The University of the State of New York

The State Education Department
State Review Officer
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No. 20-088

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioner, by Lauren Eisler, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 parent)[1] 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) which denied her request for a determination that her son's pendency (stay put) placement was the Titus School (Titus) during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended education program for the student for the 2019-20 school year. The district cross-appeals from the IHO's use of the substantial similarity standard to determine the student's pendency placement. The appeal must be dismissed. The cross-appeal must be sustained.

[1] The hearing record reflects that petitioner is the student's aunt (Tr. pp. 33, 35, 45, 46, 52) and is referred to alternately as the student's adoptive mother (Parent Ex. C at p. 2) and guardian (Tr. p. 47). Petitioner meets the regulatory definition of "parent" (8 NYCRR 200.1[ii][1]). Accordingly, all references in this decision to the parent are to the student's aunt.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student began attending the Brooklyn Autism Center (BAC) in January 2013 (Parent Ex. C at pp. 2, 3).[2] According to the parent, a CSE had not convened since June 11, 2015 and the parties entered into settlement agreements regarding the 2014-15, 2015-16, 2016-17, and 2017-18 school years (Parent Ex. A at p. 2).[3] Relating to the 2018-19 school year, the student was the subject of a prior impartial hearing resulting in an IHO decision dated July 5, 2019, which found that the parent was entitled to tuition reimbursement for the unilateral placement of the student at the BAC and for reimbursement of privately-obtained speech-language therapy services (Parent Ex. C at pp. 6-8).

According to the parent, a CSE did not convene to recommend a program or offer a placement for the student for the 2019-20 school year (Parent Ex. A at p. 2). The parent indicated that she provided 10-day notice to the district in a letter dated June 19, 2019 and that, on July 3, 2019 the district "indicated a willingness to settle the 2019-2020 matter" (id.).[4] In an amended 10-day notice letter dated August 21, 2019, the parent advised the district that the CSE had failed to develop an IEP for the 2019-20 school year, had not convened since June 11, 2015, and failed to recommend a program or placement for the 2019-20 school year and that, as a result, the district had denied the student a FAPE (Parent Ex. B at pp. 1-2). The parent notified the district that the student had attended BAC for summer 2019 and would be attending Titus for the 10-month portion of the 2019-20 school year (id. at pp. 2-3).[5] The parent specified that "[d]ue to [the student's] complex needs, [BAC] recommended that he attend school at a more behaviorally-focused program beginning in September 2019" (id. at pp. 2-3). As a result, the parent requested that the CSE contact her immediately to address "the above issues and provide an appropriate program and placement to the student prior to the beginning of the school year in September, or alternately refer this matter for expedited funding of the proposed unilateral placement . . . plus speech therapy provided at home" (id. at p. 3).

A. Due Process Complaint Notice

In a due process complaint notice dated September 4, 2019, the parent alleged that the district failed to offer the student a FAPE for the 2019-20 school year (Parent Ex. A at pp. 3-4).

[2] The Commissioner of Education has not approved BAC as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] Due to the status of this matter as an interim appeal disputing the IHO's pendency determination, as of the date of the IHO's interim decision in this matter, 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 (see Parent Ex. A; see generally Tr. pp. 1-97; Parent Exs. A-E; IHO Exs. I-II).

[4] As of the date of the IHO's interim decision in this matter, neither the parent's June 19, 2019 10-day notice letter nor the district's July 3, 2019 response were admitted as individual exhibits at the hearing. The contents of a hearing record for an appeal of an interim decision includes a copy of the record "developed as of the date of the interim decision" (8 NYCRR 279.9[d]).

[5] The educational director of BAC testified that the student did not attend the summer 2019 session (Tr. pp. 70-71).

According to the parent, the district failed to convene a CSE to develop an IEP or make a program or placement recommendation for the "upcoming school year" (id. at pp. 2, 3). The parent contended that, due to the district's failures, she was forced to enroll the student at BAC and Titus and to obtain speech-language therapy and special transportation (id. at p. 3). Accordingly, as relief, the parent sought the costs of the student's attendance at BAC and Titus for the 2019-20 school year, including transportation and "private speech-language therapy services" (id. at pp. 3-4).

As relevant to this interim appeal, the parent invoked the student's right to pendency pursuant to the unappealed July 5, 2019 IHO decision, which awarded tuition reimbursement for BAC for the 2018-19 school year (Parent Ex. A at p. 3). The parent stated that she would seek an order directing the district to fund the student's program at Titus as his pendency placement on the ground that the student's program at Titus was substantially similar to the student's program at BAC (id.).

B. Impartial Hearing Officer Decision

A prehearing conference was held on February 12, 2020, after which the parties proceeded to a hearing on pendency that took place over two days on February 24, 2020 and March 31, 2020 (Tr. pp. 1-97). The parties submitted letter briefs to the IHO regarding pendency on April 10, 2020 (IHO Exs. I; II). The parent asserted that she could unilaterally transfer the student from an established pendency placement to another educational setting provided that she complied with the 10-day notice requirement and the programs were substantially similar (IHO Ex. I at p. 4). According to the parent's letter brief, as of the date of filing the due process complaint notice, the student could no longer receive special education services from BAC, but the program director of BAC who "exmitted" the student "assisted the Parent in finding a substantially similar program for [the student] at the Titus School" (id. at p. 5). Without citation to the hearing record, the parent's brief indicated "[t]he record reflects that [the student] was exmitted from B.A.C. due to increased behavioral needs, he could not return to B.A.C." (id.). In the district's letter brief, the district argued that the parent's right to pendency "extinguished when they [sic] unilaterally transferred the student from BAC to the Titus School" and that, alternatively, the parent did not prove that the student's program at BAC for the 2018-19 school year was substantially similar to the student's program at Titus for the 2019-20 school year (IHO Ex. II at p. 1). The district did not directly address the parent's argument that BAC was unavailable but argued that the parent moved the student unilaterally, asserting the move was "not attributable to the [district]" (id. at p. 3). Regarding substantial similarity, the district asserted the parent moved the student because the parent and BAC staff believed BAC was no longer appropriate for the student, but that Titus "offered services to meet [the student's] growing needs" thus making the two programs dissimilar (id.).

In an interim decision on pendency dated April 13, 2020, without explicitly adopting a substantial similarity test, the IHO found that the student's program at Titus was not substantially similar to the program provided at BAC and therefore denied the parent's request for pendency at Titus (Interim IHO Decision at pp. 3, 4). The IHO noted that the parent moved the student from BAC to Titus for the 2019-20 school year and that the parent asserted BAC was no longer appropriate for the student (id. at p. 3). The IHO opined that the parent's decision to move the

student from a program she believed to be inappropriate (BAC) to a program she believed to be appropriate (Titus) tended to indicate that the two programs were not substantially similar (id.). Next, the IHO considered the differences between the student's classroom ratio, academic instruction, and related services at BAC and Titus, with additional attention paid to the different approaches used to address the student's social/emotional needs, and determined that the two programs were not substantially similar (id. at pp. 3-4). The IHO then denied the parent's request for pendency services at Titus (id. at p. 4).

IV. Appeal for State-Level Review

The parent appeals arguing that the IHO erred by failing to determine that the student's program at Titus was his pendency placement. Specifically, the parent asserts that BAC was not available and that the IHO failed to identify any pendency placement for the student during the pending proceeding. The parent also argues that the IHO erred in failing to find the student's program at Titus was substantially similar to the student's program at BAC. As relief, the parent requests that the district reimburse the parent for the cost of the student's attendance at Titus from the time of the filing of the due process complaint notice pursuant to pendency.

In an answer with cross-appeal, the district responds with admissions and denials and alleges that the IHO erred by considering whether the student's program at Titus was substantially similar to the student's program at BAC. The district asserts that the student's pendency placement lay in the unappealed July 2019 IHO decision, which found the parent was entitled to tuition reimbursement for the student's attendance at BAC for the 2018-19 school year. In the alternative, the district argues that the IHO correctly found that the student's program at Titus was not substantially similar to the student's program at BAC. The district also alleges that the parent cannot claim that the district was obligated to provide an alternate pendency placement for the student after the parent rejected the last agreed upon placement at BAC. As relief, the district requests that the parent's appeal be dismissed.

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 Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; 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 (Ventura de Paulino, 959 F.3d at 532; 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 (Ventura de Paulino, 959 F.3d at 532; 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).

Once a pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino, 959 F.3d at 532; Bd. of Educ. of Pawling

Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; 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]; Letter to Hampden, 49 IDELR 197 [OSEP 2012]). 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 Schutz, 290 F.3d at 483-84; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197).

VI. Discussion

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

The Second Circuit Court of Appeals recently spoke to this issue in Ventura de Paulino v. New York City Department of Education, 959 F.3d 519 (2d Cir. 2020). The Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

Ventura de Paulino concerned two cases with facts similar to this matter wherein the IHOs had concluded that the parents' unilateral placements of their children at a nonpublic school were appropriate for a prior school year and, upon the district's decision not to appeal those rulings, by operation of law, the district consented to the students' placement at the nonpublic school (959 F.3d at 532). The issue presented was whether a parent could unilaterally move a student to a different nonpublic school and still receive pendency funding (id.). The Court concluded that a parent could not effectuate this unilateral move since it is the district that is authorized to decide how (and where) a student's pendency services are to be provided as per the text and structure of the IDEA and given that the district is the party responsible for funding the pendency services (id. at 533-35). The Court observed that:

> If a parent disagrees with a school district's decision on how to provide a child's educational program, the parent has at least three options under the IDEA: (1) The parent can argue that the school district's decision unilaterally modifies the student's pendency placement and the parent could invoke the stay-put provision to prevent the school district from doing so; (2) The parent can determine that the agreed-upon educational program would be better provided somewhere else and thus seek to persuade the school district to pay for the program's new services on a pendency basis; or (3) The parent can determine that the program would be better provided somewhere else, enroll the child in a new school,

> and then seek retroactive reimbursement from the school district after the IEP dispute is resolved

(id. at 534). Therefore, the Court concluded that "[r]egardless of whether the educational program that the Students are receiving at [the new nonpublic school] is substantially similar to the one offered at [the prior nonpublic school], when the Parents unilaterally enrolled the Students at [the new nonpublic school] for the 2018-2019 school year, they did so at their own financial risk" (id.).

In the present matter, the student's last agreed upon placement for purposes of pendency is based on the July 2019 unappealed IHO decision, which ordered the district to fund the student's unilateral placement at BAC for the 2018-19 school year (see Parent Ex. C). Applying Ventura de Paulino to the instant dispute, when the parent unilaterally enrolled the student at Titus for the 2019-20 school year, she did so at her own financial risk (959 F.3d at 534).

The appeal in this matter was fully submitted after the Second Circuit's ruling; however, the parent does not address the Court's holding that parents do not share the district's authority to determine how a student's last agreed-upon educational program will be provided during pendency (Ventura de Paulino, 959 F.3d at 525). Rather, the parent points out that the Second Circuit "noted" a Fourth Circuit Court of Appeals decision that indicated there were certain circumstances where a parent may seek injunctive relief to modify a student's placement pursuant to equitable authority where the pendency placement is no longer available and the school district did not propose an alternative. The parent argues that the IHO failed to decide where the student's pendency existed in light of BAC being unavailable and the district failing to offer an alternative placement and that the IHO could have used her broad equitable power to identify the student's pendency placement. The district argues that it did not have an obligation to secure an alternate pendency placement after the parent rejected BAC.

In Ventura de Paulino, the Second Circuit left open the question as to what would happen if a student's prior nonpublic school placement was not available to provide pendency services and the district either refused or failed to provide pendency services (959 F.3d at 534 n.65).[6] However, the present case does not present such an instance, as the evidence in the hearing record does not support a finding that BAC was not available.

The parent's amended 10-day notice letter dated August 21, 2019 reflected that "[d]ue to [the student]'s increasingly complex needs, [BAC] recommended that he attend school at a more

[6] The Court in Ventura Paulino cited Wagner, in which the Fourth Circuit held that 20 U.S.C. § 1415(j) does not impose any affirmative obligations on a school district to seek out alternative placements when a student's then-current educational placement is not functionally available (Wagner, 335 F.3d at 301 [finding that "the question of availability is entirely irrelevant to the task of identifying the child's then-current educational placement, and it is only the current placement, available or unavailable, that provides a proper object for a 'stay put' injunction"]). However, the Fourth Circuit noted two situations in which a student's pendency placement could be changed: either by an agreement of the parties or by "a preliminary injunction from the district court, changing the child's placement" (Wagner, 335 F.3d at 302). This follows the long-standing principle that "the stay-put provision in no way purports to limit or pre-empt the authority conferred on courts" (Honig, 484 U.S. at 327; see 20 USC 1415[i][2][C][iii]).

behaviorally-focused program beginning September 2019" (Parent Ex. B at pp. 2-3). As of September 2019, the student began attending Titus (Tr. pp. 25-26). The due process complaint notice does not assert that BAC was not available at the time of the transfer and instead only referenced that the parent "unilaterally" enrolled the student at BAC for the summer and Titus for the 10-month portion of the school year (Parent Ex. A at pp. 2-3). As mentioned above, in the parent's motion for pendency, she argued, without citation to the hearing record, that the record reflected that the student could not return to BAC and she had no choice but to enroll the student at Titus (IHO Ex. I at pp. 2, 4). The hearing record indicates that the student was not re-enrolled at BAC for the 2019-20 school year due to changes in behavioral needs that were no longer addressed by the program at BAC; more specifically, staff at BAC seemed to believe the student needed additional mental health services from a psychologist that were not available at BAC (Tr. pp. 26, 28-29, 36, 37, 73, 76-77). The parent's attorney argued during the impartial hearing that the student was not allowed to re-enroll at BAC (Tr. pp. 14, 18-19, 52, 54-55). One witness, the educational director of BAC, testified that he discussed the student transferring schools with the parent "the summer prior to letting her know that we weren't able to provide services for him anymore" and followed up stating later on "we didn't allow him back" due to the lack of a mental health component in the program at BAC (Tr. pp. 73, 75-76). However, the director's testimony was not clear as to whether there was ever a formal end date set at which point the student could no longer receive services from BAC or at what point BAC would not have been an available program. Adding to the opacity of whether the student could have re-enrolled at BAC is the parent's attorney's description of the student as having been "exmitted" from BAC (Tr. pp. 19, 52; IHO Ex. I at p. 5; Parent Mem. of Law at p. 6). Despite parent's counsel's repeated use of this word, it has no meaning with respect to why the student did not return to BAC.[7]

Without more explicit facts establishing the unavailability of BAC as a placement for the 2019-20 school year, there is insufficient basis to find that this matter falls outside of the scope of the holding in Ventura Paulino. Thus, based on the foregoing and consistent with the Second Circuit's decision in Ventura de Paulino, the parent is not entitled to public funding for pendency services at Titus for the 2019-20 school year. Accordingly, the district's cross-appeal is sustained.

In the alternative, with respect to the parent's appeal—that is, assuming for the sake of argument that I was to accept the legal position presented by the parent that Titus could be the student's pendency placement if it was substantially similar to Titus—the hearing record supports the IHO's determination that the program provided at Titus was not substantially similar to the program provided by BAC.

Whether a student's educational placement has been maintained under the meaning of the pendency provision may, under certain circumstances, depend on whether the educational program is "substantially and materially the same" as the student's educational program for the

[7] "Exmitted" does not appear in any dictionary. The parent's attorney appears to use it as an antonym for admit but, because it is not a word with a conventionally-accepted definition, it lacks meaningful context that other known words or phrases would provide, such as if the student had been expelled, removed, rejected, discharged, or disallowed from re-enrolling at BAC.

prior school year (Letter to Fisher, 21 IDELR 992 [OSEP 1994]; see Application of a Student with a Disability, Appeal No. 16-020). The United States Department of Education's Office of Special Education Programs 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). Student-to-staff ratio is also a relevant factor in determining whether a student's program has changed (M.K. v. Roselle Bd. of Educ., 2006 WL 3193915, at *14-*15 [D.N.J. Oct. 31, 2006]; Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 60-61 [D.N.H. 1999]; Application of a Child with a Disability, Appeal No. 05-028). State regulations define a change in program as "a change in any one of the components" of an IEP, which include the size of the special class in which a student is recommended to receive services (8 NYCRR 200.1[g]; 200.4[d][2][a], [b][2]). While these factors, in many instances, are specific to district programs, they are instructive in this current circumstance.

Under this standard, as noted by the IHO, the change in class ratio and the addition of mental health services are indications that the programs were not substantially similar (Interim IHO Decision at pp. 3-4). The addition of mental health services at Titus is of particular note as the parent's witnesses testified that the addition of such services was necessary to provide the student with an appropriate program (Tr. pp. 28, 30, 36, 38, 74-75, 76-77). If the district had attempted to make such a change to the student's program, it would have required a substantive change in the student's IEP to add counseling as a related service (see 8 NYCRR 200.1[qq]; 200.6[e]). Accordingly, even if I were to apply a substantial similarity test as put forth by the parent, there is not a sufficient basis in the hearing record to overturn the IHO's determination that the two programs were not similar.[8]

VII. Conclusion

Based on the foregoing, the hearing record supports the district's argument that the IHO erred in applying the substantial similarity standard to determine the student's stay-put placement during the pendency of the present proceedings. However, based on the Second Circuit's holding

[8] As alluded to above, the parent is not left without any other options. The parties could reach an agreement to change the student's pendency placement without sacrificing their respective positions on the merits of the underlying matter. Further, although courts tend to apply the automatic injunction provided for under the IDEA, they have from time to time also found it necessary to apply the traditional injunctive relief standards to create or modify a student's pendency placement when circumstances warrant such relief (see Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F Supp 2d 375, 391 [N.D.N.Y. 2001]; see also Sabatini v. Corning-Painted Post Area Sch. Dist., 78 F. Supp. 2d 138, 143 [W.D.N.Y. 1999]; A.T., I.T. v. New York State Educ. Dep't, 1998 WL 765371 at *11 [E.D.N.Y. Aug. 4, 1998]; J.B. v, Killingly Bd. of Educ., 990 F. Supp. 57, 72 [D. Conn. 1997]; Kantak v. Bd. of Educ. of Liverpool Cent. Sch. Dist., 1990 WL 36803 at *2 [N.D.N.Y. Mar. 30, 1990]). Accordingly, the parent may obtain injunctive relief in a court of competent jurisdiction if she can demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief (Cosgrove, 175 F. Supp. 2d at 391).

in Ventura de Paulino, the evidence in hearing record supports the IHO's denial of the parent's request that the district fund the student's attendance at Titus pursuant to pendency.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

Dated: Albany, New York
June 25, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER