The University of the State of New York

The State Education Department
State Review Officer
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No. 19-015

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

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Brian Davenport, Esq.

The Brain Injury Rights Group, attorneys for respondent, by Karl J. Ashanti, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining respondent's (the parent's) daughter's pendency placement was at the International Institute for the Brain (iBrain) during a due process proceeding challenging the appropriateness of petitioner's recommended educational program for the student for the 2018-19 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The hearing record reflects that the student attended the International Academy of Hope (iHope) for the 2017-18 school year, at district expense, as the result of an IHO decision dated March 13, 2018 (see Parent Ex. B at pp. 5, 16-17).[1] In the March 13, 2018 IHO Decision, the IHO

[1] Due to the status of this matter as a dispute of a pendency determination, there has been very little documentary

determined that the district did not offer the student a FAPE for the 2017-18 school year because it failed to present evidence "of its attempts to arrange a mutually agreed upon time and place for its CSE meetings before proceeding in the absence of the parent or staff from iHope" (id. at p. 13). The IHO then found that iHope was "an appropriate program for the student because it provides her with specifically designed, individualized instruction to meet her unique educational needs" (id. at p. 14). The IHO described the student's program at iHope for the 2017-18 school year as including "direct instruction in a 6:1+1 special class setting . . . supported by a full-time, one-to-one paraprofessional daily," as well as specified related services (id. at pp. 14-15). The IHO directed the district to fund the cost of the student's program at iHope for the 2017-18 school year (id. at pp. 16-17).

A. Due Process Complaint Notice

In a due process complaint notice dated July 9, 2018, the parent requested an impartial hearing, asserting that the district failed to offer the student a FAPE for the 2018-19 school year and seeking direct payment for the cost of the student's tuition at iBrain and the cost of transportation, including a 1:1 travel aide (Parent Ex. A). While the parent's substantive claims concerning the 2018-19 school year are not relevant to this appeal of an interim decision on pendency and are therefore not summarized; the parent's due process complaint notice included allegations related to pendency (id. at pp. 1-2). The parent asserted that the March 13, 2018 IHO Decision was the basis for the student's pendency placement and requested that the district "prospectively pay for the student's Full Tuition at iBrain (which includes academics, therapies and a 1:1 paraprofessional during the school day) and special transportation accommodations (which includes limited travel time of 60 minutes, wheelchair-accessible vehicle, A/C, flexible pick-up/drop-off schedule and a paraprofessional)" (id. at p. 2).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on October 9, 2018 and concluded the pendency portion of the hearing on November 27, 2018, after two days of proceedings (Tr. pp. 1-159). On the first hearing day, the IHO provided a verbal summation of the district's position as to pendency, which was provided to the IHO in a letter requesting an adjournment of the pendency hearing (Tr. pp. 4-5). According to the IHO the district asserted that the student's pendency placement was at iHope pursuant to a March 13, 2018 IHO Decision, that iHope was "a completely separate entity from iBrain," and that the two programs were not substantially similar (id.). At the outset, the IHO determined that the March 13, 2018 decision set forth the student's pendency placement and adjourned the hearing to allow the parties to provide information regarding the similarity of the two programs and whether the district offered the student a pendency placement (Tr. pp. 6-10).

In an interim decision dated October 22, 2018, the IHO noted that he allowed the district time to demonstrate that it had offered or was offering an available seat to the student at iHope during the pendency of the proceeding (October 22, 2018 IHO Decision at pp. 3-4). The IHO also

evidence entered into the hearing record with respect to the student's educational history (see Parent Exs. A-C; District Exs. 1-2; 6-7). However, the hearing record does include a proposed IEP, dated March 17, 2017, developed by iHope for the student's education for the 2017-18 school year (Parent Ex. C).

noted that the district had not yet made such a showing (id. at p. 4). The IHO further determined that while it was essential that those familiar with the student's new school (iBrain) be made available for district examination, the IHO placed the burden of demonstrating the similarity or dissimilarity between iHope and iBrain on the district (id. at p. 3). The IHO ordered that the parties would reconvene to address the issue of substantial similarity and directed that the district had the burden to demonstrate that iBrain was not sufficiently similar to the baseline program at iHope (id. at p. 15).

After the parties reconvened for an additional hearing on pendency on November 27, 2018, the IHO issued a second interim decision dated December 25, 2018 (December 25, 2018 IHO Decision). The IHO reiterated that, pendency is the district's obligation and that only if the district fails in its obligation, may the parent seek funding of a new school location through pendency (id.at pp. 3-5). The IHO noted that the program provided at the new school must also be substantially similar to the pendency program and altering his earlier interim decision found that the burden of proving substantial similarity was on the parent (id. at p. 5-6). The IHO then went on to determine that, the program at iBrain met "the demands of the baseline pendency program, with one notable exception" regarding the provision of vision education services (id. at p. 6). The IHO found that the failure to provide vision education services did not invalidate the placement as a whole (id. at pp. 6-7). In making this determination the IHO found that, according to iHope staff, any shortfall in the delivery of vision education service would be made up and that "the student has been receiving the substantial proportion of these services" (id. at p. 7). The IHO also noted "Stuff happens" indicating that any number of events can cause a student to miss mandated related services and that as long as they will be made up they "do not automatically invalidate an otherwise valid placement" (id.). The IHO then noted placement at iBrain should be validated because it was the parent's choice and because denying the parent's request would "offload the obligation to provide pendency onto the family and/or the school" (id. at pp. 7-8). The IHO ordered the district to pay for the student's placement at iBrain during the pendency of the underlying impartial hearing and further ordered that, if iBrain was "not fully-staffed with Vision Services providers by February 1, 2019 and engaging in a schedule of make-up services designed to achieve parity with the student's baseline program by June 30, 2019, it must contract with an outside agency to provide those services according to such a schedule," at district cost (id. at p. 8).

IV. Appeal for State-Level Review

The district appeals from the IHO's interim decision, asserting that the IHO erred in finding that iHope and iBrain were substantially similar programs. The district also alleges; that the IHO misinterpreted the law by inferring that the district was required to contract with a third party private school to secure a place for the student during the pendency of the proceeding and that the IHO lacked the authority to order iBrain to contract for the provision of vision education services. The district further contends that the IHO erred as a matter of law, asserting that any time a parent moves a student from one unilateral placement to another, it is a change in educational placement because the two schools are not part of "a single school-entity implementing an IEP at its different brick and mortar locations." The district contends that since there is no evidence in the hearing record that iHope is no longer available or that the parent was forced to transfer the student, iBrain should not be found to be the student's pendency placement.

In an answer, the parent generally responds to the district's allegations and argues in favor of the IHO's determinations that the student's pendency placement is iBrain. The parent attaches two documents to her answer.

In the answer, the parent also asserts that the district cannot challenge the IHO's determinations made in the October 22, 2018 interim IHO decision because the district did not appeal from that decision. The parent further contends that the district mischaracterized the IHO decision regarding the IHO's finding that the district was required to contract with iHope to provide pendency, and the IHO decision and testimony regarding the provision of vision education services at iBrain. The parent also objects to the district's view of the law regarding when a district is obligated to fund placement at a new private school selected by the parent during the pendency of the proceeding; the parent contends that the district improperly implies the standard that iHope would have to be "unavailable" from caselaw, but the caselaw cited by the district does not set forth such a legal standard. The parent further asserts that in prior appeals before the Office of State Review, the "unavailability" standard asserted by the district has been rejected. The parent also adopts the IHO's reasoning that the district was required to secure a pendency placement for the student and that if iBrain is not the student's pendency placement, the student will not have a pendency placement. Additionally, the parent argues that the IHO was correct in finding iHope and iBrain were substantially similar and further asserts that the temporary absence of one related service cannot preclude a finding of substantial similarity.

The parent further contends that the district's objection that the IHO lacked authority to direct a private school to contract with a related service provider is moot because iBrain has since hired another vision services provider.

In a reply, the district the objects to the inclusion of the parent's exhibits that were attached to the answer.

V. Applicable Standards

The IDEA and the New York State Education Law require that during the pendency of any proceedings relating to the identification, evaluation or placement of the student, the student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906;

O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]).

An educational agency's obligation to maintain a student's pendency placement, sometimes referred to by parties as the "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).

VI. Discussion

A. Initial Matter - Additional Evidence

The parent submits two additional documents for review with their answer on appeal and the district objects to their submission. Generally, documentary evidence not presented at an impartial hearing will 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 (Application of a Student with a Disability, Appeal No. 14-179; Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; 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]).

The parent submits a purported iBrain IEP with an original report date of March 6, 2018 and a reviewed date of February 8, 2019 (Answer Ex. AA). Initially, the document indicates it was reviewed by iBrain's director of special education, who testified during the hearing, and iBrain's director of clinical services; however, there is no indication that any of the information contained in the document was changed from the original report date (id.). Additionally, although the private school IEP may be helpful in determining what iBrain intended to provide to the student, 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 or are currently being delivered to the student at iBrain. As the document does not provide new information necessary for an SRO to render a decision on the issue of pendency, I decline to accept it into evidence (see L.K., 932 F. Supp. 2d at 488-89).

The parent also submits an affidavit from the director of special education at iBrain, who testified during the hearing (Answer Ex. BB; see Tr. pp. 76-149). The district justifiably objects to the introduction of this document on the basis that acceptance of it would deprive the district of the opportunity to cross-examine the affiant on the statements contained therein, especially those statements related to the services that iBrain had initially failed to provide to the student (see Reply). As this document is not necessary to for an SRO to render a decision on the issue of pendency in this matter it is not accepted into evidence (L.K., 932 F. Supp. 2d at 488-89).

B. Pendency

The parties agree that the student's educational placement for purposes of pendency is based on the unappealed March 13, 2018 IHO decision, which found that iHope was an appropriate placement for the student for the 2017-18 school year (see Tr. p. 38; Parent Ex. A at p. 2). Once a parent successfully challenges a proposed IEP and is awarded reimbursement for placement in a private school "consent to the private placement is implied by law, and the requirements of [the pendency provision] become the responsibility of the school district" (Bd. of Educ. of Pawling C. Sch. Dist. v. Schutz, 290 F.3d 476, 484 [2d Cir. 2002]). Accordingly, the March 13, 2018 IHO decision, directing placement at iHope at district expense, is the student's agreed-upon educational placement for the purposes of pendency.

Separate from a student's educational placement is the selection of the site where services will be provided. Generally, the Second Circuit has held that the selection of a public school site for providing special education and related services is an administrative decision within the discretion of a district (R.E. v. New York City Dep't of Educ., 694 F.3d 167 191-92 [2d Cir. 2012];

T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). Similarly, in assessing whether the 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).

The issue of whether a parent may transfer a student from one nonpublic school setting that was unquestioningly a valid stay-put placement—iHope in this matter—to another nonpublic school setting—such as iBrain—and still receive public funding under the protections of the stay put rule is just beginning to be addressed by the courts (see Paulino v. New York City Dep't of Educ. 19-cv-00222 [S.D.N.Y. March 20, 2019][finding that pendency remained at iHope after parent unilaterally transferred the student to iBrain because the parent did not challenge the adequacy of the program provided at iHope]; Cruz v. New York City Dep't of Educ., 2019 WL 147500, at *10 n. 7 [S.D.N.Y. Jan. 9, 2019] [explicitly declining to make a ruling as to whether pendency is available to "a parent who has prevailed in a due process proceeding and obtained tuition reimbursement for a particular school year [and] unilaterally decides to place the child at a different private school for a subsequent school year," but remanded the matter for a determination as to substantial similarity of the two schools]). Recent decisions from my colleagues have indicated that once a parent is awarded reimbursement at a nonpublic school as part of a due process proceeding, the parent is also awarded the ability to maintain the student's placement in a different nonpublic school selected by the parent provided that the programs provided to the student at both schools are substantially similar (see Application of a Student with a Disability, Appeal No. 19-006; Application of a Student with a Disability, Appeal No. 18-139). This analysis turns the guaranty that students receive "the same general level and type of services that the disabled child was receiving" into an affirmative parental choice as to the student's providers at public expense, which, in my opinion, is inconsistent with the reasoning behind the term "educational placement" and the intent of the pendency provision.

