The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 20-033

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 Theresa Crotty, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondent, by Peter G. Albert, 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) son's pendency placement during a due process proceeding challenging the appropriateness of district's recommended educational program for the student for the 2019-20 school year. The IHO found that the student's pendency placement was at the International Institute for the Brain (iBrain). 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

A full recitation of the student's educational history is unnecessary due to the nature of the appeal.[1] Briefly, the student attended a nonpublic school, the International Academy of Hope

[1] Due to the status of this matter as an interim appeal disputing a pendency determination, at the time of the district's request for review, there had been very little evidence received at the impartial hearing; accordingly, some of the factual background is derived from allegations in the due process complaint notice or factual points

(iHope), for the 2017-18 school year (see Parent Pendency Mem. of Law at p. 2; Dist. Pendency Brief & Mem. of Law at p. 3). During a prior impartial hearing, the parent sought tuition reimbursement for and pendency at iHope for the 2017-18 school year (see Parent Pendency Mem. of Law at pp. 2-3; Dist. Pendency Brief & Mem. of Law at p. 3). In the proceeding regarding the 2017-18 school year, an IHO issued an interim decision dated January 3, 2018, finding that the student's pendency was placement in a 6:1+1 special class at iHope along with related services, effective from November 3, 2017 (Parent Ex. B at p. 4).[2]

For the 2018-19 school year, the parent enrolled the student at International Institute for the Brain (iBrain) and filed a due process complaint notice to seek tuition reimbursement and pendency at iBrain (see Parent Ex. A at p. 1; Parent Pendency Mem. of Law at p. 3; Dist. Pendency Brief & Mem. of Law at p. 3).[3]

According to the parent, a CSE convened on May 30, 2019 to develop an IEP for the student for the 2019-20 school year and recommended that the student be placed in a "12:1+(3:1)" special class in a district public school (Parent Ex. A at p. 2). The parens rejected the CSE's recommendation and the student continued attending iBrain for the 2019-20 school year (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated July 8, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year "by committing many substantive and procedural errors under the IDEA and state law while developing" the May 2019 IEP (Parent Ex. A at p. 2). As relevant here, the parent requested that an interim order on pendency be issued immediately (id. at pp. 1-2). The parent asserted that the basis for pendency was the unappealed IHO decision on pendency in the prior administrative

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upon which the parties agreed in their briefs to the IHO regarding pendency (see generally Tr. pp. 1-23; Parent Exs. A-D; Dist. Ex. 1; Parent Pendency Mem. of Law; Dist. Pendency Brief & Mem. of Law).

[2] According to the parent, the IHO presiding over the impartial hearing related to the 2017-18 school year found that iHope was not an appropriate unilateral placement (Parent Mem. of Law at p. 3). The parent appealed the IHO's decision; however, an SRO did not render a decision because the parties settled the matter (Tr. p. 10). The parent indicated that, as part of the settlement agreement, the IHO's decision was "overturn[ed] . . . in its entirety" (Parent Pendency Mem. of Law at p. 3).

[3] An appeal related to pendency, as well as the merits of the parent's claims pertaining to the 2018-19 school year, is currently pending before another SRO under the docket number 20-044. In addition, as discussed further below, the district has submitted additional evidence with its request for review relating to the proceedings for the 2018-19 school year (SRO Exs. A-B). Briefly, in an interim decision dated November 13, 2018, an IHO denied the parent's request for pendency at iBrain (see SRO Ex. A at pp. 1, 7). The parent appealed the November 2018 interim decision directly to the District Court for the Southern District of New York (see id. at pp. 1, 8). In a decision dated October 15, 2019, the district court remanded the matter back to the IHO to determine whether the programs at iBrain and iHope were "substantially similar" (id. at p. 20). Upon remand, an IHO issued an interim decision dated January 26, 2020, which found that the programs were substantially similar and that iBrain was the student's pendency placement for the duration of that proceeding (SRO Ex. B at pp. 4-5). That IHO also found that due to the operation of pendency for the entirety of the 2018-19 school year, the parent's claims had become moot (id. at pp. 13-14).

hearing, which was based on an August 2016 IEP (id. at p. 2). The parent indicated the "specific pendency request" was for the district to "prospectively pay for the student's [f]ull [t]uition at iBrain (which includes academics, therapies and a 1:1 professional during the school day), and pay for his special transportation accommodations which include: limited travel time of 60 minutes, wheelchair-accessible vehicle, A/C, flexible pick-up/drop-off schedule and a 1:1 paraprofessional for transportation" (id.).[4]

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on December 10, 2019 and concluded the portion of the hearing related to pendency on December 13, 2019 after two days of proceedings without taking testimony (Tr. pp. 1-23).[5] At the hearing, counsel for the parent argued that the basis for pendency was an interim decision from the prior impartial hearing regarding the 2017-18 school year, which found iHope was pendency for the 2017-18 school year, and that, for the 2019-20 school year (the year at issue in this proceeding), iBrain and iHope were "substantially similar" (Tr. pp. 8-10). The district opposed the request for funding arguing that the parent did not have the right to unilaterally move the student from one school to another and require the district pay for it (Tr. p. 13). According to district counsel, iHope was able to "serve" the existing IEP and, therefore, the district was not required to fund a "substantially similar" school (id.). When asked by the IHO why the parent changed the student's school, the attorney responded: "The parent determined that they wanted to enroll their student in another school" and that the "underlying reason for the parent removing their student is irrelevant" for the purposes of pendency (Tr. pp. 14-15). The parties agreed to brief their arguments for the IHO (Tr. pp. 17-18; Parent Pendency Mem. of Law; Dist. Pendency Brief & Mem. of Law).

By interim decision dated January 13, 2020, the IHO determined that the program and placement at iBrain was substantially similar to the student's program and placement at iHope (IHO Decision at pp. 5-6). The IHO found that the parent was "entitled to funding of the student's placement at iBrain under pendency" (id.).[6] Additionally, the IHO determined "the fact that the student [wa]s receiving more related services at iBrain, than he did at iHope, [wa]s insignificant and does not change the fact that the programs are substantially similar" (id.). Finally, the IHO noted that he did not agree with the parent's argument that the student's operative placement was iBrain because that "would require some consent on behalf of the" district (id.). The IHO ordered

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[4] As the request for review is limited to a review of the IHO's interim decision on pendency, a full discussion of the parent's allegations regarding the May 2019 IEP is unnecessary (see Parent Ex. A at pp. 2-3).

[5] Prior to the matter proceeding to an impartial hearing, the parent filed an action regarding pendency for the 2019-20 school year in the District Court for the Southern District of New York, which was stayed pending the outcome of the matter relating to the 2018-19 school year (SRO Ex. C at pp. 2, 6-7). According to the civil docket, the stay was lifted as of February 18, 2020 (id. at pp. 7-8). Subsequently, however, on March 13, 2020, the matter was again stayed pending resolution of three cases pending before the Second Circuit (see 19-cv-8726).

[6] The IHO noted that the district asserted the student's pendency was iHope but that there was "nothing in the record to suggest that the [district] did anything to facilitate the student's placement at iHope under pendency" (IHO Decision at p. 6).

the district to fund the student's placement at iBrain during the 2019-20 school year under pendency (id.).[7]

IV. Appeal for State-Level Review

The district appeals. The district contends that IHO erred in finding that iBrain was the student's pendency placement. First, the district argues that the parent "filed a federal court action regarding pendency for the 2019-20 school year." According to the district, the federal court "issued a stay of the proceedings 'given the similarity between the Student's 2018-2019 and 2019-2020 pendency case, and that the administrative proceedings on the 2018-2019 case . . . may be dispositive of this action.'" Additionally, while the case in federal court was initially stayed pending the resolution of the proceeding for the 2018-19 school year, the district avers that it is now active as the stay was lifted on February 18, 2020. The district asserts that it was an error for the IHO to make a finding regarding pendency for this proceeding regarding the 2019-20 school year while it was pending before the federal court. The district argues that, therefore, given that the parent filed an action in federal court after filing the due process complaint notice but before the IHO issued a decision on pendency, the parent chose her "preferred method of recourse," the parent is now engaging in "forum shopping," and the SRO should decline to "allow [the parent] multiple bites at the pendency apple." The district argues that the IHO should have declined to address pendency and that the SRO should vacate the pendency determination and decline to address the issue. Finally, the district notes that an issue similar to the issue in this matter is currently pending before the Second Circuit, which just heard oral arguments on the cases before it.

The district does not dispute that the student has pendency in his program at iHope; however, the district asserts that the student does not have the right to pendency at iBrain and specifically objects to the IHO's use of the substantial similarity standard. The district argues that the stay-put provision of the IDEA does not entitle the parent to transfer the Student from iHope, the student's pendency placement, to another nonpublic school, iBrain, when there is no evidence that iHope was no longer an available placement. Finally, even if, the substantial similarity test applied, the district argues that it should not be deemed satisfied absent evidence that the student's program at iHope was not available.

In an answer, the parent generally denies the district's allegations and contends that the IHO's decision should be upheld as both factually and legally correct.[8] The parent argues that the IHO properly issued a decision on pendency, even though the issue is also pending in federal court. Further, the parent argues that the standard of "substantial similarity" is the correct standard and

[7] The IHO found that the student's pendency was retroactive to the date of the filing of the due process complaint notice (IHO Decision at p. 6).

[8] The Office of State Review did not receive the parent's answer until March 20, 2020; however, according to the parent's affirmation of e-mail service of the answer, the answer was served on February 27, 2020. The Office of State Review received the affirmation of e-mail service on March 2, 2020. According to State regulations, each pleading, together with proof of service, must be filed with the Office of State Review within two days after service of the pleading is complete (8 NYCRR 279.4[e]; 279.5[c]; 279.6[b]). The parent's counsel is warned that such a delay in filing a pleading may impede an SRO's ability to consider the party's position and may result in an SRO's rejection of the document (see 8 NYCRR 279.8[a]).

was properly applied by the IHO. The parent requests that the district's appeal be dismissed in its entirety.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, 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 (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; 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 and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement

actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

VI. Discussion

A. Additional Evidence

With its request for review, the district submits as additional evidence three documents identified as SRO exhibits (see Req. for Rev.; SRO Exs. A; B; C). SRO exhibit A is a copy of the October 2019 district court decision, which remanded the issue of pendency for the 2018-19 school year to an IHO to render a decision as to whether the student's programs at iHope and iBrain were substantially similar (see generally SRO Ex. A). SRO exhibit B is the final decision rendered in the impartial hearing regarding the 2018-19 school year, which determined that iBrain was the student's pendency placement and that the parent's claims were moot because the parent received all of the relief that she had requested under pendency (see generally SRO Ex. B). Finally, SRO exhibit C is the civil docket for the case pending before the United States District Court for the Southern District of New York regarding the student's 2019-20 school year, the school year at issue in this case (see generally SRO Ex. C). While SRO exhibits A through C include documents that are public records and/or relate to the procedural history of administrative proceedings involving this student, all of which may be available for consideration by the undersigned without

admitting the documents as additional evidence,[9, 10] in this instance, for purposes of convenience, the documents will be referenced by citing to the exhibits as identified and submitted by the district.

B. Jurisdiction

The district argues that the issue of pendency for this matter is currently before the District Court.[11] Citing Application of a Student with a Disability, Appeal No. 19-089, the district contends that the IHO should have declined to address pendency and that the "SRO should vacate the IHO's pendency determination and decline to address pendency" (Req. for Rev. at p. 6). However, the posture of Application of a Student with a Disability, Appeal No. 19-089 differs significantly from this appeal. In that matter, 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 first 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 parent in this matter is not seeking to enforce a favorable administrative decision and the district is actually challenging the IHO's interim decision.

With that said, having the proceeding pending simultaneously in two forums at the same time leaves the matter in an awkward posture. This posture comes about because, unlike most matters under the IDEA, some courts have indicated that a parent may bring an action for pendency without first exhausting administrative remedies (Murphy v. Arlington Cent. Sch. Dist., 297 F3d 195, 199-200 [2nd Cir. 2002] [administrative process is inadequate given the time sensitive nature of stay-put rights]; accord Ferreira v. New York City Dep't of Educ., 2020 WL 1158532, at *2 n.2

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[9] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

[10] An SRO may, as a matter within his or her discretion, take notice of records before the Office of State Review in other proceedings, especially those between the same parties and involving the same student in order to avoid unnecessarily confusing or conflicting factual determinations by the same administrative tribunal (see Application of a Student with a Disability, Appeal No. 19-053; Application of a Student with a Disability, Appeal No. 18-067; Application of a Student with a Disability, Appeal No. 17-057).

[11] As noted above, although the district court had lifted a stay that had been granted until the matter relating to the student's 2017-18 school year had been resolved, the matter has again been stayed, this time pending resolution of three cases pending before the Second Circuit Court of Appeals (see 19-cv-8726).

[S.D.N.Y. Mar. 6, 2020]; Neske v. New York City Dep't of Educ., 2019 WL 3531959, at *2 [S.D.N.Y. Aug. 2, 2019], reconsideration denied, 2019 WL 5865245 [S.D.N.Y. Nov. 7, 2019]; Navarro Carrilo v. New York City Dep't of Educ., 384 F. Supp. 3d 441, 456-57 [S.D.N.Y. 2019]; Abrams v. Carranza, 2019 WL 2385561, at *4 [S.D.N.Y. June 6, 2019]; de Paulino v. New York City Dep't of Educ., 2019 WL 1448088, at *5-*6 [S.D.N.Y. Mar. 20, 2019], reconsideration denied, 2019 WL 2498206 [S.D.N.Y. May 31, 2019]; Cruz v. New York City Dep't of Educ., 2019 WL 147500, at *8 [S.D.N.Y. Jan. 9, 2019]; but see M.M. v. New York City Dep't of Educ., 2010 WL 2985477 at * 10-11 [S.D.N.Y. July 27, 2010] [applying exhaustion requirement to claim for reimbursement under stay-put provision]).[12] I am not aware of any authority that speaks to the current posture where the pendency question is pending in court and in the administrative process simultaneously. Under these circumstances, I considered whether or not it was appropriate to abstain from making a decision on the student's pendency, as the district court's decision on this issue will ultimately supersede this decision; however, some authorities suggest that where there is jurisdiction or even concurrent jurisdiction, there may still be value in issuing a final administrative decision and, consequently, I have decided to proceed to the merits of the appeal (Brock v. Pierce Cnty., 476 U.S. 253, 259-60 & n.7, 266 [1986]; Shaw v. New York Dep't of Corr. Servs., 451 Fed. App'x 18, 21 [2d Cir. Dec. 15, 2011]; 40 West 75th Street LLC v. Horowitz, 25 Misc. 3d 1230(A), at *5 [Civ. Ct., New York County Nov. 19, 2009]). As of the date of this decision, the merits of the parties' dispute regarding pendency in this matter is also still pending in district court, and under such circumstances there is little or no danger of my inadvertently issuing a decision in conflict with the court's rulings and I see little prejudice to the parties before me in this proceeding because this administrative decision will ultimately remain subject to judicial review Accordingly, the district's assertion that the IHO erred by failing to abstain is without merit and its request that I abstain from making a decision is denied.

C. Pendency

The substance of the parties' arguments subject to review in this proceeding focuses on the question of when a parent may unilaterally transfer a student from one nonpublic school (iHope), which was being funded by the district, to another nonpublic school (iBrain) and continue to have the student's tuition funded by the district pursuant to pendency.

It is well settled that the pendency provision does not dictate that a student must remain in a particular site or location, or receive services from a particular provider; rather, "it guarantees only the same general level and type of services that the disabled child was receiving" (T.M., 752 F.3d at 171, citing Concerned Parents, 629 F.2d at 756; see G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *6 [S.D.N.Y. Jan. 31, 2012]; Child's Status During Proceedings, 71 Fed. Reg. 46,709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]). In prior decisions, I have noted that, 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 a Student with a Disability,

[12] Indeed, the district court's decision regarding this student's pendency arising out of the proceedings related to the 2018-19 school year likewise determined that the parent was not required to exhaust remedies in order to seek judicial review of the pendency issue (SRO Ex. A at pp. 13-14).

Appeal No. 18-139; Application of the Dep't of Educ., Appeal No. 18-127; Application of a Student with a Disability, 18-123; Application of a Student with a Disability, Appeal No. 18-119). As I discussed in these prior decisions, whether a student's educational placement has been maintained under the meaning of the pendency provision depends on whether the educational program is "substantially and materially the same" as the student's educational program for the prior school year (Letter to Fisher, 21 IDELR 992 [OSEP 1994]; see also Matter of Beau II, 95 N.Y.2d 234, 239-40 [2000] [applying Letter to Fisher]; Application of a Student with a Disability, Appeal No. 16-020).

Some district courts have adopted a similar approach finding that "[p]arents 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 Franco v. New York City Dept. of Educ., 416 F. Supp. 3d 302, 306 [S.D.N.Y. 2019]; Navarro Carrilo, 384 F. Supp. 3d at 464; Abrams, 2019 WL 2385561, at *4). However, other 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, 2019 WL 3531959, at *7; de Paulino, 2019 WL 1448088, at *6; see also Ferreira, 2020 WL 1158532, at *4 [following Neske and Hidalgo]). In addition, 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, e.g., Mendez v. New York City Dep't of Educ., No. 19-1852 [2d Cir. filed June 24, 2019, heard Jan. 28, 2020]; Paulino v. New York City Dep't of Educ., No. 19-1662 [2d Cir. filed June 3, 2019, heard Jan. 28, 2020]; Carrilo v. New York City Dep't of Educ., No. 19-1813 [2d Cir. filed Apr. 2, 2019, heard Jan. 28, 2020]). Until the Second Circuit has resolved the split in the district courts, I see no reason to depart from my previous decisions.

Moreover, in prior proceedings involving this student related to the 2018-19 school year, substantial similarity has been determined to be the appropriate standard, most recently adopted in a remand order from the District Court for the Southern District of New York (SRO Ex. A at pp. 18-20). The district court's remand order specifically adopted the "substantial similarity" test and directed remand to an IHO to supplement the evidentiary record concerning whether iBrain and iHope were substantially similar (id. at p. 20). Although I recognize that there is disagreement amongst the courts as to the issue before me, the IHO's application of the substantial similarity test in this matter is consistent with my prior decisions and the prior decisions that have been issued involving this student. Accordingly, I will uphold the IHO's decision adopting the substantial similarity test.

Having determined that the IHO was correct in applying the substantial similarity test, the next step would normally be to resolve any dispute as to whether or not the student's program at iBrain for the 2019-20 school year was substantially similar to the student's program at iHope for the 2017-18 school year. However, on appeal, the district has not challenged the IHO's factual finding that the two programs are substantially similar. The district has only appealed the IHO's adoption of the standard in this matter.

The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514 [b][1]; 8 NYCRR 200.5[k]). State regulations governing practice before the Office of State Review are explicit and require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see also 8 NYCRR 279.4[a], [f]; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]).

The only allegation contained within the request for review that could be considered a challenge is that "if such a test were to be applied, it should include, at a bare minimum, evidence that the [s]tudent's pendency program was not . . . available at iHOPE" (Req. for Rev. p. 6).[13] This allegation though does not call into question the IHO's factual findings that the two programs were substantially similar, rather, it seeks to apply a condition on the applicability of the substantially similar test. Therefore, as there is no challenge to the similarity of the programs, the IHO's determination that the programs are similar and that the student's stay-put placement is at iBrain for the pendency of this proceeding must be upheld (see 8 NYCRR 279.8[c][2], [4]).

[13] In prior decisions, I have noted that, because a pendency placement does not mean a student must remain in a particular location, it would not appear that, in most circumstances, the reasons for a change in location would be accorded much weight in an examination of whether or not the new location constituted the student's then-current educational placement (see, e.g., Application of a Student with a Disability, Appeal No. 18-139). In cases involving location changes precipitated by districts, the reasons for the transfers have not been deemed to effect a change in placement so long as those reasons were broader (i.e., external factors, such as those based on policy or fiscal considerations) and did not relate to the particular student (i.e., a student's expulsion due to his or her behaviors) (see D.M. v New Jersey Dep't of Educ., 801 F.3d 205, 217 [3d Cir. 2015]; Hale v. Poplar Bluffs R-I Sch. Dist., 280 F.3d 831, 834 [8th Cir. 2002]; Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook Cty., Ill. v. Illinois State Bd. of Educ., 103 F.3d 548, 548-49 [7th Cir. 1996]). Ultimately, while the reasons for a parent's decision to transfer a student from one nonpublic school to another may be relevant to the discussion, it is unlikely to be determinative except in an instance where the student's needs influenced the transfer, in which case the new nonpublic school would probably not meet the substantial similarity standard discussed above (i.e., if the parent sought a nonpublic school with different or additional services because of a change in the student's needs).

VII. Conclusion

Having found that the IHO correctly applied the substantial similarity standard in determining the student's pendency program and placement, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 25, 2020

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SARAH L. HARRINGTON
STATE REVIEW OFFICER