The University of the State of New York

The State Education Department
State Review Officer
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No. 20-001

Application of a STUDENT WITH A DISABILITY, by his parents, 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, Ltd., attorneys for petitioners, by John Henry Olthoff, 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. Petitioners (the parents) appeal, 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) denying their request for a determination that their son's pendency (stay put) placement was the International Institute for the Brain (iBrain) during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2018-19 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 student has been the subject of a prior State-level administrative appeal of an interim decision rendered by an impartial hearing officer (IHO 1) regarding the student's pendency placement after the parent rejected the district's offer of a public school placement and unilaterally placed him at iBrain for the 2018-19 school year (see Application of a Student with a Disability,

Appeal No. 18-132).[1] This appeal for State-level review relates to a second interim decision on the issue of the student's pendency placement rendered by a second impartial hearing officer (IHO 2) in the same proceeding following remand by the United States District Court for the Southern District of New York, and as the student has been the subject of a long procedural history, the parties' familiarity with the student's educational history and prior due process proceedings is assumed and will not be repeated here in detail, except as relevant (id., see M.F. and R.C. v. New York City Dep't of Educ., 2019 WL7629255 at *1 [S.D.N.Y. Jul. 26, 2019]).

Briefly, the parents unilaterally placed the student at the International Academy of Hope (iHope) for the 2017-18 school year and obtained tuition reimbursement and the cost of related services pursuant to an unappealed March 12, 2018 IHO decision (Interim IHO 1 Decision at p. 2).[2] The parents unilaterally placed the student at iBrain for the 2018-19 school year and, in a due process complaint notice dated July 9, 2018, alleged that the district failed to offer the student a FAPE for the 2018-19 school year and sought tuition reimbursement for iBrain on the merits (Parent Ex. A). The parents also sought an interim decision for the district to fund the student's placement at iBrain for the 2018-19 school year as the student's pendency (stay-put) placement, based on the unappealed March 2018 IHO decision (id. at pp. 1-2; Parent Ex. B). By interim decision dated October 12, 2018, IHO 1 denied the parent's request to fund the student's placement at iBrain as pendency (Interim IHO 1 Decision at p. 7). Initially, the IHO noted that the sole issue to be addressed was whether the student's program at iBrain was "substantially and materially similar" to the student's prior program at iHope, such that iBrain could be deemed the student's current pendency program (id. at p. 4). After review of the hearing record, IHO 1 found that the parents did not establish that the iBrain program was substantially similar to the iHope program (id.).

Following the pendency hearing, and issuance of the interim decision, the parties participated in status conferences with IHO 1 on October 31, 2018, and December 13, 2018 (Tr. pp. 90-129). On December 21, 2018, the undersigned issued a decision with respect to the parents' appeal of IHO 1's October 12, 2018 interim decision (Application of a Student with a Disability, Appeal No. 18-132). This SRO largely affirmed, determining that the evidence in the hearing record supported IHO 1's finding that the "programming and related services the student was receiving at iBrain during the 2018-19 school year were not substantially similar to the programming and related services he received at iHope for the 2017-18 school year" and that IHO 1 correctly found that iBrain was not the student's placement for the purposes of pendency (id.). However, the undersigned left open the opportunity for the parents to make another application for pendency should the student's program at iBrain "evolve to the point that it becomes substantially similar to what the student received at iHope's program" (id.). The parties proceeded to a second hearing date on January 10, 2019, during which the parties gave opening statements and the parents' exhibits were received into evidence (Tr. pp. 130-159).

[1] The impartial hearing related to pendency was held on August 23, 2018 and concluded that day (see Tr. pp. 1-82) and an additional "status conference" took place on September 27, 2018 (Tr. pp. 83-89).

[2] IHO 2 issued the unappealed March 12, 2018 IHO decision (see Interim IHO 2 Decision at p. 2).

While the merits of the case were pending before IHO 1, the parents filed a complaint in court seeking a temporary restraining order and preliminary injunction reversing the undersigned's December 21, 2018 decision (New York City Dep't of Educ., 2019 WL7629255 at *1). The District Court determined that a remand to the IHO was "necessary to develop the record concerning whether iBrain became substantially similar to iHope over the course of the 2018-2019 school year" (id. at *2). The District Court denied the parents' application for a temporary restraining order and preliminary injunction and ordered that the case be remanded to the IHO to "supplement the evidentiary record concerning whether iBrain and iHope have become substantially similar for purposes of the [the student's] educational placement" (id. at *3). The District Court further ordered that once the evidentiary record had been supplemented, the IHO would issue a revised pendency order (id.).

As a result of the District Court's decision, the parties continued with the impartial hearing before IHO 2 on August 29, 2019 and concluded on November 7, 2019, after three additional hearing dates (Tr. pp. 160-357).[3] As further described below, the IHO gave several directives to the parties to develop the hearing record, especially with respect to iBrain's provision of vision education services to the student and the parents' attorney responded that he was prepared to do so (see Tr. pp. 166-182, 212). However, during the impartial hearing the IHO indicated that the parents were not complying with her directives for presenting evidence as they related to the student's vision education services (see e.g., Tr. pp. 213, 349-54).

IHO 2 issued an interim decision on November 19, 2019 (Interim IHO 2 Decision). IHO 2 denied the "[p]arents' request for pendency at iBrain" finding that the parents failed to supplement the record with documentary evidence and witness testimony as ordered by the District Court (id. at p. 4). Specifically, IHO 2 noted that an October 2018 progress report did not include "any delivery of vision education services" nor was an iBrain year-end progress report offered into evidence (id.). Additionally, IHO 2 went on to find found that the IDEA "does not require the [district] to fund [the] student's attendance at a preferred, 'substantially similar' school… when the existing school is… able to service the student's IEP" (id.). IHO 2 further noted that the parents did not allege that iHope was not capable of educating the student as it was "still operational," and that iBrain had no "track record of educating students with traumatic brain injury" (id. at p. 5).

On December 3, 2019, the parents wrote to the court in the Southern District of New York asking the assigned judge to issue a pendency order establishing iBrain as the student's pendency placement (Answer SRO Ex. A at pp. 1, 8). The also district wrote to the court in the Southern District of New York on December 3, 2019 to "apprise" the assigned judge that IHO 2 had denied the parents' request for a determination that iBrain was the student's pendency placement for the 2018-19 school year (Answer SRO Ex. B at p. 1). The district asserted that while "substantial similarity" was "the wrong analytical framework for a determination of pendency," should the District Court conclude otherwise, it could still adopt IHO 2's findings on that issue and deny the parents' requested relief for failing to demonstrate "substantial similarity" between the programs at iHope and iBrain (id. at p. 3). As a third alternative, the district requested that the District Court

[3] IHO 2 noted that she was the same IHO who heard and decided the parents' tuition reimbursement case for iHope for the 2017-18 school year.

stay the proceedings pending the outcome of three similar cases currently before the Court of Appeals for the Second Circuit (id.).

IV. Appeal for State-Level Review

The parents appeal and argue that IHO 2 erred by failing to make a determination regarding the substantial similarity of the iBrain and iHope programs, and failing to find that iBrain was substantially similar to iHope for the 2018-19 school year. The parents also allege that IHO 2 exhibited contempt for and bias against the parents' attorney, rejected the authority of the District Court, and made disparaging remarks about the parents' attorney, all of which warrant reversal of IHO 2's interim decision.

The parents further contend that IHO 2 erred by precluding the parents' vision education services provider from testifying and that the session notes requested by IHO 2 were in fact "available." The parents assert that IHO 2 failed to consider testimony and evidence that demonstrated that the iBrain program was substantially similar to the student's program at iHope. The parents further allege that IHO 2 erred by declaring evidence of the student's vision education services sessions to be "facially defective" and by failing to consider testimony explaining why vision education services were not included in the October 2018 progress report. The parents also assert that IHO 2 erred by relying on case law currently on appeal to the Second Circuit which found that parents could not unilaterally change a student's pendency placement when a prior pendency placement was capable of implementing a student's IEP. Lastly, the parents argue that IHO 2 erred by determining that iBrain did not have a track record of educating students with traumatic brain injury because it opened in July 2018. As relief, the parents request reversal of IHO 2's interim order on pendency, a finding that iBrain is substantially similar to iHope, and an order directing the district to fund the student's pendency placement at iBrain for the 2018-19 school year.

In an answer, the district denies the parent's material allegations of error in IHO 2's decision and argues that the parents' request for review should be dismissed, or in the alternative, that IHO 2's decision should be upheld in its entirety. The district also asserts that the parents failed to timely serve a notice of intention to seek review. The district contends that an SRO lacks jurisdiction to determine if IHO 2 followed the order of the District Court and should refrain from making a pendency determination as the parents' have requested that the District Court reverse IHO 2's decision and determine pendency. The district further argues that IHO 2 was not obligated to make a pendency determination given that the parents chose not to present the specific evidence IHO 2 requested and that their one witness had failed to provide.

Additionally, the district contends that iBrain was not substantially similar to the student's program at iHope because the student did not receive vision education services until mid-September 2018 and there was no evidence that the student received makeup sessions. With regard to allegations of bias by IHO 2, the district asserts that IHO 2 made clear directives that she wanted in-person testimony from the student's vision education services provider and session notes admitted into evidence however, the parents chose not to comply with IHO 2. The district further alleges that the parents failed to disclose the session notes or admit them into evidence and did not inform IHO 2 in advance of the hearing date that the student's vision education services provider during the relevant time period was not able to provide in-person testimony. The district asserts

that IHO 2's decision was well supported by the hearing record, and the parents' disagreement with the decision did not provide a basis for finding bias by IHO 2. As relief, the district requests that the parents' request for review be dismissed, or a determination that iBrain was not substantially similar to iHope.

In a reply, the parents, among other things, assert that the district's jurisdictional argument is without merit and assert that the SRO should determine the student's pendency placement because IHO 2 failed to comply with the order of the District Court.[4]

V. Discussion

A. IHO Bias and Conduct of Hearing

In their appeal, the parents allege that IHO 2's interim order on pendency should be reversed on the grounds that she exhibited contempt for and bias against the parents' attorney, rejected the authority of the District Court, and made disparaging remarks about the parents' attorney. The parents further allege that IHO 2 erred by declaring evidence of the student's vision education services sessions to be facially defective and by failing to consider testimony explaining why vision education services were not included in the October 2018 progress report. In addition, the parents contend that IHO 2 improperly precluded a witness and failed to consider testimony and documentary evidence that demonstrated iBrain was substantially similar to iHope (Req. for Rev. at pp. 3, 4, 5). As further evidence of bias, the parents assert that IHO 2 "[i]nserted [h]er [o]wn [f]atally [f]lawed [l]egal [a]nalysis… reflecting a pattern of poor legal reasoning" and an inability to remain fair and impartial (Req. for Rev. at p. 7; see also Req. for Rev. at pp. 8, 9).

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

[4] A reply is limited by State regulation to addressing "any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal." (8 NYCRR 279.6[a]). To the extent the reply, in part, exceeds the scope of permissible content by improperly reiterating the parent's other arguments set forth in the request for review, those portions of the reply have not been considered.

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

A review of the transcript indicates that during a prehearing conference on August 29, 2019, IHO 2 stated that "what [she] want[ed] for the pendency hearing… [was] testimony from the vision education provider and the session notes for the student" (Tr. p. 166; see also Tr. pp. 171, 175-76, 178, 213, 349, 355; Interim IHO Decision at p. 2). IHO 2 further advised the parties that testimony from the vision education provider and the session notes of the student's vision education provider were essential to the substantial similarity determination stating, "the crux of this matter is the vision education services" (Tr. p. 169; see also Tr. p. , 181). Prior to concluding the prehearing conference IHO 2 reiterated that she wanted "testimony from the vision service provider and the underlying session note[s]. What was done with the student and when it was done" (Tr. p. 171; see also Interim IHO Decision at p. 2). A second prehearing conference was held by IHO 2 on September 9, 2019 (Tr. pp. 174-184; see also Interim IHO Decision at p. 2). Prior to the district's attorney participation, IHO 2 stated to the parents' attorney "[a]lso at the last pre-hearing conference, we had-- in terms of moving this case forward, since it's been remanded from District Court, about having the vision education provider testify and having the session notes available" (Tr. pp. 175-76). IHO 2 later reiterated her instructions to both parties' attorneys stating "at the last pre-hearing conference, I had stated I wanted the vision education provider to testify with the session notes available. And that person should be our first witness" (Tr. p. 178; see also Interim IHO Decision at p. 2). IHO 2 further instructed the parties' attorneys that "[t]he key point in this line of cases seems to be the provision of vision education services as to whether iBrain is substantially similar to iHope for the purpose of pendency" (Tr. p. 181).[5] The hearing was scheduled to begin on November 7, 2019 and IHO 2 instructed that the parties exchange documentary evidence and witness lists by October 24, 2019 (Tr. p. 182).

By email dated October 30, 2019, the parents' attorney notified IHO 2 that "[a]s directed, [p]arents will have a vision educator who will testify, via affidavit and be available for cross examination via telephone, regarding vision education services" (IHO Ex. II at p. 3; see also Interim IHO Decision at p. 3). IHO 2 responded by email on the same date writing "[m]y instructions were for the vision education provider to appear in person for testimony. An affidavit is unacceptable" (id.).

[5] I agree with IHO 2 that iBrain's provision of vision education services during the 2018-19 school year has featured prominently as a factual issue in a number of district court proceedings involving a number of different children, but IHO 2 appeared to limit the pendency remand to that issue at one point (Tr. p. 181) but the District Court's order did not limit the factual issues the student's vision education services (New York City Dep't of Educ., 2019 WL 7629255), and the evidentiary record regarding the provision of substantially similar services must be appropriately developed in each child's case and will I discuss this issue further below.

The impartial hearing was held on November 7, 2019 (Tr. pp. 185-357). Prior to calling the first witness, the parents' attorney explained that in accordance with IHO 2's instructions, the session notes from both vision educators who had provided services to the student during the 2018-19 school year had been summarized on a chart (summary chart) that had been admitted into evidence (Tr. pp. 211-12; see Parent Ex. U). The parents' attorney further stated that the actual session notes were available for review but had not been disclosed to the district or been marked for identification (Tr. pp. 212-13; see also Interim IHO Decision at p. 3). The parents' attorney indicated that the author of the summary chart was an employee of iBrain who was now working "offsite" in another state (Tr. p. 212). The parents' attorney also explained that he requested a summary chart because the session notes were "voluminous… and sometimes hard to read" (Tr. p. 212; see also Interim IHO Decision at p. 3). Regarding IHO 2's directive to produce an in-person witness, the parents' attorney stated that the student's current vision educator who had provided services at the end of the 2018-19 school year was present to testify (Tr. p. 210). In conclusion, the parents' attorney explained "that what was admitted is a summary chart of the session notes, and the vision education services. The backup is available" (Tr. p. 213). In response IHO 2 stated "my directive was very explicit, a copy of the session [notes]. And here we sit today… the session notes are here, but not marked, and not admitted into evidence. Therefore, we will not move forward with [] pendency… until those documents are marked, admitted, and disclosed" (Tr. p. 213). IHO 2 further directed that the parents proceed with their tuition reimbursement case and that "[w]e will come back for pendency" (Tr. pp. 213-14). The parents' witness was the director of special education for iBrain (director), who had also testified before IHO 1 on August 23, 2018 (Tr. pp. 224-347; see also Tr. pp. 8-59).

Following the testimony of the director, the parents' attorney stated that the hearing record was sufficient to support a finding of substantial similarity and requested that IHO 2 issue an order on pendency (Tr. p. 348). The district's attorney objected on the grounds that the vision educator had not yet testified, and that pendency had been established at iHope in the prior pendency hearing on August 23, 2018 (Tr. p. 348). IHO 2 agreed with the district's attorney and stated that "my directive was very clear during the prehearing conference. I said testimony in person, and the session notes" (Tr. p. 349). The parents' attorney argued that evidence was presented regarding pendency and the related services that the student received at iBrain "in all respects, the frequency, the duration" (Tr. pp. 349-50). Additionally, the parents' attorney asserted that the session notes were available and that the summary chart was prepared because the author of the session notes was not available to testify (Tr. p. 350). IHO 2 responded that she was not informed that the author of the session notes was unavailable until that hearing date (Tr. p. 350). IHO 2 further stated that the parents' attorney had failed to follow her directives to "introduce the session notes into evidence", had failed to inform her prior to the hearing date that the vision educator was unavailable to testify, and that she was denying his application for pendency (Tr. p. 351). At the conclusion of the November 7, 2019 hearing date, IHO 2 stated that "[a]n order on pendency will issue when the hearing officer is provided with the requested documentary evidence, and the witness testimony" and that she would provide the parties with her next available hearing dates via email (Tr. p. 356).

In an email to IHO 2 dated November 9, 2019, the parents' attorney asserted that IHO 2 had ignored the order of the District Court as well as her "own directives to the parties regarding pendency" (IHO Ex. III at p. 1). The parents' attorney further wrote that IHO 2 refused to permit the testimony of the student's current vision educator despite the witness having been present and

"ready, willing and able to testify" as IHO 2 had requested (id.). Next, the parents' attorney asserted that "[a]s you requested, the [p]arents disclosed and introduced into evidence a summary of the vision educators' session notes for [the student]" with "[c]opies of the actual session notes… available at the hearing for review by" IHO 2 and the district's attorney (id.). Additionally, the parents' attorney contended that the testimony of the director was sufficient to establish that iBrain was substantially similar to iHope (id.). The parents' attorney alleged IHO 2 had "curtailed the process and refused to address pendency… [and] refused to schedule another hearing date to address this critical issue" (id.). In conclusion, the parents' attorney stated that "the [p]arents have determined to 'rest' their direct case" (id.).

As indicated above, IHO 2 reiterated many of the exchanges between herself and the parents' attorney within her interim decision on pendency (Interim IHO Decision at pp. 2, 3). Concerning the parents' summary chart of vision education services, IHO 2 found that the lack of a legend to explain its contents and the failure to annex the student's vision education goals to the summary chart rendered the exhibit "facially defective" (id. at p. 4; see also Parent Ex. U). Regarding the parents' attorney's November 9, 2019 email, IHO 2 wrote the "[parents' attorney] is disingenuous and this outright lie is a part of [parents' attorney's] tactics to thwart/frustrate the pendency hearing" (Interim IHO 2 Decision at p. 4). On the basis of the parents' attorney's "willful noncompliance with the case management orders… for documentary evidence and witness testimony to supplement the record for adjudication of pendency, the [p]arent's [sic] request for pendency at iBrain must be denied" (id.). IHO 2 further noted that any delivery of vision education services was absent from an October 2018 iBrain progress report and that an end of year progress report was not offered into evidence (id.; see also Parent Ex. I).

On review, the hearing record does not support a finding that IHO 2 demonstrated bias toward the parents or in her conduct of the hearing. The hearing record suggests that IHO 2 was unequivocal in her numerous requests for in-person testimony from a vision educator and for the session notes to be offered into evidence (Tr. pp. 166, 171, 175-76, 178, 213, 349, 355). IHO 2 correctly noted that the parents' attorney did not inform her that the student's vision educator for the 2018-19 school year was located out of state before the November 7, 2019 hearing date (Tr. p. 350). The parents' attorney's assertion that 20 pages of session notes were voluminous and therefore only available for review at the hearing as justification for deviating from IHO 2's instructions is unavailing. It would be improper for an IHO to consider any document outside of the hearing record when rendering a decision.

In the email exchange on October 30, 2019, the parents' attorney could have responded to IHO 2's denial of testimony by affidavit by advising her that the vision educator was located out of state. Further, according to the parents' attorney, the vision educator was an employee of iBrain at the time of the hearing, and as such iBrain could have produced the vision educator as a witness. It was not unreasonable for IHO 2 to insist that the author of the session notes be the witness. The hearing record reflects that IHO 2 did not abuse her discretion in the conduct of the hearing. Essentially, the only evidence of bias that the parents point to is that IHO 2 did not tolerate the parents' attorney's deviation from her specific instructions and did not issue a ruling in their favor that iBrain was the student's pendency placement. The parents' evidence and proffered argument fall markedly short of bias (see, e.g., Application of a Student with a Disability, Appeal No. 18-116).

The parent's disagreement with the conclusions reached by IHO 2 does not provide a basis for finding actual or apparent bias by IHO 2 (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994]; Application of a Student with a Disability, Appeal No. 13-083). Further, the IHO's rulings fell within her broad discretion (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *7-*8 [S.D.N.Y. Mar. 30, 2017]).

As to the parents' claim that IHO 2 applied flawed or poor legal reasoning to deny the student's pendency placement at iBrain, the hearing record and IHO 2's interim decision show that IHO 2, in making the decision, cited to pertinent legal authority relevant to the issue of pendency and attempted to apply it in a fair and neutral manner (see Interim IHO Decision at pp. 4-5). Accordingly, the parents' claims with respect to IHO 2's bias and conduct of the hearing are dismissed. Notwithstanding the above, IHO 2 intended to revisit pendency at a later date (Tr. pp. 213-14). The parents' attorney decided to "rest" his case on the testimony of the director and decided not to offer the session notes into evidence (Tr. p. 355; IHO Ex. III at p. 1). It was the parents' attorney's obligation to inform IHO 2 of any potential obstacles to complying with her directives.

B. Jurisdiction

The district argues that the parents have appealed IHO 2's decision directly to the District Court thereby depriving the SRO of jurisdiction in this matter. Relying on Application of a Student with a Disability, Appeal No. 19-089, the district contends that the SRO should decline to issue an order on pendency as the District Court is in the best position to determine if IHO 2 adhered to its order. However, the posture of Application of a Student with a Disability, Appeal No. 19-089 differs significantly from this appeal. In that case, the parents did not raise before the SRO any challenge to the IHO's January 2019 interim decision finding iHope and iBrain substantially similar and were instead seeking enforcement of both the IHO's interim decision and a prior SRO decision that were favorable to the parent in District Court (Application of a Student with a Disability, Appeal No. 19-089; see also Application of a Student with a Disability, Appeal No. 18-123). More specifically, while the parents' District Court action seeking enforcement of the administrative decisions was pending, the parents requested a second interim administrative decision from the IHO directing placement of the student at iBrain, which the IHO denied and the appeal for State-level administrative review in Application of a Student with a Disability, Appeal No. 19-089 ensued. The SRO in that matter explicitly explained that IHOs and SROs do not have authority (that is, jurisdiction) to enforce favorable administrative orders (i.e. the January 2019 IHO interim decision in favor of the parents) and declined to address the IHO's decision not to issue a second interim decision, noting in addition that the parents had elected to pursue the enforcement issue in District Court and finding that "it would not be prudent to permit the same appeal to go forward in two different forums" (Application of a Student with a Disability, Appeal No. 19-089). In stark contrast, the parents in this matter are not seeking to enforce a favorable administrative decision and have directly challenged IHO 2's interim decision which was adverse to them. Moreover, there is nothing in the District Court's order remanding the matter to an IHO that forecloses an appeal of IHO 2's interim decision to an SRO. The order merely stays the court proceedings and requires the parties advise the Court of the issuance of a substantive order by the

IHO (New York City Dep't of Educ, 2019 WL 7629255, at *3). Thus, the district's jurisdictional argument is without merit.

VI. Legal Framework—Pendency

Having denied the parents' request for pendency at iBrain based on procedural noncompliance with her directives, IHO 2 also determined that even if iBrain was substantially similar to iHope, the district was not required "to fund a student's attendance at a preferred, 'substantially similar' school, at least not when the existing school is concededly able to service the student's IEP" (Interim IHO 2 Decision at p. 4). IHO 2 further noted that the parents had not alleged that iHope was not capable of educating the student and that iBrain was founded in July 2018 and had "no educational track record of educating students with traumatic brain injury" (id. at p. 5). The parents argue that IHO 2 erred in her legal analysis and that the summary chart of vision education services and the testimony of the director are sufficient to establish that iBrain is substantially similar to iHope. The parents' evidence does not support a finding of substantial similarity.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]).

An educational agency's obligation to maintain stay-put placement is triggered when an administrative due process proceeding is initiated (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 445, 452 [2d Cir. 2015]). When triggered, there are numerous ways that the terms of the stay-put placement may be established. First, a school district and parent may simply reach an agreement as to the services and programming that the student shall receive while a proceeding is pending (20 U.S.C. § 1415[j] ["unless the State or local educational agency and the parents otherwise agree,

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

Stay-put "is often invoked by a child's parents in order to maintain a placement where the parents disagree with a change proposed by the school district; the provision is used to block school districts from effecting unilateral change in a child's educational program" (Susquenita, 96 F.3d at 83). "Where the parents seek a change in placement, however, and unilaterally move their child from an IEP-specified program to their desired alternative setting, the stay-put rule does not immediately come into play" (M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 [3d Cir. 2014]). "[A]n administrative ruling validating the parents' decision to move their child from an IEP-specified public school to a private school will, in essence, make the child's enrollment at the private school her 'then-current educational placement' for purposes of the stay-put rule. Having been endorsed by the State, the move to private school is no longer the parents' unilateral action, and the child is entitled to 'stay put' at the private school for the duration of the dispute resolution proceedings" (M.R., 744 F.3d at 119; see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 484 [2d Cir. 2002]; see also Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 201 [2d Cir. 2002]). The purpose of the pendency provision is "to maintain the educational statuts quo while the parties' dispute is being resolved," and it "therefore requires a school district to continue funding whatever educational placement was last agreed upon for the child until the relevant administrative and judicial proceedings are complete" (T.M., 752 F.3d at 152, 170-71).

When a school district has been paying for a student's tuition at a nonpublic school pursuant to pendency as the then current educational placement, "it must continue to do so until the moment when the child's educational placement changes" (E. Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 599 [S.D.N.Y. 2011], aff'd sub nom. R.E. v. New York City Dep't of Educ., 694

F.3d 167 [2d Cir. 2012]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *6 [S.D.N.Y. Mar. 17, 2010]). Parents can successfully secure stay put protection if they obtain an administrative or judicial ruling that validates their decision to move a student from an IEP-specified public school setting to a nonpublic school that they unilaterally selected without the district's input and this placement becomes the "then-current educational placement" for purposes of the stay-put rule, so long a proceeding is pending (Schutz, 290 F.3d at 483 [noting that "once the parents' challenge succeeds, . . . consent to the private placement is implied by law" and the funding of the private placement becomes the responsibility of the school district pursuant to stay put]).

The 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 currently before the Second Circuit (see Navarro Carrilo v. New York City Dep't of Educ., 384 F.Supp.3d 441 [S.D.N.Y. 2019][finding parents may unilaterally transfer their child from an established pendency placement to another educational setting so long as they comply with the ten-day notice requirement and establish that the two programs are substantially similar]; Mendez v. New York City Dep't of Educ., 19-cv-2945 [S.D.N.Y. May 23, 2019][denying parent's request for a preliminary injunction]; Paulino v. New York City Dep't of Educ., 2019 WL 1448088 [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]).

In prior administrative proceedings, I have noted that 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 (see Application of the Dep't of Educ., Appeal No. 19-039; Application of a Student with a Disability, Appeal No. 19-006;). Some district courts have adopted a similar approach finding that "Parents may unilaterally transfer their child from an established pendency placement to another educational setting so long as they comply with the ten-day notice requirement and establish that the two programs are substantially similar" (Soria v. New York City Dept. of Educ., 397 F. Supp. 3d 397, 402 [S.D.N.Y. 2019]; see Melendez v. New York City Dept. of Educ., 2019 WL 5212233, at *9 [S.D.N.Y. Oct. 16, 2019]; Navarro Carrilo, 384 F. Supp. 3d at 464; Abrams v. Carranza, 2019 WL 2385561, at *4 [S.D.N.Y. June 6, 2019]; Cruz v. New York City Dept. of Educ., 2019 WL 147500, at *10 [S.D.N.Y. Jan. 9, 2019]). However, some district courts have taken the opposite approach, finding that parents are not permitted to unilaterally move a student from one school to another and continue to receive the benefits of having the new placement paid for under pendency (see Hidalgo v. New York City Dept. of Educ., 2019 WL 5558333, at *8 [S.D.N.Y. Oct. 29, 2019]; Neske v. New York City Dept. of Educ., 2019 WL 3531959, at *7 [S.D.N.Y. Aug. 2, 2019], reconsideration denied, 2019 WL 5865245 [S.D.N.Y. Nov. 7, 2019]; Paulino, 2019 WL 1448088, at *6).

A. Law of the Case

Initially, with respect to the legal standard employed in this case, I find that IHO 2 erred in determining that a district was not required "to fund a student's attendance at a preferred, 'substantially similar' school, at least not when the existing school is concededly able to service the student's IEP". In this case, the District Court's order specifically adopted the "substantial similarity" test citing to Cruz (2019 WL 147500, at *10) and directing remand to an IHO to supplement the evidentiary record concerning whether iBrain and iHope have become substantially similar (New York City Dep't of Educ., 2019 WL7629255 at *3). While acknowledging that as of the date of this writing there are a number of hotly contested legal theories in this Circuit regarding stay put that involve the meaning and precise contours of the term "educational placement"—with both administrative hearing officers and district court judges taking a wide variety of approaches— the substantial similarity standard was employed as the applicable legal test by the District Court and has become the law of the case in this matter unless and until such time as the Second Circuit rules otherwise. Consequently, it was error for IHO 2 to deviate from the law of the case set forth by the District Court.[6]

B. Substantial Similarity

Turning next to the factual determination of whether the hearing record supports a finding of substantial similarity, in this case, as the district points out, the student did not receive vision education services from July 9, 2018 through September 14, 2018. The March 8, 2017 iHope IEP—on which the student's pendency program is based—included recommendations for 12-month services and that the student receive individual vision education services two times per week for 60 minutes each session (Parent Ex. D at pp. 27, 35). For the 2018-19, 12-month school year, the student should have received vision education services beginning on July 9, 2018 (Parent Ex. C at p. 43). The director testified that the student received his mandated 60-minute sessions of vision education services two times per week beginning September 14, 2018 (Tr. pp. 250-51, 290, 293-94).

The summary chart of the session notes offered by the parents into evidence corroborates the director's testimony that the student received vision education services at iBrain from September 14, 2018 through June 20, 2019 (Parent Ex. U at p. 2). From July 9, 2018 through June 20, 2019—approximately 49 weeks—the student should have received 98 individual 60-minute sessions of vision education services. However, the summary chart of vision education services also reflected that the student did not receive direct therapy after September 14, 2018 until November 5, 2018 and in total received only 36 sessions of vision education services for the 2018-19 school year (Parent Ex. U at pp. 1-2).

[6] The doctrine of the law of the case is intended to avoid retrial of issues that have already been determined within the same proceeding (People v. Evans, 94 N.Y.2d 499, 502-04 [2000] [noting that law of the case has been described as "'a kind of intra-action res judicata'"]; see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Cone v. Randolph Co. Schs. Bd. of Educ., 657 F. Supp. 2d 667, 674-75 [M.D.N.C. 2009]; see generally Application of a Child with a Disability, Appeal No. 98-73 [noting that a pendency determination by an SRO would not be reopened during the proceeding once it was decided]).

The mere fact that services were not delivered exactly as contemplated has not always proven to be fatal. The District Court in Navarro Carrilo found that a parent's unilateral placement that was initially unable to provide the entirety of the student's pendency program could nevertheless meet the substantial similarity test if other conditions were also present. In that case, the District Court explained that missing one of twelve counseling sessions would not cause the private school placement to fail the substantially similar test, but that "[t]he loss of twenty sessions of vision services over a two and a half month period is more troubling. And, if there were no plan to make up those services, then they would be effectively eliminated, which would render the educational program at iBRAIN not 'substantially similar' to that at iHope" (Navarro Carrilo, 2019 WL 2511233, at *16). In regulatory terms, in most cases, significant changes in the delivery of a student's special education programming that exceed ten school days will constitute a change in educational placement (see 34 CFR 300.530[a] [describing when disciplinary removals constitute a change in placement]; see e.g., Questions and Answers on Providing Services to Children With Disabilities During an H1N1 Outbreak, 53 IDELR 269 [OSERS 2009] [noting that the need for a CSE meeting occurs generally for absences of more than ten consecutive school days and for which an IEP meeting is necessary to change the child's placement and the contents of the child's IEP, if warranted]).[7] Ten school days out of a 180 day school year would be approximately five and one-half percent of the total enrolled time, or slightly less than five percent if summer services during July and August are also taken into account. In this case five percent of the missed vision education services would be about two-to-three sessions and, similar to Judge McMahon's reasoning in Navarro Carrilo, such a low number of missed sessions would not cause iBRAIN to fail the substantially similar test. However, the hearing record in this matter demonstrated that the student missed a far more significant amount—approximately 62 of 98 sessions over a 49-week period or about 63 percent. The director at iBrain also testified that she was unsure whether the student received any vision education services sessions delivered remotely via video conferencing and I do not find her testimony convincing with respect to the student's vision education services (Tr. p. 298).

Unlike the Navarro Carrilo case, there is no evidence in the hearing record of make-up sessions (Tr. p. 298; see Application of the Dep't of Educ., Appeal No. 19-039 [reasoning that service records showing makeup services that were already in progress was similar to the circumstances in Navarro Carrilo and supported application of the substantial similarity test). In view of the evidence proffered by the parents that shows a significant downward modification in the delivery of vision education services, I find no basis to conclude that the parents showed that iBrain provided substantially similar services to iHope during the 2018-19 school year because the evidence tends to show the opposite. Consequently, the parents do not prevail in their request for pendency funding at iBrain for purposes of this proceeding.[8]

[7] A similar but not identical time period for missed services involving a nondisabled student in the general education context is described as chronic absence from school, which is defined as missing at least ten percent of enrolled school days "Chronic Absenteeism Reports Now Available in SIRS," Office of Student Support Services [May 2, 2016], available at http://www.p12.nysed.gov/sss/documents/FINALchronicabsenteeismmemo_May2_2-16.pdf). Ten percent of the missed vision education services in this case would be approximately four sessions.

[8] I have taken notice that there is yet another due process proceeding regarding this student and the parents' claims

As noted in the prior administrative appeal, the hearing record is unclear with respect to most of the aspects of the student's programming at iBrain (Application of a Student with a Disability, Appeal No. 18-132). The IHO in the prior administrative proceeding determined that iBrain was not substantially similar to iHope and noted that in her testimony the iBrain director failed to indicate what size class—a 6:1+1 or an 8:1+1—the student attended at iBrain, and that iBrain had six classes in three classrooms, which indicated the student's classroom was actually a 10:2+2 or 11:2+2 special class with ten or eleven additional paraprofessionals in the room, thereby doubling the number of students, teachers, assistants, and paraprofessionals in the classroom (Tr. pp. 11-12, 16-21, 22-24, 33-45, 47-48, 52-53, 54-56). After the matter was remanded by the District Court, the iBrain director testified that the student was attending a 6:1+1 special class, but did not specify how the class was laid out or interacted with other special classes, if at all (Tr. pp. 226, 234, 239-40, 249, 260, 304-05, 316). But in doing so, the iBrain director continued to testify broadly about the iBrain program and confirmed that the student's iBrain IEP for the 2018-19 school year was identical to the iHope IEP for the 2017-18 school year (Tr. pp. 225-29, 239-242). The iBrain director testified that she did not provide direct services to the student but averred that the student had received all of the services recommended on the iBrain IEP (Tr. pp. 241-42, 249-52, 309). Additionally, the iBrain director described the daily instruction the student received (Tr. pp. 246-48). But, IHO 1 was also concerned that the physical classroom of iBrain's special class was being used by multiple classes, despite what any planning document might indicate, and as I noted in the previous State-level review:

> Putting aside that the hearing record does not establish definitively which class ratio the student was attending, information that might be relevant to the inquiry might include how the classes were separated in the room, if at all, and whether the students and staff from the two classes intermingled with one another. At least one court has passed upon a class ratio question that was not unlike the facts here, in which modifications regarding the interchangeability of 6:1+1 and 12:2+2 special classes were called into question (Kalliope R. v. New York State Dep't of Educ., 827 F. Supp. 2d 130, 141 [E.D.N.Y. 2010]). As a legal matter, the court determined that an administrative policy dividing 12:2+2 special classes into 6:1+1 special classes (if supported by evidence) would be impermissible outside the CSE process (id.). As applied by analogy to this case, if facts tend to show that the 6:1+1 special classes at iBrain were intermingled in their functioning, it would likely constitute a change in educational placement of the type that, if being educated in a public school, would require a modification of a student's IEP.

(Application of a Student with a Disability, Appeal No. 18-132 [emphasis added and footnote omitted]). In this case, the director additional testimony after remand did nothing to clarify IHO 1's or the undersigned's concerns that the student's special classes may have in actuality been

for tuition reimbursement related to the 2019-20 school year, and there was another State-level review proceeding related to that school year. In a decision, issued earlier today, that SRO described how the district took a decidedly different approach to the pendency dispute and, with respect to the 2019-20 school year challenges only the parents' legal theory but did not challenge the parent's factual assertions that iHope and iBrain became substantially similar (at least in the 2019-20 school year). In terms of the facts, this decision is confined to the delivery of services at iBrain during the preceding 2018-19 school year.

intermingled at times with other special classes, notwithstanding any IEP planning document that iBrain may have generated or what iBrain intended to occur.[9] Because as noted above, the District Court's remand was not limited to the issue of vision education services, the parent should have clarified this on remand. But for the fact that the vision education services were not substantially similar for the 2018-19 school year, I would otherwise need to remand this issue for a determination.[10]

Despite the additional testimony from the director at the hearing before IHO 2, she provided general information relative to the design of student's overall programming and very little information about the actual delivery vision education services the student received during the 2018-19 school year (Tr. pp. 240-41, 296-97, 328). As such, there is insufficient basis in the hearing record to reverse IHO 2's determination to deny public funding of iBrain as the student's stay-put placement.

VII. Conclusion

In light of the above, I find that IHO 2 erred by deviating from the substantial similarity standard and in finding that the parents were required to demonstrate that iHope was not capable of educating the student prior to unilaterally enrolling the student at iBrain. Nevertheless, the hearing record does not support a finding that the student's program at iBrain for the 2018-19 school year was substantially similar to the student's program at iHope for the 2017-18 school year.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 21, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER

[9] This fact issue arose in this case due to testimony elicited on cross examination by the district prior to remand (see Application of a Student with a Disability, Appeal No. 18-132).

[10] To the credit of the parent's attorney, he asked the IHO if he could offer other witnesses on the issue of pendency (Tr. p. 181) but the IHO erroneously indicated that the key point was the student's vision education services. Even so, the parent was able to elicit testimony from the director, but did not clarify the actual layout of iBrian's classrooms or extent to which the special classes at the school were physically intermingled at any point during the school day. However, remand is not necessary in this instance because evidence showing a lack of similarity between the vision education services at iHope during the 2017-18 school year and iBrain during the 2018-19 school year forecloses a finding that the parents' were entitled to stay-put funding in this proceeding.