Initially, the Second Circuit's interpretation of educational placement was based, in part, on policy considerations regarding the administrative discretion of local educational agencies in implementing educational programs (Concerned Parents, 629 F.2d at 756 ["we conclude that the term 'educational placement' refers only to the general educational program in which the handicapped child is placed and not to all the various adjustments in that program that the educational agency, in the traditional exercise of its discretion, may determine to be necessary"] [emphasis added]).

Additionally, as noted above, 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, 484 U.S. at 323 [emphasis in original]; Evans, 921 F. Supp. at 1187; Bd. of Educ. v. Ambach, 612 F. Supp. at 233). The Third Circuit has determined that the purpose of the pendency provision, i.e. maintaining the status quo in situations where the school district acts unilaterally, is not implicated where a parent moves a student from one district to another (J.F. v. Byram Tp. Bd. of Educ., 629 Fed. Appx. 235, 237 [3d Cir. 2015]). Undeniably, the facts of that case do not align

perfectly with the situation presented here, where the parent has moved the student from one nonpublic school to another rather than from one school district to another school district; however, the premise that the parent's action is interrupting the provision of pendency rather than the district's unilateral action remains true.

Certainly, there are situations where a district may forfeit its discretion to select a location at which to implement a student's pendency placement (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] [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 after expelling the student];[2] 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"]). However, those situations involve a district failing to implement pendency, rather than a district's failure to provide FAPE prior to the initiation of pendency. Adopting the proposition that, using the pendency provision, parents may unilaterally move their children from school to school while continuing to have tuition paid for at public expense appears to go against the expressed purposes of the provision and the rationale for the definition of educational placement.

Up to this point, my analysis largely concurs with the IHO's determination in that prior to reaching the issue of substantial similarity, he allowed the district time to demonstrate that it had offered or was offering an available seat for the student at iHope during the pendency of the proceeding (October 22, 2018 IHO Decision at pp. 3-4). However, due to the timing of the parent's placement of the student at iBrain beginning July 9, 2018 and the filing of the due process complaint notice on July 9, 2018, there was no opportunity for the district to secure the student's placement at iHope for the 2018-19 school year (see Parent Ex. A.). As the parent placed the student at iBrain and filed her due process complaint notice on the same day (specifically requesting pendency at iBrain), it appears the parent unilaterally made the decision to have the student attend iBrain for the 2018-19 school year. The parent chose to move the student to iBrain; however, she has not provided any explanation as to why she decided to move the student from one school to another. While such an explanation is not relevant to the below determination regarding whether the two schools are substantially similar, it could be relevant to determining whether the "substantially and materially the same" standard should apply to the parents' decision to switch schools (see Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 61 [D.N.H. 1999] [holding that when a student had aged out of a particular program and the district had not identified a placement comparable to the student's then-current educational placement, the nonpublic school selected by the parents became the student's pendency placement because it was substantially similar to the student's prior placement]).

Additionally, regardless of whether the district was required to secure placement of the student at iHope, as of the time of the hearing in this matter, the program provided to the student at iBrain was not substantially similar to the program provided to the student at iHope for the 2017-

[2] 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). Nevertheless, the Court's observations are instructive to the present context.

18 school year, which was found to be appropriate for the student in the March 13, 2018 IHO decision.

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 [OSEP 1994]). Additionally, State regulations define a change in program as "a change in any one of the components" of an IEP, which includes, among other things, the size of the special class in which a student is recommended to receive services, supplementary aides and services and program modifications, supports for school personnel, the extent to which parents will receive parent counseling and training, any needed assistive technology devices or services, and the anticipated frequency, duration, and location of recommended programs and services, as well as testing accommodations, the extent to which the student will participate in classes with nondisabled peers, transition planning, and 12-month services (8 NYCRR 200.1[g]; 200.4[d][2][a], [b][2]). In order to qualify as a change in educational placement, one district court 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; see N.M. v. Cent. Bucks Sch. Dist., 992 F. Supp. 2d 452, 464 [E.D. Pa. 2014]). Similarly, the District of Columbia Circuit has described it as "a fundamental change in, or elimination of a basic element of the education program" (Lunceford v. D.C. Bd. of Educ., 745 F.2d 1577, 1582 [D.C. Cir. 1984]).

As set forth in the March 13, 2018 IHO decision, the student's 2017-18 school year program at iHope consisted of: "direct instruction in a 6:1+1 special class setting . . . supported by a full-time, one-to-one paraprofessional daily"; five weekly, 60-minute sessions of individual PT; four weekly, 60-minute sessions of individual OT; three weekly, 60-minute sessions of individual vision services; five weekly, 60-minute sessions of individual speech-language therapy; and group parent counseling and training once per month for 60 minutes (Parent Ex. B at pp. 14-15).

The district identifies one deviation in the student's iBrain program from the program provided to the student at iHope: that the student did not receive vision education services at the beginning of the school year, and alternatively, did not receive the mandated amount of vision education services during the school year.

The director of special education at iBrain testified that the student began attending a 6:1+1 class at iBrain as of July 9, 2018 (Tr. p. 122). She further testified that as of the November 27, 2018 hearing date, the student's current program and related services for the 2018-19 school year included an individual paraprofessional who worked with the student on health, feeding, and toileting and a transportation paraprofessional (Tr. pp. 129-30). In response to a question regarding whether PT was being implemented, the director testified "it looks as [has] been described" further indicating the student has been working on her PT goals and receives 60-minute sessions on a one-to-one basis "on a push-in/pullout manner" (Tr. p. 124-25). She also testified the student received individual OT four times per week for 60 minutes, and individual speech-language therapy five times per week for 60 minutes (Tr. pp. 125, 127).

With respect to vision services, the director of special education at iBrain testified that the student "will be" receiving one-to-one vision education services three times per week for 60 minutes (Tr. p. 126). She clarified that the student "is receiving some vision services" but because iBrain did not yet have its full vision staff, the school has not been able to meet the student's full mandate (id.). She further testified that the school was tracking the student's missed vision services and would provide make-up sessions for any sessions missed (id.). However, the hearing record does not include any specific details as to how many sessions of vision services the student has missed. The director of special education at iBrain further testified that iBrain was following the student's vision recommendations and supporting her visual needs in the classroom (Tr. p. 127). However, in reviewing the student's specific management needs related to vision, the director testified that iBrain addressed them to "the best of [her] knowledge," but she "wasn't there every day to see" (Tr. p. 134-35).[3]

The hearing record shows that the student has received diagnoses of periventricular leukomalacia (PVL), cerebral palsy, asthma, and cortical visual impairment (CVI) (Dist. Ex. 7 at p. 1; Parent Ex. C at p. 1). With respect to the student's visual deficits, the hearing record shows that in addition to being diagnosed with CVI, the student also has visual diagnoses of nystagmus, mild optic atrophy, strabismus, and hyperopic astigmatism (far-sightedness) (Dist. Ex. 7 at p. 3; Parent Ex. C at p. 7). The hearing record also shows that the student is legally blind and has a history of seizures (Dist. Ex. 7 at p. 1; Parent Ex. C at p. 1).

According to the March 2018 iHope draft IEP, the student underwent an eye examination on March 28, 2016 (Parent Ex. C at p. 7). As noted on the iHope draft IEP, according to the resulting eye report, the student was noted as having bilateral hypermetropia (also known as far-sightedness) (id.). According to the IEP, the resulting eye report showed that the student's visual impairment impacted her ability to attend, remember what she saw, and perceive what she was seeing (id.). The optometrist felt that the student "would make progress when she receive[d] consistent vision services" (id.).

The iHope assessment of the student's cortical visual impairment also shows that the student requires a high level of visual adaptations in order to access visual information, and as the student was "just learning to use her vision for functional tasks," it was deemed "important that she receive vision services on a consistent basis at a high frequency" (Parent Ex. C at pp. 8-10, 27). The assessment also noted that as the student was non-verbal, vision was a main sensory area that she should be able to utilize for learning as her visual processing skills improve, and that the more her vision is utilized and developed with specialized techniques and modifications throughout the entire day, whenever possible, the greater her access to information will be (id.).

Further, according to the staff at iHope, the student greatly benefited from receiving vision services during the 12-month 2016-17 school year (Parent Ex. C at p. 6). The IEP noted that the student was less dependent on light and movement when she looked at objects, had become less dependent on looking at objects in her right visual field, and was now able to consistently visually locate objects in both her left and right peripheral visual fields (id.).

[3] The transcript reflects that the question was posed with respect to iHope, but the line of questioning suggests that the parent's attorney was soliciting and received a response as to the program at iBrain (Tr. pp. 134-36).

In sharp contrast to the student's documented need for vision education services on a consistent basis at a high frequency (Parent Ex. C at pp. 7, 10, 27), and contrary to the IHO's determination that the student "has been receiving the substantial proportion of these services even during the period of diminished provider staffing," the hearing record does not indicate, in either specific or general terms, how many sessions of the recommended three hours per week of vision services the student did not receive. The director testified that as of November 17, 2018 iBrain had yet to hire the full contingency of vision education service providers and although the director testified that staff at iBrain were tracking missed sessions and would provide make-up services, she did not testify as to how many sessions were missed, how missed services might have impacted the student's educational opportunity, or whether the provision of missed services at a later date would adequately make up for the services missed (Tr. pp. 126-27). Accordingly, based on the hearing record it cannot be said that the failure to provide the student with vision education services did not affect her learning experience in some significant way, even if the service is later provided as a make-up service. [4]

Given the hearing record's support of the proposition that the student required vision education services on a consistent basis at a high frequency to address her severe visual deficits and the lack of proof as to the extent that those services were provided as of the date of the hearing, the program provided to the student at iBrain cannot be found substantially similar to the program provided at iHope during the prior school year.[5]

VII. Conclusion

While parents may, under certain circumstances, maintain pendency in a different nonpublic school if it is substantially similar to the original pendency placement, the hearing record in this matter does not support such a finding.

THE APPEAL IS SUSTAINED.

[4] To the extent that the parent asserts vision services have become available to the student since the completion of the hearing (see Answer Ex. BB), at some point, when vision services were provided in full or at least provided to an extent that there is evidence it did not affect the student's learning experience in some significant way, the programs may have become substantially similar. However, the evidence in the hearing record supports a finding that, at the time of the pendency hearing, the parent's unilateral placement of the student at iBrain constituted a "change in placement" for the purposes of pendency.

[5] As the IHO's decision on pendency is being reversed, I need not address the district's argument that the IHO did not have the authority to order that if iBrain was not fully-staffed with vision services providers by February 1, 2019, and engaging in a schedule of make-up services designed to achieve parity with the student's baseline program by June 30, 2019, iBrain must contract with an outside agency to provide those services at district expense. However, given the documented history of the severity and extensiveness of the student's visual deficits, the lack of evidence in the hearing record that the student received such services, and the admitted inability of iBrain to provide the student with the required level and frequency of vision education services for at least five months–it seems inconsistent for the IHO to have found that iBrain was substantially similar to iHope and yet, also that such services were important enough to order iBrain to hire a vision education therapist to address the student's needs by a certain date, or hire outside contractors to deliver the service.

IT IS ORDERED that that the IHO's decision dated December 25, 2018, which found that the program at iBrain constituted the student's pendency placement during the pendency of this proceeding is hereby reversed.

Dated: **Albany, New York**
March 21, 2019

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STEVEN KROLAK
STATE REVIEW OFFICER