The University of the State of New York

The State Education Department
State Review Officer
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**No. 20-041**

**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 Sarah M. Pourhosseini, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondent, 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 respondent's (the parent's) son's pendency placement during a due process proceeding challenging the appropriateness of the 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

Due to the nature of the appeal, a full recitation of the student's educational history is unnecessary at this time. Briefly, the hearing record reflects that the student attended a nonpublic school, the International Academy of Hope (iHope) for the 2017-18 school year (see Dist. Ex. 20). The parent's unilateral placement of the student at iHope for the 2017-18 school year was the subject of a prior impartial hearing (see Parent Ex. L). At the conclusion of the impartial hearing concerning the student's 2017-18 school year, an IHO issued a decision, dated March 20, 2018,

finding that the district conceded that it had failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year, that iHope was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of an award of the costs of the student's tuition at iHope, including related services, for the 2017-18 school year (id. at pp. 3, 5-8).[1]

According to the parent, for the 2018-19 school year she enrolled the student at iBrain and sought tuition reimbursement for and pendency at iBrain (see Parent Ex. K at pp. 3-4; SRO Ex. A at p. 10). The parent indicated that an interim order issued by an IHO during the impartial hearing for the 2018-19 school year, dated December 8, 2018, established iBrain as the student's stay-put placement for the pendency of that proceeding (see Parent Exs. A at p. 2; K at p. 2 n.1; SRO Ex. A at p. 11). An appeal related to the merits of the parent's claims pertaining to the 2018-19 school year is currently pending before the undersigned under docket number 20-038.

A CSE convened on May 29, 2019 to develop an IEP for the student for the 2019-20 school year and recommended a 12:1+4 special class along with related services (see Dist. Exs. 4 at pp. 1-3; 6; see also Dist. Ex. 14 at pp. 1-2).[2] The parent rejected the CSE's recommendation and the student continued at iBrain for the 2019-20 school year (see Parent Ex. D; see also Parent Ex. A).

**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 FAPE for the 2019-20 school year (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 alleged that the basis for pendency was the unappealed interim IHO decision dated December 8, 2018 that determined the student should remain at iBrain pending the resolution of the impartial hearing for the 2018-19 school year (id. at p. 2). The parent requested that pendency

[1] The hearing record includes the pendency order which reflects a corrected date of March 23, 2018 as well as the original date of March 20, 2018 (Parent Ex. L).

[2] The hearing record filed by the district with the Office of State Review contained discrepancies as acknowledged by the district in its certification of the hearing record. Specifically, the hearing record as filed did not include district exhibits 5 or 15 or parent exhibit C, although the transcript of the impartial hearing reflects that these exhibits were admitted into evidence (see Tr. pp. 76, 81). The district's certification of the hearing record, dated March 2, 2020, indicated that the district had "requested clarification from the [IHO]" regarding these exhibits and that the district was "awaiting response" and "anticipate[d] [that] the record w[ould] be completed by March 16, 2020." The district did not follow-up with the Office of State Review about this discrepancy. The missing exhibits are described in the hearing record as follows: an IEP dated May 29, 2019 (Dist. Ex. 5); a class schedule dated March 21, 2019 (Dist. Ex. 15); and an iBrain IEP dated April 1, 2019 (Parent Ex. C) (see Tr. pp. 73, 75, 78). As an additional observation regarding the state of the hearing record, although it includes a memorandum of law regarding pendency as submitted to the IHO by the parent (see Parent Ex. K), there is no such memorandum in the hearing record from the district, although the district stated its intent at the impartial hearing to make such a submission (see Tr. pp. 82-83). It is unclear from the hearing record if this is an omission or if the district ultimately decided against submitting a written argument to the IHO on the issue of pendency. Given the limited nature of the district's appeal, it does not appear that either party is prejudiced by the district's omission of these documents with its filing of the hearing record in this limited instance; however, the district is reminded that it carries the responsibility to file a complete copy of the hearing record with the Office of State Review and that failure to do so could result in dismissal of a request for review (see 8 NYCRR 279.9[a], [c]).

be determined to consist of the full cost of the student's tuition at iBrain (including academics, therapies, and a 1:1 professional during the school day), as well as special transportation accommodations (including limited travel time of 90 minutes, a wheelchair-accessible vehicle, air conditioning, a flexible pick-up and drop-off schedule, and a 1:1 nurse) (id.).

**B. Impartial Hearing Officer Decision**

The parties proceeded to an impartial hearing on December 6, 2019 and concluded the portion related to pendency that day (see Tr. pp. 1-144).[3] At the impartial hearing, the parent asserted that the basis for pendency was an interim decision from the prior impartial hearing regarding the 2018-19 school year, which found that iBrain was the student's stay-put placement for the pendency of that proceeding or, alternatively, that iBrain was the student's operative placement or that pendency was based on the March 2018 unappealed IHO decision which found iHope was an appropriate unilateral placement for the 2017-18 school year and that iBrain was substantially similar to iHope (Tr. pp. 6-9).[4] The district asserted that, because the December 8, 2018 pendency order was an interim order and there had been no decision on the merits of the parent's claims relating to the 2018-19 school year, that pendency lay in the March 2018 IHO decision, which found that iHope was an appropriate unilateral placement for the 2017-18 school year (Tr. pp. 12-14). After some further discussion, the IHO stated that, subject to further research, he believed that an interim order on pendency could not form the basis for a finding of pendency in a subsequent proceeding (Tr. p. 25). The IHO further indicated his understanding that the "only issue" before him was "whether iBrain is similar to iHope" (Tr. p. 24).

By interim decision dated January 22, 2020, the IHO determined that "it [wa]s clear" that the March 2018 IHO decision ordering tuition reimbursement for the student's attendance at iHope for the 2017-18 school year had not been appealed (Interim IHO Decision at pp. 8-9).[5] The IHO further found that "[i]t [wa]s undisputable" that the student was attending iBrain at the time the parent invoked her right to pendency (id. at p. 8). The IHO indicated that the parent's witness gave ample testimony to establish the similarity between iBrain and iHope (id.). Therefore, the IHO ordered the district to fund the student's placement at iBrain as the student's pendency placement retroactive to the date of the parent's July 2019 due process complaint notice (id.).

[3] On December 6, 2019, the parties also offered documentary and testimonial evidence relevant to the merits of the parent's claims (see Tr. pp. 72-144).

[4] In a December 27, 2018 memorandum of law on the issue of pendency, submitted to the IHO, the parent agreed that the underlying basis for pendency was the unappealed March 2018 IHO decision (Parent Ex. K at p. 2).

[5] The IHO's interim decision was not paginated (see generally Interim IHO Decision). For ease of reference, citations to the IHO's interim decision will reflect pages numbered "1" through "10," with the cover page identified as page "1.

## IV. Appeal for State-Level Review

The district appeals and requests that the IHO's interim decision be reversed or, in the alternative, that the matter be remanded for further hearing on iHope's availability. As an initial matter, the district argues that the parent "filed a federal action, seeking a federal order regarding pendency" and, given that the action was filed after the IHO rendered a decision, the parent had, in effect, selected her preferred method of recourse to address the pendency matter and the SRO should decline to address it.[6] The district further argues that allowing the parent to litigate pendency at two different levels is akin to "forum shopping" and the SRO "should decline the [p]arent's invitation to allow multiple bites at the pendency apple and to allow potentially conflicting simultaneous orders." The district further asserts that the Second Circuit is poised to render a decision which will offer clarity on the exact issue presented and as the parent moved for pendency in federal court the SRO should vacate the IHO's pendency decision and allow the federal action to proceed.

The district maintains that the student's pendency placement remains at iHope based upon the unappealed March 2018 IHO Decision.[7] The district asserts that the IDEA does not entitle the parent to transfer the student from his pendency placement at iHope to another nonpublic school (iBrain), when there was no evidence that iHope was no longer an available placement for the student. The district further asserts that a "substantial similarity test should not have been applied" and that the IHO erred in doing so. Lastly, the district argues that the IHO deprived it of the opportunity to present evidence that iHope remained an available program for the student and therefore the IHO's order must be vacated and the matter remanded for a hearing on the availability of iHope.

In an answer, the parent responds to the district's allegations and argues that the IHO's decision should be upheld it its entirety. The parent argues that the IHO correctly determined that the student was entitled to pendency at iBrain for the 2019-20 school year based on its substantial similarity to the student's program and placement at iHope for the 2017-18 school year.

## 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

[6] With its request for review, the district submits evidence regarding a civil action brought by the parent in the United State District Court for the Southern District of New York (see SRO Ex. A). The filings in the civil matter are a public record and, therefore, it is appropriate for the undersigned to consider the same. In the complaint to the district court, filed on February 19, 2020, parents of students with disabilities who attend iBrain sought enforcement of IHO interim decisions finding that the students' pendency placements were at iBrain, including the IHO's January 22, 2020 interim decision in the present matter (see id.). According to the civil docket, the district court stayed the matter pending resolution of three cases pending before the Second Circuit (see 20-cv-01464).

[7] The district notes that while the parent initially asserted pendency based on an interim IHO decision regarding pendency, which was issued as part of the proceedings concerning the 2018-19 school year, the parent later abandoned that argument at hearing and asserted pendency based on the unappealed March 2018 IHO decision regarding the 2017-18 school year.

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. Jurisdiction

The district argues that the issue of the student's stay-put placement during the pendency of this matter is currently before a district court.[8] Citing Application of a Student with a Disability, Appeal No. 19-089, the district contends that the "SRO should vacate the IHO's pendency decision and allow the federal action to proceed" (Req. for Rev. at p. 4). However, the posture of Application of a Student with a Disability, Appeal No. 19-089 differs 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 contrast, while the matter in district court relates to the parent's request for enforcement of the IHO's interim decision, the district's appeal in the present matter pertains to review of the IHO's determination that iBrain constituted the student's pendency placement. As such, the pending matter is not identical to the issue presented to the district court. Further, the district's suggestion that the IHO's decision be vacated so that the merits of the pendency question can proceed in federal court is without basis since, according to the parent's complaint in district court to which the district points (see SRO Ex. A), the merits of the pendency dispute are not pending before the district court. Thus, the district's jurisdictional argument is without merit.

[8] As noted above, the matter to which the district refers has again been stayed pending resolution of three cases pending before the Second Circuit Court of Appeals (see 20-cv-01464).

**B. Pendency**

Here, the parties agree that the student's educational placement for purposes of pendency is based on the unappealed March 2018 IHO decision, which found that iHope was an appropriate unilateral placement for the student for the 2017-18 school year (see Parent Ex. L). As noted above, 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). 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, 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 Melendez v. New York City Dept. of Educ., 2019 WL 5212233, at *9 [S.D.N.Y. Oct. 16, 2019]; Franco v. New York City Dept. of Educ., 416 F. Supp. 3d 302, 306 [S.D.N.Y. 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]). 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 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]; see also Ferreira v. New York City Dept. of Educ., 2020 WL 1158532, at *4 [S.D.N.Y. Mar. 6, 2020] [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.

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. Here, although the IHO appears to have conflated the identification of the student's then-current educational placement based on the March 2018 unappealed IHO decision with the question of the student's operative placement—an alternative basis for pendency—the IHO ultimately found that iBrain served as the student's pendency placement based on the substantial similarity of the student's program and placement at iBrain compared to that at iHope.[9] Specifically, the IHO found that it was clear that the March 2018 findings of fact and decision was not appealed and that the parent's witness gave ample testimony to establish the similarity between the two schools (see IHO Decision at p. 8). Accordingly, I see no basis to modify 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

[9] To the extent the IHO applied the "operative placement test," I find that aspect of his reasoning was error for the same reasons described in Navarro Carrilo, (384 F. Supp. 3d at 464); that is, the test does not apply in these circumstances in which there is an IEP or unappealed IHO decision to look to for purposes of establishing the student's pendency rather than the operative placement test. Nevertheless, as the IHO did not rely exclusively on the "operative placement" test to reach the conclusion that iBrain is the student's pendency placement, the IHO's ultimately conclusion is affirmed.

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 such a challenge is relat4ed to the availability of iHope as the student's pendency placement.[10] 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]).[11]

[10] 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).

[11] For the same reasons, the district's argument that the IHO erred in limiting the district's ability to develop the hearing record regarding the availability of iHope is without merit. State regulation provides that the IHO "shall exclude any evidence" that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). The district argues that, notwithstanding the IHO's ruling that testimony about the availability of iHope was irrelevant (see Tr. pp. 54-57), the IHO ultimately relied on the proposition that the student would be deprived of services during the pendency of the matter if iBrain were not determined to be the student's pendency placement to support his determination on pendency (see IHO Decision at p. 8). While the IHO may have inartfully characterized his concern about the potentiality of no placement for the student, it does not appear that the IHO relied upon this as the basis for his determination that iBrain constituted the student's stay-put placement during the pendency of the proceedings. Accordingly, I find no reason to disturb the IHO's ultimate conclusion on this ground.

## 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**
**April 2, 2020**

**SARAH L. HARRINGTON**
**STATE REVIEW OFFICER**