not apply.

I will first address the IHO II's determination that the student's pendency placement was governed by the March 20, 2015 IEP. IHO II erred in finding pendency for the student was established by the March 20, 2015 IEP. IHO II appeared to make assumptions that pendency must be selected by choosing an IEP (IHO Interim Decision at p. 6 [stating that "[t]he purpose of stay-put is to prevent school officials from unilaterally trying to change a child's placement, so the "current placement" must be the one that was previously implemented in the last agreed upon IEP]). That may be the case in many due process proceedings, however, there are a growing number of other possibilities for stay-put that do not always involve the implementation of an IEP document such as unappealed orders, party agreements, final State-level determinations in favor of a parent, and operative placements at the time a due process complaint is filed. Although IHO II was notified by the parties that IHO I had issued her pendency decision in May 2018, a final decision in June 2018, and that the 2017-18 proceeding had been appealed for State-level review (Parent Ex. C; Tr. pp. 14), IHO II did not engage or grapple with the circumstances arising out of the 2017-18 proceeding and the possible implications that pendency had already attached in the 2017-18 proceeding, which was still in pending at the time this proceeding for the 2018-19 school year was commenced on July 9, 2018 due to the parent's appeal for State level-review by service of a request for review on the district July 16, 2018 challenging IHO I's final June 2018 decision.

IHO I described in detail in her May 22, 2018 interim decision that when the parties appeared before her in February 2018, the district did not challenge the parent's request for pendency at iHope or the services delivered there "which is described in [the September 29, 2016 proposed IEP] which was and is being substantially implemented at iHope" (Parent Ex. C at pp.4-5). IHO I noted that the parent's allegation that the district "had not identified a placement for the student for the 2017/2018 school year" and she made it abundantly clear in her interim decision that the basis for her conclusion was the district's failure to contest the September 29, 2016 IEP or its implementation at iHope as the student's pendency placement on two occasion during the impartial hearing. As noted above one of the bases for a student's pendency placement is found in the IDEA itself at 20 U.S.C. § 1415[j] which states that "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). IHO I's explanation that "the parties do not dispute that the district did not contest the parents request for pendency during the impartial hearing February

[4] The district cites Student X, which stands for the proposition that a prior unappealed final IHO decision may establish a student's current educational placement for purposes of pendency, but the authorities discussed in Student X do not address an interim decision (Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *21–*22 [E.D.N.Y. Oct. 30, 2008]), however that case does not address the effect of prior interim decisions addressing pendency in a two-tier system. Because of my determination below, I need not reach this issue.

2018, and it appears that the district in fact paid in these circumstances. In this case there is no dispute that the student's last agreed upon placement, funded by the Department, is that which is described in [the September 29, 2016 proposed IEP] which was and is being substantially implemented at iHope" (Parent Ex. C at p. 4). These facts are sufficient to find that there was an agreement between the parties regarding the student's pendency placement under the under the IDEA that was reached while the proceeding was pending before IHO I.[5] IHO I merely memorialized the undisputed nature of the parties' agreement in her May 22, 2018 interim decision.

Even assuming, for the sake of argument, that these facts are not sufficient to find that the parents reached an agreement, by continuing to pay for the student's placement at iHope for the 2017-18 school year, it had become the operative placement at the time the parent's due process complaint notice was filed on July 9, 2018 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 (see Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58, quoting Mackey, 386 F.3d at 163). The conclusion to be drawn is that the district was required to continue funding the student's placement as it had been during the impartial hearing phase of the 2017-18 proceeding because the parent filed the due process complaint this proceeding for the 2018-19 school year on July 9, 2018.[6] To hold otherwise would, in the middle of the continuing 2017-18 due process proceeding, fail to achieve the "purpose of the pendency provision [which] 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. at 323 [emphasis in original]).[7]

Having determined that the district would be required to fund the student's stay-put placement at iHope in this proceeding, I turn next to whether the parent may transfer the student to another private school such as iBrain if it implements substantially similar educational placement, or whether the parent is required to keep the student in the same brick and mortar school (iHope) in order to receive stay-put funding. 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

[5] The IHO I's final order provides more context. IHO indicated that district also did not offer any evidence contesting the parent's allegations regarding its obligation to offer a FAPE during the 2017-18 proceeding (IHO I Decision June 5, 2018 at p. 3). While I express no opinion as to the merits of that proceeding, it further explains why the district would agree to pay for the student's placement at iHope as the student's pendency placement. If the June 5, 2018 IHO decision had gone unappealed, pendency would not have continued after the date of the IHO's final decision, but that is not the case. Pendency continued because the parent's appealed for State-level review.

[6] It might not have been as obvious to the district on July 9, 2018, but it should have become obvious that stay-put had to continue when the parents served their appeal of IHO I's final decision for State-level review on July 16, 2018.

[7] If one holds that that a privately selected "brick and mortar" placement is what is meant my "then current educational placement," then it would be the parents who are making the change in pendency in this case, however for the reasons explained below, I do not believe under the current state of the law that this is the case.

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).[8] 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

[8] 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"]).

City Dep't of Educ., 694 F.3d 167, 191-92 [2d Cir. 2012]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that, while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). Similarly, in assessing whether a parent's selection of private service providers was reimbursable as part of the student's educational program under pendency, the Second Circuit noted that "[i]t is up to the school district to decide how to provide that educational program, at least as long as the decision is made in good faith" (T.M., 752 F.3d at 171).

However, the district's discretion to select a location at which to implement a student's pendency placement can, under certain circumstances, be forfeited (see Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook Cty., Ill. v. Illinois State Bd. of Educ., 103 F.3d 548, 549-50 [7th Cir. 1996] [in the case of a student who had been expelled from school, examining "the power of the court and the parents, rather than the power of the school district, to effect [the student's] placement" when the district forfeited that power by not producing any placement alternatives];[9] 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).

[9] 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.

VII. The Parent's Claim for Pendency Funding at iBrain

As set forth above, the parent is not precluded as a matter of law 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. IHO II declined to address the issue of substantial similarities between the two programs because the program at iHope still existed for the student in the 2018-2019 school year.

As noted above herein, in her interim decision on pendency, IHO I described the student's pendency program as a placement at iHope in an 8:1+1 special class with the services of a "[h]ealth paraprofessional daily/full time," and related services consisting of five 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, one 60-minute session per week of speech-language therapy in a "small group no larger than 3," and two 60-minute sessions per week of "individual" vision education services (Parent Ex. C at p. 5). IHO I also provided that the pendency placement include transportation to and from iHope from the student's home and a transportation paraprofessional daily(id.). Finally, the IHO stated that the pendency placement is effective as of November 15, 2017, the date of the (due process complaint notice) request for the hearing (id.).

In this case for the 2018-2019 school year, the iBrain clinical director testified regarding her affidavit which states that the student's program at iBrain is in an 8:1+1 special class with the services of a "full-time 1:1 paraprofessional" and related services consisting of five 60-minute sessions per week of OT, five 60-minute sessions per week of PT, four 60-minute sessions per week of speech-language therapy, three 60-minute sessions per week of vision education services, two 60-minute sessions per week of assistive technology service, and one 60-minute session per week of parent counseling and training (Parent Ex. D at p. 2). The student also receives special transportation, consisting of a bus with a wheelchair lift, adequate wheelchair space, air conditioning, a bus paraprofessional and travel time limited to sixty (60) minutes (id.).

In comparing the two programs, I note the following differences: (1) the iHope pendency program includes a "[h]ealth paraprofessional daily/full time," while the iBrain 2018-19 program does not specify the nature of the service, rather the iBrain program includes a "full-time 1:1 paraprofessional"; (2) the iHope program specifies that related services of OT, PT, speech-language therapy, and vision education services be delivered on an "individual" basis, while the iBrain program does not specify; and (3) relatedly, the iHope program includes speech-language therapy to be delivered in a "small group no larger than 3" for one 60-minute session per week, while the iBrain program does not.

When asked to compare the two programs as to whether there were any similarities or differences, the director of special education at iBrain testified that "[t]hey're very similar," "I can't really think of any differences between these programs," "it is almost exactly the same," "substantially the same" without providing specifics (Tr. pp. 74-75). The district did not attempt

any rigorous effort to cross-examine or try to make much of an argument that the iHope/iBrain services are not substantially similar (see Tr. pp. 75-78, 53-59). However, the 1:1 paraprofessional verses the "heath" paraprofessional is concerning, as well as the lack of clarity as to when the student receives "individual" verses "group" related services.

It appears that the transfer of the student from iHope to iBrain for the 2018-2019 school year would not constitute a change in educational placement so as to automatically preclude pendency at iBrain; however, IHO II opted to forego the requisite inquiry into the similarities, or lack thereof, between the two programs. In order to qualify as a change in educational placement, change must impact the child's learning experience in some significant way (Brookline Sch. Comm. v Golden, 628 F. Supp. 113, 116).

As there are discrepancies in the provisions of the iHope program as the described in IHO I's interim pendency decision and the provisions of the iBrain program as described in iBrain's clinical director's affidavit, the appeal must be remanded for further proceedings consistent with this decision. The IHO is directed to examine these discrepancies before determining whether pendency can lie at iBrain for the 2018-2019 school year.

VIII. Conclusion

For the reasons stated above, the matter is remanded to the IHO to complete the record in accordance with this decision and render a determination of whether the remaining elements of the student's educational placement provided by iHope in the 2017-18 school year and iBrain in the 2018-19 school year are substantially similar for purposes of the student's stay-put placement.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that IHO II's interim decision dated December 4, 2018 is vacated, and

IT IS FURTHER ORDERED that the matter is remanded to IHO II who issued the December 4, 2018 decision, who shall in a manner not inconsistent with the body of this decision, address the remaining fact issues including the iHope's health paraprofessional verses iBrain's 1:1 paraprofessional, and the differences between the student's programing with respect to individual related services verses group related services, and reach a determination of whether there is substantial similarity between student's former educational placement at iHope and his current educational placement at iBrain no later than 21 days from the date of this decision.

Dated: **Albany, New York**
February 15, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER