The University of the State of New York

The State Education Department
State Review Officer
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No. 20-165

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 Office of Michelle Siegel, attorneys for petitioner, by Jared S. Stein, Esq.

Howard Friedman, General Counsel, attorneys for respondent, by Kathryn F. Shreeves, 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) 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 her son's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2020-21 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

Due to the interlocutory nature of this appeal, the hearing record is sparse with respect to information regarding the student's educational history. According to his parents, the student received early intervention services and later special education and related services in a State-approved nonpublic school (NPS) since preschool (Parent Ex. A at p. 2). From kindergarten through fifth grade, the student attended the same NPS (id.). The parents indicated that the student was diagnosed with a language disorder, attention deficit hyperactivity disorder – combined type (ADHD), and a specific learning disorder with impairment in written expression (clarity and

organization of written expression), presented with ongoing receptive language weaknesses and significant self-regulation and executive functioning difficulties, and has been found eligible for special education as a student with a speech or language impairment (Parent Exs. A at p. 2; B at pp. 1, 24).[1]

On March 27, 2019, a CSE convened to review the student's programming and revise the student's IEP for the 2019-20 school year (Parent Ex. B). For the 2019-20 school year, the CSE recommended that the student receive 12-month services in an 8:1+1 special class in a State-approved, nonpublic day school (id. at pp. 20, 23). The CSE also recommended that the student receive the related services of one weekly 30-minute individual counseling session; one weekly 30-minute, counseling session in a group of four; three weekly, 30-minute speech-language therapy sessions in a group of three; and a weekly 30-minute session of occupational therapy (OT) in a group of five (id.). Finally, the CSE recommended that the student receive special education transportation services of limited travel time and the provision of a minibus (id. at p. 23).

After fifth grade (2018-19 school year), the student "aged out" of the NPS he had been attending (Tr pp. 25-27). According to the parents, the district did not provide the student with a State-approved, nonpublic school site for the 2019-20 school year and, therefore, the parents placed the student at the Winston Preparatory School (Winston Prep) for the 2019-20 school year (see Parent Exs. A at p. 2; E at p. 2).

It also appears that as a result, the parent filed a due process complaint notice on or about September 2, 2019 in relation to the student's educational program for the 2019-20 school year (see Parent Ex. C at pp. 5, 7). In a November 18, 2019 interim decision, the IHO in the 2019-20 proceeding noted, among other things, that there was no dispute that pendency was based on the March 2019 IEP (id. at p. 3). Ultimately, the IHO found that "it would be against the purpose of pendency for the student not to have a placement" and ordered the district to fund the student's tuition at Winston Prep for the 2019-20 school year, from September 2, 2019 until the resolution of the impartial hearing (id. at p. 5). Although somewhat unclear in the hearing record, it appears that the parties reached a settlement regarding the 2019-20 school year proceeding and the parent's due process complaint notice regarding the 2019-20 school year was withdrawn with prejudice in June 2020 (Tr. pp. 7-9, 31).

The hearing record does not indicate if any further CSE meetings were conducted or if the student's IEP was revised for the 2020-21 school year (see Tr. pp 23-24); however, the parent filed a 10-day notice with the district on June 17, 2020 asserting that she intended to place the student at Winston Prep for the 2019-20 school year because the district failed to convene a CSE meeting to create an IEP for the student's 2020-21 school year (Parent Ex. E at p. 2). The student attended Winston Prep's Summer Enrichment program from June 29, 2020 to August 13, 2020 (see Parent Exs. G-I).

[1] The student's eligibility for special education instruction and related services as a student with a speech or language impairment is not in dispute in this appeal (see 8 NYCRR 200.1[zz][11]).

A. Due Process Complaint Notice

The parent filed a due process complaint notice dated June 29, 2020 requesting an impartial hearing, asserting that the district failed to provide the student a free appropriate public education (FAPE) for the 2020-21 school year (Parent Ex. A at p. 1). The parent alleged that "[f]or the 2020-2021 school year, the CSE has not convened an IEP meeting for [the student] or identified an appropriate nonpublic school placement for [the student], thereby depriving him of FAPE" (Parent Ex. A at p. 3). As relevant to this appeal, the parent asserted that during the pendency of the impartial hearing, the student's stay-put placement, or pendency placement, was found in the March 27, 2019 IEP and the placement was a "non-public day school" and that "[t]o satisfy the requirement of 34 CFR § 300.513(a), the [d]istrict is required to maintain the child in an educational program that is 'substantially and materially the same' as the student's last agreed-upon educational placement. Letter to Fisher, OSEP July 6, 1994" and, therefore, alleged that the student's pendency placement should be Winston Prep (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 21, 2020 and continued on September 11, 2020, during which the parties and the IHO discussed the student's pendency placement and heard testimony from two witnesses from Winston Prep (Tr. pp. 1-65).

During the impartial hearing, counsel for the parent asserted that pendency "was decided already under the identical set of facts last year" (Tr. p. 6). According to the parent's attorney, an unappealed November 2019 IHO interim decision, decided as part of the proceeding regarding the prior school, established pendency at Winston Prep because it was substantially similar to the student's March 2019 IEP (id.).The parent's attorney reiterated that the parent believed "the pendency order on its own does constitute pendency"; asserting, that res judicata applied because it was an identical set of facts (Tr. pp. 8-9). Nevertheless, the parent's attorney indicated that, as an alternative, he was prepared to move forward and present witnesses to prove that the student's placement at Winston Prep was substantially similar to the program at the NPS that the student last attended (Tr. pp. 10-11).

The district counsel disagreed with the parent's position and asserted that the November 2019 IHO interim decision was terminated when the parent withdrew the due process complaint notice regarding the 2019-20 school year with prejudice (Tr. p. 7). The district also asserted, in the alternative, that Winston Prep could not be the student's pendency placement because the student's current placement at Winston Prep was not substantially similar to the student's program at the NPS (id.).

During the impartial hearing, the IHO suggested that if the district could not identify an alternative pendency placement, the IHO was inclined to order Winston Prep as the student's pendency placement (Tr. pp. 32-33). However, several days later, the IHO notified the parties in writing that upon further consideration, she was uncertain that Winston Prep would automatically become the student's pendency placement and suggested that the parties may wish to fully brief the issue (IHO Ex. IV). At the conclusion of the second day of the hearing, the parties agreed to brief the issues regarding pendency to the IHO, and both parties submitted briefs to the IHO on September 21, 2020 (Tr. pp. 61-63; IHO Exs. I; II; see IHO Ex. IV).

In an interim decision dated September 24, 2020, the IHO determined that the student's pendency placement was "generically," the program offered on the March 2019 IEP (IHO Decision at p. 6).

With respect to the parent's assertion that the November 2019 IHO interim decision determined Winston Prep was substantially similar to the program included in the March 2019 IEP and should be given preclusive effect under a res judicata theory, the IHO disagreed, and found that the program at Winston Prep was not substantially similar (IHO Decision at pp. 4-5). Specifically, the IHO found that Winston Prep, unlike the program recommended in the March 2019 IEP, did not provide for an assistant teacher (an 8:1+1 special class was recommended in the IEP versus a 9:1 class ratio provided at Winston Prep), and that Winston Prep did not provide pullout services, OT, or related services, all of which were provided for in the March 2019 IEP (id.). The IHO rejected the parent's argument that "the last hearing officer's conclusion regarding Winston Prep being substantially similar to [the NPS] would prevent [the IHO] from finding otherwise" on the basis of res judicata (id. at p. 5). The IHO noted that the prior IHO "did not precisely find substantial similarity; rather she found that, as perhaps an equitable matter, since [the district] had not offered a placement—that [it] should fund the program at Winston Prep despite the lack of similarity" between the IEP and Winston Prep's program (id.). The IHO further found that she was not bound by the prior IHO's balancing of equities because the pendency provisions do not provide for a balancing of equities, and the prior order was issued prior to the issuance of Ventura de Paulino, which had somewhat changed the "legal framework for analyzing pendency placements" (id.). The IHO also found that the prior pendency order was extinguished when the prior proceeding ended (id.).

With respect to the parent's assertion that pendency rested at Winston Prep under the theory of "operative placement," the IHO found that a unilateral placement does not establish pendency, which can only be changed by an agreement with the district (IHO Decision at p. 5). The IHO then found that there was no evidence of such an agreement and specifically noted that the stipulation settling the prior proceeding was not included in the hearing record (id.).

Further addressing the parent's assertion that Winston Prep is the only program available for the student, the IHO found that while the particular NPS that the student had last attended in fifth grade was no longer available because the student had aged out of that school, there was no evidence that the generic program, that is, an 8:1+1 special class in a nonpublic school, and those related services set forth in the pendency IEP (the March 2019 IEP), were unavailable (IHO Decision at p. 6). The IHO noted that the Court in Ventura de Paulino suggested at least three other options for parents when they disagree with a district's decision on how to provide a child's educational program, and specifically referred to two options available to the parent in this matter: the parent could seek to persuade the district to pay for the program they request on a pendency basis, or could enroll the student in a new school and seek retroactive reimbursement after the IEP dispute is resolved (id. at p. 6). The IHO also noted that in the event that the pendency program is unavailable, and the district does not provide a pendency program, under Ventura de Paulino, parents may seek injunctive relief to modify a student's pendency placement pursuant to the equitable authority provided in 20 U.S.C. §1415[i][2][B][iii] (id. at pp. 5-6).

The IHO concluded that Winston Prep was not the student's pendency placement (IHO Decision at p. 6). For relief, the IHO ordered that if the parent did in fact wish to have the district

provide the student a placement as contained in the March 2019 IEP, and "if requested" by the parent, the district was to promptly offer placement in an 8:1+1 class in a nonpublic school plus related services consisting of counseling twice per week for 30 minutes, once individually and once in a group of four; OT once per week for 30 minutes in a group of five; and speech-language therapy three times per week for 30 minutes in a group of three; as well as 12-month services (id. at pp. 6-7).

IV. Appeal for State-Level Review

The parent appeals from the IHO's interim decision, asserting that

> The IHO incorrectly ruled that the "pendency placement is, generically, the program on the IEP dated March, 27 2019" rather than the actual school the student previously attended and which the DOE funded pursuant to a prior, unappealed Order on Pendency in which a prior IHO deemed that exact same school to be substantially similar to that exact March 27, 2019 program. The DOE failed to offer any placement for the 2020-2021 school year or, before the start of the 2020-2021 school year, revise the March 27, 2019 IEP. The student aged out of the placement initially offered to implement the March 27, 2019 program, and the recent de Paulino ruling specifically declined to address situations in which a student has aged out of the last agreed upon placement.

As relief, the parent requests that an SRO reverse the IHO's decision denying pendency at Winston Prep, and order the district to fund the student's pendency placement at Winston Prep.

In its answer, the district generally responds to the parent's allegations with admissions, denials, or various combinations of the same and sets forth arguments in support of the IHO's decision. The district also asserts that the parent failed to appeal from the IHO's factual determination that Winston Prep was not substantially similar to the program contained in the March 2019 IEP and that determination is therefore binding on the parties. The district further asserts that the parent failed to raise the defenses of res judicata and collateral estoppel within her appeal and only included those arguments in her memorandum of law. With respect to the merits of the parent's appeal, the district asserts that the parent enrolled the student at Winston Prep at her own risk. The district notes that the that parent "never alleged the unavailability of the program in her [due process complaint notice] and failed to adduce any evidence showing that the program was not available." Nevertheless, the district argues that the availability of the program is not relevant to determining what constitutes a student's pendency placement. The district requests an SRO affirm the IHO's determination and to dismiss the petition with prejudice.

The parent files a reply in response to the procedural matters raised in the district's answer. The parent asserts that the arguments related to substantial similarity and to both res judicata and collateral estoppel were raised on appeal. Further, the parent asserts that the issue of collateral estoppel was raised during the hearing in a statement that an IHO was faced with that same set of facts and coming to a different conclusion with the same set of facts would be an "impossibility" (see Tr. p. 45).

V. Applicable Standards

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; 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. 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 [OSEP 2007]).

VI. Discussion

I must first address the parent's contention that the November 2019 interim decision issued in a prior proceeding establishes the student's pendency during this proceeding. Initially, this argument is flawed as a pendency decision in one proceeding may not serve as the basis for pendency in a future proceeding because, in order to represent an agreement between the parties, the unappealed decision upon which pendency may be based must be a decision on the merits, including a determination of the appropriateness of the unilateral placement (see 34 CFR 300.518[d]; 8 NYCRR 200.5[m][2]; see also Ventura de Paulino, 2020 WL 2516650, at *9; Schutz, 290 F.3d at 484-85 [explaining that "a final administrative decision by a state review board, agreeing with a parent's decision about their child's placement, constitutes a 'placement' within the meaning of the pendent placement provision of the IDEA"]; Letter to Hampden, 49 IDELR 197). According to the parties' discussion during the hearing, the prior matter did not result in a final decision on the merits and was instead withdrawn prior to reaching a determination of the disputed issues (Tr. pp. 7-9).

Additionally, to the extent the parent raised res judicata and collateral estoppel on appeal, the parent's arguments are equally unavailing for the same reason—that the prior proceeding did not result in a final determination on the merits. It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]).

The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6). Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013]).

The doctrine of collateral estoppel "precludes parties from litigating a legal or factual issue already decided in an earlier proceeding" (Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]). To establish that a claim is collaterally estopped, a party must show that:

> (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits

(Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Boguslavsky v. Kaplan, 159 F.3d 715, 720 [2d Cir. 1998]).

Simply put, both doctrines require a final ruling on the merits in a prior proceeding. As the prior proceeding did not result in a final determination, neither doctrine applies. Finally, to the extent that the parent's allege that the November 2019 interim decision was unappealed—although parties have the option of interposing an interlocutory appeal of an interim decision on pendency, State regulation also permits an appeal of any interim decisions in an appeal from the final determination of an IHO (8 NYCRR 279.10[d]). The November 2019 interim decision cannot be considered as a binding unappealed determination (see Application of a Student with a Disability, Appeal No. 18-123).[2] Thus commencing a proceeding and obtaining an interlocutory order to pay for a new placement selected by the parents—Winston Prep—on non-substantive grounds and then withdrawing the tuition reimbursement claim for Winston Prep on the merits before any administrative or judicial determination on the merits could be conducted will not suffice to bind the district or another tribunal in a subsequent proceeding.[3]

Having determined that the November 2019 IHO interim decision does not establish pendency in this proceeding, the question turns to what constitutes the student's pendency placement for the duration of this proceeding. On this point, I agree with the IHO that the district would be required to implement 12-month special education and related services in an 8:1+1 special class in a State-approved, nonpublic school. as that was the last placement actually implemented by the school district for the student.

According to the parent, the NPS that the student attended through the end of the 2018-19 school year was no longer an available option for the student, and because the district failed to

[2] If the facts had been different and the IHO in the prior proceeding had issued a "consent order" that reflected that the parties themselves had agreed that Winston Prep should serve as the student's pendency placement going forward, I might have found that the IHO's interim order was persuasive evidence that implicated a different rule, namely that "unless the State or local educational agency and the parents otherwise agree," the student shall stay in the then current educational placement (20 U.S.C. § 1415[j]). However, the November 2019 interim decision reflects no such agreement between the parent and the local educational agency to modify the student's stay put placement (see Parent Ex C).

[3] Additionally, to the extent that the parents have come to the IHO and the undersigned to, in effect, enforce the prior IHO's November 2019 interim determination or the subsequent settlement reached in that proceeding, administrative hearing officers lack the authority to compel that kind of relief.

offer a "substantially similar" pendency program, the district should be required to fund the student's placement at Winston Prep under pendency, consistent with the holding in Ventura de Paulino.[4]

Ventura de Paulino concerned two cases 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.).

The Second Circuit specifically declined to consider "any question presented where the school providing the child's pendency services is no longer available and the school district either refuses or fails to provide pendency services to the child" (De Paulino, 959 F.3d at 532 n. 65). It is under this exception that the parent attempts to fit this matter; however, the facts do not support the parent's dispute as to pendency.

