The University of the State of New York

The State Education Department
State Review Officer
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No. 20-039

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 Nathaniel R. Luken, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondents, by John Henry Olthoff, 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 respondents' (the parents') daughter's pendency placement during a due process proceeding challenging the appropriateness of petitioner'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 sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

Due to the nature of this appeal from an interim decision related to pendency, a full recitation of the student's educational history is unnecessary. Briefly, the student attended the International Academy of Hope (iHope) for the 2017-18 school year (Parent Ex. B at p. 5). The parents requested an impartial hearing seeking reimbursement for the cost of the student's tuition and related services at iHope for the 2017-18 school year (id. at p. 2). The IHO who presided over that matter (IHO 1) rendered a decision dated May 3, 2018 which found that the district failed to

offer the student a FAPE, that iHope was an appropriate unilateral placement for the student, and that equitable factors favored the parents' request for an award of tuition reimbursement (id. at pp. 13, 14, 16). The parents moved the student to the International Institute for the Brain (iBrain) for the 2018-19 school year (see Application of a Student with a Disability, Appeal No. 18-123).

In July 2018, the parents requested an impartial hearing concerning the 2018-19 school year, and the IHO who was assigned to that matter (IHO 2) issued an interim decision concerning the student's placement for the purpose of pendency dated September 15, 2018 (see Parent Ex. C). That interim order was the subject of a prior appeal to this office, resulting in a remand with instructions for the IHO to make a determination as to whether the programs at iHope and iBrain were substantially similar (see Parent Ex. C; see also Application of a Student with a Disability, Appeal No. 18-123). IHO 2 then issued a second interim decision dated January 8, 2019, which found that the programs provided at iBrain and iHope were substantially similar but did not directly order the district to fund the student's placement at iBrain (Parent Ex. D. at p. 6). The parents sought enforcement of that order in District Court (see Application of a Student with a Disability, Appeal No. 19-089).

A. Due Process Complaint Notice

In a due process complaint notice dated July 8, 2019, the parents asserted that the district failed to offer the student a FAPE for the 2019-20 school year and requested an impartial hearing (Parent Ex. A). The parents also requested that the due process complaint notice be consolidated with a prior due process complaint notice concerning the 2018-19 school year (id. at p. 1).[1] Relevant to this appeal, the parents asserted that the student's pendency placement was found in IHO 1's unappealed May 2018 decision (id. at p. 2). The parents asserted that their specific pendency request was for the district to prospectively pay for the student's full tuition at iBrain, including the costs of "academics, therapies and a 1:1 professional during the school day," and special transportation in an air conditioned, wheelchair-accessible vehicle, a 1:1 travel paraprofessional, limited travel time of 60 minutes, and a flexible pick-up/drop-off schedule (id.).[2]

B. Subsequent Events

IHO 2 subsequently recused herself from the proceeding involving the 2018-19 school year. A new IHO (IHO 3) was appointed and issued a decision dated September 5, 2019 that dismissed the underlying 2018-19 school year matter without prejudice, and that decision was the subject of a second appeal to the Office of State Review (see Application of a Student with a Disability, Appeal No. 19-089). In that appeal, I declined to address pendency because the parents were seeking enforcement of IHO 2s decision on pendency and were also pursuing the matter in District Court and I remanded the matter for a determination on the merits (id.). There is nothing in the current hearing record to indicate that a decision has been rendered on the merits in the

[1] In an Order of Consolidation dated July 24, 2019, the IHO who was appointed to hear the matter involving the 2018-19 school year (IHO 3) denied the consolidation request (Order on Consolidation).

[2] To be clear, while the parents requested that the district fund the student's cost of tuition and related services at iBrain as part of the asserted "specific pendency" as found in the unappealed May 2018 IHO decision, that decision found iHope to be the appropriate unilateral placement (see Parent Ex. B at p. 14).

matter regarding the 2018-19 school year. The student remained at iBrain for the 2018-19 and 2019-20 school years (Parent Ex. A at p. 1).

C. Impartial Hearing Officer Decision

An impartial hearing convened on September 4, 2019 for the initial purpose of determining the student's pendency placement and continued for two additional days of proceedings concluding on December 10, 2019 (Tr. pp. 1-79). More specifically, the parties presented arguments and evidence regarding whether the parents can move the student from one unilateral placement to another and continue to receive the benefit of having that placement funded by the district, and whether or not iHope and iBrain were substantially similar (id.).[3] In an interim decision dated January 21, 2020, the IHO assigned to this matter (IHO 4) determined that the iHope and iBrain programs were substantially similar and ordered the district to fund all costs for tuition and related services at iBrain for the 2019-20 school year (Jan. 21, 2020 Interim Order on Pendency at pp. 3-4).

D. Subsequent Event

On February 19, 2020, the parents filed a civil action in federal district court asserting that the district had yet to file an appeal or seek a stay of the January 21, 2020 interim order on pendency, and had not otherwise complied with the interim pendency order (Req. for Rev. Ex. A).[4, 5] It appears the parents are asking the District Court to compel the district to comply with the January 21, 2020 interim decision on pendency (id.).[6]

IV. Appeal for State-Level Review

The district appeals the January 21, 2020 interim order on pendency, asserting that: since the parents have filed a complaint in district court seeking a pendency decision, they have "in effect, selected their preferred method of recourse"; the SRO should vacate the IHO's decision and allow the parents' district court action to proceed since the Second Circuit is poised to issue a decision which will offer clarity on the issue as to whether a parent can continue to receive funding

[3] It appears that the district submitted a brief to the IHO on the issue of pendency; however, it was not included in the hearing record. According to State regulation, it should have been included as a part of the hearing record (8 NYCRR 200.5 [j][5[vi][a], [b], [e]-[g][any briefs filed by the parties for consideration by the IHO, and "any other documentation deemed relevant and material by the [IHO]" are part of the hearing record]).

[4] The district labeled the attachment as "SRO A"; however, as the document was annexed by the district to the district's request for review, it is labeled herein as "Req. for Rev. Ex. A".

[5] According to the district, the federal action has been stayed pending a decision by the Second Circuit Court of Appeals in Mendez v. New York City Dep't of Educ., No. 19-1852, Paulino v. New York City Dep't of Educ., No. 19-1662, and Carrilo v. New York City Dep't of Educ., 19-1813 (Req. for Rev. n.1). The district also asserts that the impartial hearing that is on remand from Application of a Student with a Disability, Appeal No. 19-089, is still pending a final determination on the merits (id.).

[6] In their answer, the parents indicate that the question of the student's pendency for the 2018-19 school year is currently pending in District Court (Answer at p. 3). That District Court action was explained in more detail in Application of a Student with a Disability, Appeal No. 19-089.

under pendency after moving the student from one nonpublic school to another; the IHO erred in determining iBrain was the student's pendency placement because it was the parents' unilateral decision to terminate the services at iHope, and iHope constituted the student's pendency; the IHO also erred in his pendency decision because the substantial similarity test should not apply without proof that iHope was no longer an available placement; and even if the substantial similarity test were applicable, the IHO erred in finding the two programs were substantially similar. In its request for relief, the district asks that an SRO reverse the IHO's pendency decision.

In their answer, the parents admit and deny portions of the request for review and request that the SRO uphold the IHO's pendency determination. In their answer, the parents assert that notwithstanding the current federal litigation, the IHO was correct in issuing a pendency determination, the IHO properly found that iBrain constitutes the student's pendency placement, and the IHO correctly found that the iHope and iBrain programs were substantially similar.

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

The IHO decided that "pursuant to the last agreed upon IEP," the district must fund all costs for tuition and related services at iBrain for the 2019-20 school year (IHO Decision at p. 4). In this matter, the parents asserted that the student's pendency placement was based on an unappealed IHO decision finding that for the 2017-18 school year, the district did not offer the student a FAPE and iHope was an appropriate placement for the student (Parent Ex. A at p. 2). The district agrees that the IHO Decision regarding the 2017-18 school year is the basis for pendency in this matter (Req. for Rev. at p. 4).[7] However, the district asserts that the parents cannot move the student from one school to another and continue to receive funding under pendency.

[7] As discussed above, the parents moved the student from iHope to iBrain after the conclusion of the 2017-18 school year, and, while a prior IHO found that the two programs were substantially similar, the parties are seeking a determination from District Court as to what the student's pendency placement is for the prior proceeding

The district asserts that the IHO erred in applying the substantially similar test to determine the student's pendency placement. Specifically, the district asserts that the parents cannot move the student from iHope, the nonpublic school that constitutes the student's pendency placement, to iBrain, another nonpublic school, and retain funding under pendency without first showing that iHope could not provide the student's programming and related services under pendency. The district contends that because the district is tasked with providing the student's programming, including under pendency, the parents' unilateral move equated to a unilateral termination of the student's pendency placement. The parents assert that the IHO's use of the substantial similarity test was appropriate in determining whether iBrain is providing the same educational placement as the student received at iHope and that the inquiry should end there.

Once a parent successfully challenges a proposed IEP and is awarded reimbursement for placement in a nonpublic school "consent to the private placement is implied by law, and the requirements of [the pendency provision] become the responsibility of the school district" (Bd. of Educ. of Pawling C. Sch. Dist. v. Schutz, 290 F.3d 476, 484 [2d Cir. 2002]). However, separate from a student's educational placement is the selection of the site where services will be provided. Generally, the Second Circuit has held that the selection of a public school site for providing special education and related services is an administrative decision within the discretion of a district (R.E. v. New York City Dep't of Educ., 694 F.3d 167 191-92 [2d Cir. 2012]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). As I have discussed in prior decisions, allowing a parent to move a student from one nonpublic school to another while maintaining the district's obligation to fund the cost of the student's placement under pendency turns the guaranty that students receive "the same general level and type of services that the disabled child was receiving" into an affirmative parental choice as to the student's providers at public expense, which, in my opinion, is inconsistent with the reasoning behind the term "educational placement" and the intent of the pendency provision (see Application of the Dep't of Educ., Appeal No. 19-015; Application of a Student with a Disability, Appeal No. 18-113).

Some district courts have adopted a similar approach finding that parents are not permitted to unilaterally move a student from one nonpublic 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]; de Paulino v. New York City Dep't of Educ., 2019 WL 1448088, at *6 [S.D.N.Y. June 13, 2019], reconsideration denied, 2019 WL 2498206 [S.D.N.Y. May 31, 2019]). However, other district courts have taken the opposite 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

involving the 2018-19 school year (see Application of a Student with a Disability, Appeal No. 19-089; Answer at p. 3). As there is no final determination concerning the 2018-19 school year, the analysis concerning pendency for the 2019-20 school year centers on the program found appropriate for the student for the 2017-18 school year.

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 Mendez v. New York City Dept. of Educ., 2019 WL 5212233, at *9 [S.D.N.Y. Oct. 16, 2019]; Navarro Carrilo v. New York City Dep't of Educ., 384 F. Supp. 3d 441, 464 [S.D.N.Y. 2019]; Abrams v. Carranza, 2019 WL 2385561, at *4 [S.D.N.Y. June 6, 2019]). 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 will not depart from my previous decisions on this issue and find that, considering the parents' unilateral decision to move the student from one school to another, the district is not obligated to pay the cost of the student's placement at the new school under pendency.

Notwithstanding the above, and out of an abundance of caution, I will also address the district's argument that the IHO erred in finding that the program the student received at iBrain for the 2019-20 school year and the program the student received at iHope for the 2017-18 school year were substantially similar. According to the district, the programs are not similar because one of the student's speech-language therapy sessions was changed from a group to an individual session at iBrain and iBrain provided the student with assistive technology services.

The United States Department of Education's Office of Special Education Programs (OSEP) has identified a number of factors that must be considered in determining whether a move from one location to another constitutes a change in educational placement, including: whether the educational program in the student's IEP has been revised; whether the student will be educated with nondisabled peers to the same extent; whether the student will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement is the same option on the continuum of alternative placements (Letter to Fisher, 21 IDELR 992 [OSEP 1994]). Additionally, State regulations define a change in program as "a change in any one of the components" of an IEP, which includes, among other things, the size of the special class in which a student is recommended to receive services, supplementary aides and services and program modifications, supports for school personnel, the extent to which parents will receive parent counseling and training, any needed assistive technology devices or services, and the anticipated frequency, duration, and location of recommended programs and services, as well as testing accommodations, the extent to which the student will participate in classes with nondisabled peers, transition planning, and 12-month services (8 NYCRR 200.1[g]; 200.4[d][2][a], [b][2]). In order to qualify as a change in educational placement, one district court held that the change "must affect the child's learning experience in some significant way" (Brookline Sch. Comm. v. Golden, 628 F. Supp. 113, 116 [D. Mass. 1986], citing Concerned Parents, 629 F.2d, at 751; see N.M. v. Cent. Bucks Sch. Dist., 992 F. Supp. 2d 452, 464 [E.D. Pa. 2014]). Similarly, the District of Columbia Circuit has described it as "a fundamental change in, or elimination of a basic element of the education program" (Lunceford v. D.C. Bd. of Educ., 745 F.2d 1577, 1582 [D.C. Cir. 1984]).

In reviewing the appropriateness of the program provided to the student at iHope for the 2017-18 school year, IHO 1 relied on a March 2017 iHope draft IEP developed by iHope for the

2017-18 school year (see Parent Ex. B at pp. 14-15, 17). The 2017-18 iHope draft IEP recommended that the student receive 12-month, special education and related services in an 8:1+1 special class along with a 1:1 paraprofessional, an extended school day, as well as: individual sessions of 1:1 PT, three times per week in 45-minute sessions; 1:1 OT, five times per week in 60-minute sessions; 1:1 speech-language therapy, three times per week in 60-minute sessions; group speech-language therapy, two times per week in 60-minute sessions; and a 1:1 nurse, daily, as needed (Parent Ex. J at p. 26). The parents were also recommended to be provided with 60 minutes of parent counseling and training, once a month in a group setting (id.). Finally, the iHope draft IEP recommended that the student receive special transportation, with the provision of a 1:1 paraprofessional, an air-conditioned vehicle that could accommodate a wheelchair, and a limited travel time of no more than 60-minutes (id. at p. 28).

With respect to the student's need for assistive technology, the iHope draft IEP identified that the student required an assistive technology device or service and that the student required an assistive technology device or service to address her communication needs (Parent Ex. J at p. 14). More specifically, the iHope draft IEP noted that the student needed to "incorporate the use of an [augmented or alternative communication] AAC in the classroom and other therapeutic settings in order to enhance her verbal communication" (id. at p. 13). In addition, although the draft IEP did include a communication goal that did not involve the use of an assistive technology device (i.e., verbally responding to yes/no questions), the student's other communication goals, directed at increasing the student's expressive and receptive language skills, specifically incorporated the use of an AAC device (id. at pp. 16, 18). However, draft the IEP did not recommend a specific assistive technology service or device (id. at p. 26).

The 2019-20 iBrain draft IEP shows that the student was recommended for a 12-month placement in an 8:1+1 special class, and the related services of 1:1 OT, five times per week in 60-minute sessions; 1:1 PT, three times per week in 45-minute sessions; 1:1 speech-language therapy, four times per week in 60-minute sessions; and group speech-language therapy, once a week in a 60-minute session (Parent Ex. E at p. 38). The IEP also recommended a 1:1 paraprofessional; a school nurse; and a set of assistive technology devices and once weekly assistive technology services (id. at p. 39). The parents were also recommended to receive group parent counseling and training once a month in a 60-minute session (id.). According to the iBrain director of special education, at iBrain, the student receives five sessions of speech-language therapy per week, four days in a 1:1 setting and one day in a group setting, is "trialing" a new assistive technology device, and also receives assistive technology services one time weekly for 60 minutes, and the support of a 1:1 paraprofessional (Tr. pp. 52-56).[8]

In addition to the above, the iBrain draft IEP identified that the student used an AAC device provided by the district and that the district had recently conducted an assistive technology

[8] While the director did not testify as to the student's actual receipt of OT and PT, the director testified as to generic related services that iBrain can provide, including vision education, music therapy, social workers, hearing services, OT, and PT (Tr. pp. 45-46). The parents did provide an affidavit from the director of operations of iBrain showing that the expected cost of the student's tuition and related services at iBrain for the 2019-20 school year included OT and PT (Parent Ex. H at p. 1).

evaluation of the student (Parent Ex. E at p. 11). According to the iBrain IEP, the district assistive technology evaluation recommended specific assistive technology software and a new device (id.). The IEP also indicated that the student would begin trialing the specific program recommended by the district assistive technology evaluation (id.at pp. 6, 11), and that the student was trialing a large keyboard and adapted mouse for computer access (id. at p. 16). According to the director of special education, the change in speech-language therapy was made to focus on the student's use of a new assistive technology device (Tr. pp. 55-56; see Tr. p. 52). The provision of assistive technology services was added to provide the student with the support required to use the new assistive technology device (Tr. pp. 68-69). According to the iBrain IEP, the recommended assistive technology services were, in part, directed at how the student could "best access [] her AAC device, mounting, computer access and environment adaptations," as well as collaboration with the district's team (Parent Ex. E at p. 33).

The 2017-18 iHope program and the 2019-20 iBrain program differ in two ways: the 2019-20 iBrain program changed one of the student's group speech-language therapy sessions into an individual session and added specific recommendations for assistive technology devices and services (compare Parent Ex. J at p. 26, with Parent Ex. E at pp. 38-39). Overall, while the inclusion of assistive technology devices and services in the iBrain IEP could be considered a change in the student's programming, as discussed above the student's program at iHope was not devoid of assistive technology, but included it as a part of the student's program in the description of the student's needs and in the student's annual goals (see Parent Ex. J at pp. 13, 14, 18). Additionally, the iBrain IEP indicated that the district provided the student's assistive technology device and a driving factor in the change in the student's assistive technology was an assistive technology evaluation conducted by the district (see Parent Ex. E at p. 11). Under these circumstances, I agree with the IHO that the addition of assistive technology services once weekly and the change in speech-language services do not warrant a finding that the programs are not substantially similar. However, while the hearing record supports finding that the program delivered at iHope during the 2017-18 school year is substantially similar to the program the student attended at iBrain for the 2019-20 school year, for the reasons discussed above, I do not find that the student's pendency placement is at iBrain.

VII. Conclusion

Based on the above, I find that the IHO in this matter erred in determining that the student's pendency placement for the 2019-20 school year was at iBrain.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated January 21, 2020, which found that iBrain constituted the student's pendency placement for the 2019-20 school year is reversed.

Dated: **Albany, New York**
April 1, 2020

STEVEN KROLAK
STATE REVIEW OFFICER