The parent's due process complaint notice in this matter is dated June 29, 2020, the same day the student began attending the summer program at Winston Prep for the 2020-21 school year

[4] Although the parent's attorney indicated during the hearing that the student's prior NPS was no longer available to him because it only served students through 5th grade, there is no evidence in the hearing record to support this statement (Tr. p. 27).

(Parent Exs. A at p. 1; G at p. 1; H).[5] At that juncture, it cannot be said that the district failed to implement pendency by not having a State-approved nonpublic school available to implement the student's pendency programming as of the time of filing the due process complaint notice. Further, as noted by the IHO, during the hearing it was "unclear whether the Parents want the DOE to arrange for such a program, given their placement of the Student at Winston Prep" (IHO Decision at p. 6). At the time, the parents had already sent a 10-day notice of unilateral placement on June 17, 2020 "this letter serves to inform you of my intent, absent an appropriate non-public school placement, to reenroll [the student] at Winston Preparatory School and to seek funding for his placement there during the 2020-2021 twelve-month school year" (Parents Exs. E, F).

Additionally, even if I were to assume, for the sake of argument, that the parent was correct that the primary holding of De Paulino does not apply under the circumstances of this case and that a test of substantial similarity should apply instead, the IHO did not err in her factual findings that Winston Prep for the 2020-21 school year was not substantially similar to the programming that the parent asserted was the basis for pendency (see IHO Decision at p. 5). Primarily, the student attended a 9:1 class at Winston Prep, while the asserted pendency program recommended more adult support in an 8:1+1 special class (compare Tr. at p. 17-18, with Parent Ex. B at p. 20). Additionally, while the asserted pendency program recommended related services, including OT, speech-language therapy, and counseling, Winston Prep only offered counseling services (compare Tr. at p. 18-20, with Parent Ex. B at p. 20).[6]

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.

[5] The hearing record includes a 10-day notice letter and a "Pendency Form" both dated June 17, 2020, in which the parent is asking for placement of the student at Winston Prep at district expense for the 2020-21 school year (Parent Exs. D; E).

[6] Testimony by the Winston Prep head of school indicated that while Winston Prep did not offer OT or speech-language therapy, the school did work on these areas in a Focus class and throughout the day (Tr. p. 18, 20-22). Winston Prep did not have an occupational therapist on staff to provide OT services; however, the head of school testified that Winston Prep did have speech-language pathologists on staff who worked with the teachers (Tr. pp. 20-21).

Under this standard, the one adult to nine student class ratio is an indication that the class the student attended at Winston Prep is not substantially similar to the 8:1+1 special class having two staff for eight student's called for by the pendency programming (see 8 NYCRR 200.1[g]; 200.4[d][2][a], [b][2]).

To be clear, the appeal before me only addresses the student's placement for the purpose of pendency. If the parent's allegations that the district has "not convened an IEP meeting for [the student]" for the current school year and has not "identified an appropriate nonpublic school placement for [the student]" for the current school year is accurate (Parent Ex. A at p. 3), then there is little purpose in hearing evidence on the issue of whether the district offered a FAPE, and the parent can ultimately prevail on the merits if the unilateral placement of the student at Winston Prep was appropriate and equitable considerations favor awarding relief.

Finally, if the parent wishes to transfer the student back to public schooling to avail herself of a publicly funded pendency placement she may do so, and in that instance the district should have a reasonable opportunity to implement the pendency placement in this matter. The parties should move forward to address the merits of the parent's substantive allegations during a hearing, rather than as part of the pendency dispute.

VII. Conclusion

Based on the foregoing, there is no reason to disturb the IHO's September 24, 2020 interim decision denying Winston Prep as the student's pendency placement. If the parent reenrolls the student in public schooling instead of private schooling during the pendency of these proceedings, the district shall promptly arrange for the student's placement in a State-approved nonpublic school in an 8:1+1 special class with related services consisting of counseling two times per week for 30 minutes, once individually and once in a group of four, OT one time per week for 30 minutes in a group of five, and speech language therapy three times per week for 30 minutes in a group of three, and that the student's educational program shall be provided on a 12-month basis.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 18, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER