The University of the State of New York

The State Education Department
State Review Officer
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No. 20-184

Application of a STUDENT WITH A DISABILITY, by her 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:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Peter G. Albert, Esq., and John Henry Olthoff, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Sarah Pourhosseini, 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 daughter'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

With regard to the student's educational history, the parent indicated that from 2009 to the end of the 2019-20 school year, the student attended both elementary and secondary school in one of the district's 12:1+3 special classes within two of its specialized schools (Parent Ex. A at pp. 3-4; see IHO Ex. I at p. 2).

On January 16, 2020, the CSE convened to develop the student's IEP with a projected implementation date of January 31, 2020 (Parent Ex. C at pp. 1, 16). As a result of the CSE meeting, the student was determined eligible for special education as a student with multiple disabilities, and the CSE recommended that the student receive 12-month services consisting of a 12:1+(3:1) special class placement in a specialized school together with related services of occupational therapy, physical therapy, speech-language therapy, school nursing services and parent counseling and training, as well as assistive technology including a dynamic display speech generating device, and special transportation including door-to-door air conditioned transportation with a lift and limited travel time (id. at pp. 11-12, 15-16).

According to the parent, in March 2020 the district became unable to implement the student's January 2020 IEP "as written" due to closure of public school buildings and the "shutdown" resulting from the COVID-19 pandemic; subsequently implementing remote learning during the remainder of the 2019-20 school year and a "hybrid learning model" beginning in the 2020-21 school year (see Tr. pp. 18, 22-23, 30-31; Parent Ex. A at p. 2-3).

On or about July 10, 2020, the parent provided the district with a 10-day notice of her intention to unilaterally place the student at the International Institute for the Brain (iBrain) for the 2020-21 school year and seek public funding for that unilateral placement (Parent Ex. D). The student began attending classes iBrain on July 20, 2020 (Parent Ex. A at p. 3; see IHO Ex. I at p. 5).

A. Due Process Complaint Notice

In a due process complaint notice dated July 28, 2020, the parent requested an impartial hearing and asserted that the district failed to offer the student a free appropriate public education (FAPE) "for her entire educational career," or more specifically for the 2009-10 through the 2020-21 school years (Parent Ex. A at pp. 1-2). Due to the limited nature of this appeal, a full recitation of all of the issues contained in the due process complaint notice is not necessary,[1] save the parent's request that the student's pendency placement consist of (a) direct payment of tuition and costs for related services at iBrain, and (b) and direct payment of special transportation services and support costs to and from iBrain (id. at p. 2). The parent asserted that due to the COVID-19 pandemic, all district school buildings were closed and that "all academic and related services by the district and independent providers [were] ONLY being offered via remote learning" (id. at pp. 2-3). Therefore, the parent argued that as the district was unable to provide the student with her last agreed-upon educational placement, and as her then-current educational placement at iBrain was substantially similar to the student's last agreed upon placement, namely a class with a low student to teacher ratio with related services provided in-person and special transportation, she was entitled to pendency funding for her placement at iBrain (id. at p. 3).

[1] Among other things, the parent's claims on the merits relate to allegations of an inappropriate category of classification as a student with multiple disabilities, inappropriate evaluations of the student, an inaccurate description of the student's present levels of performance, inappropriate IEP goals, inappropriate related services, and inappropriate placement in a 12:1+4 special class (Parent Ex. A at pp. 5-7).

B. Impartial Hearing Officer Decision

While the administrative claims were pending the parent filed another lawsuit. Along with 32 other parents of children at iBrain, the parent brought a proceeding against the district in the United States District Court for the Southern District Court of New York seeking damages and a preliminary injunction directing the district to fund iBrain as the student's pendency placement (Araujo v. New York City Dep't of Educ., 2020 WL 5701828 [S.D.N.Y. Sept. 24, 2020]]).

On September 24, 2020, the District Court found that the district had agreed to fund thirteen of the students' placements at iBrain but denied the remaining parents' request for stay-put funding at iBrain, including the parent of the student in this case. With respect to the parent in this case, along with the request of fourteen other students, the court held that the argument for pendency funding at iBrain failed under Ventura de Paulino (Araujo, 2020 WL 5701828, at *3-*4, reconsideration denied, 2019 WL 6392818 [S.D.N.Y. Nov. 2, 2020]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]).

On October 6, 2020, an impartial hearing was convened during which the parties addressed the student's pendency placement and thereafter filed briefing on the issue (Tr. pp. 12-37; IHO Exs. I; II).[2] During the impartial hearing, the district and parent agreed that the student's January 2020 IEP was "the pendency IEP" and the IHO confirmed with the parties that "if not for a unilateral placement I would just order this [as] pendency" (Tr. pp. 28-29; see Parent Ex. C).[3] Counsel for the parent argued that had the student remained in the district's placement, she would not be receiving her IEP services "because of the change to this kind of hybrid learning model that has been implemented," and that "the only place where the student is actually receiving the services that are on the IEP . . . [is] in the student's program at iBrain" (Tr. p. 30).

In an interim decision dated October 26, 2020, the IHO found that she was not persuaded by the parent's assertion that iBrain was "the student's operative placement because the [district] changed the [s]tudent's placement during the pandemic" and she determined that the student's pendency program was set forth in the last agreed-upon IEP dated January 16, 2020 (IHO Interim Decision at p. 3). According the IHO, "[i]f services are unable to be provided in person for a period of time, students would be entitled to services to make up for the inability to receive services during the pandemic. At this point in time, there is no evidence that the school-based services are unavailable or that the [district] would be unable to provide the services set forth on the last agreed-upon IEP if the [p]arent[] wished those services to be provided as the pendency program" (id. at p. 3). The IHO also concluded that the January 2020 IEP could not be implemented because the parent unilaterally placed the student at iBrain for the 2020-21 school year, but added that should the parent "request that the January 16, 2020 IEP be implemented during the pendency of these proceedings, the [district] shall promptly implement that IEP" (id.). Although the parent continued to be represented by Brain Injury Rights Group, who also represented her in the district court, there

[2] The first record date of the impartial hearing was September 21, 2020, in which no testimony was taken and the parent attempted to introduce two documents; however, due to issues concerning the "5-day" discovery rule and witness availability, the hearing was adjourned until October 6, 2020 to allow for proper evidence introduction and witness availability (Tr. pp. 1-11).

[3] No testimony was taken during the hearing (Tr. pp. 1-44).

was no indication that counsel for the parent disclosed to the IHO that the student's pendency placement had also been the subject of litigation in the district court.

IV. Appeal for State-Level Review

The parent appeals from the IHO's interim decision, asserting that the IHO erred in determining that the student's pendency programming during the underlying due process proceeding was found in the January 2020 IEP and that the student was not entitled a publicly funded stay-put placement at iBrain. More specifically, the parent asserts that the IHO's finding that there was no evidence that the school-based services were unavailable or that the district was unable to provide the services set forth on the last agreed-upon IEP was incorrect. The parent asserts that it is undisputed that in March 2020, the district transitioned from in-person services to remote or hybrid services, whereby the student would attend school in-person part-time, which constituted a unilateral change in her educational placement, rendering the last agreed-upon placement essentially "unavailable" to the student.[4] The parent also seeks a determination that the IHO's recusal after the interim decision was issued is in violation of State law. The parent requests that the undersigned reverse the IHO and find that the student's pendency placement is at iBrain.

In an answer, the district denied each and every allegation set forth in the request for review, and asserts among other things, that the undersigned is bound by the District Court's determination in Araujo because it found that the student was not entitled to a publicly funded pendency placement at iBrain. The district requests that the SRO dismiss the parent's request for review.

In a reply to the district's answer the parent asserts that the undersigned is not bound by that District Court's determination in Araujo because that determination is the subject of an appeal to the Second Circuit Court of Appeals.[5]

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 Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. for 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

[4] The parent proffers additional evidence in the form of a letter or web site posting from the student's former public school site with her request for review.

[5] The parent also provides a copy of an interim decision by an IHO as persuasive authority to apply a substantial similarity standard for determining a different student's pendency placement. Since the parent's filing, that interim decision was reversed by the undersigned for the reasons described in Application of a Student with a Disability, Appeal No. 20-178, including the IHO's failure to apply the law of the circuit in Ventura de Paulino as well as counsel for the parent's improper attempt to collaterally attack multiple district court determinations regarding the student's pendency placement.

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 & 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). 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, 86 F. Supp. 2d at 366; 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

As a threshold issue, the district argues that the student's pendency placement was already ruled upon by the District Court, wherein it was determined that the student was not entitled to publicly funded pendency placement at iBrain (see Araujo v. New York City Dep't of Educ., 2020 WL 5701828 *3-*4 [Sept. 24, 2020] reconsideration denied, 2020 WL 6392818 [Nov. 2, 2020]). Counsel for the parent asserts in the reply that the determinations contained in Araujo are on appeal at the Second Circuit, and that the district court decision is not final, but that argument is improper because the only place that a decision issued by a court of competent jurisdiction can be legitimately challenged is either in that court or in a direct appeal to an appellate court of competent jurisdiction. In this case the District Court has already ruled that

> Plaintiffs' theory fails because Plaintiffs have not shown that the enrollment of these fifteen students at iBRAIN was agreed upon between their parents and [the district]. A "parent cannot unilaterally transfer his or her child and subsequently initiate an IEP dispute to argue that the new school's services must be funded on a pendency basis," because permitting pendency on such grounds "effectively renders the stay-put provision meaningless by denying any interest of a school district in resolving how the student's agreed-upon educational program must be provided and funded." Ventura, 959 F.3d at 536. This accurately describes what has occurred with respect to these fifteen students. As such, Plaintiffs' arguments on this point are foreclosed by Ventura.
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> Plaintiffs attempt to distinguish Ventura on the basis that, in that case, [the district] had explicitly offered another school [iHope] to the parents, who nonetheless chose to send their child to iBRAIN. Plaintiffs argue that because Defendant has not yet provided the students with any pendency placement, Ventura is inapplicable. This argument is unpersuasive. If Plaintiffs' issue is that no timely pendency determination has been made, then they can move to obtain such relief. However, under Ventura, they may not unilaterally alter students' enrollments and then claim pendency funding on that basis:
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> > Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved....
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> Ventura, 959 F.3d at 526; see also Mackey v. Board of Educ., 386 F.3d 158, 160 [2d Cir. 2004] ["Parents should, however, keep in mind that if they 'unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local officials, [they] do so at their own financial risk.' "] [quoting Sch. Comm. v. Dep't of Ed., 471 U.S. 359, 373–74, [1985]]

(Araujo v. New York City Dep't of Educ., 2020 WL 5701828, at *4).

As SROs have explained there may be instances when a parent pursues a pendency argument in both the administrative and judicial forums simultaneously and there is concurrent jurisdiction—however awkward that makes the proceedings—(see, e.g., Application of a Student with a Disability, Appeal No. 20-178; Application of the Dep't of Educ., Appeal No. 20-033),[6] but once a court has issued a determination resolving the stay-put issue, administrative hearing officers do not have the power to alter a court's stay-put decision. The District Court's decision with respect to this student cannot be collaterally attacked in an IDEA administrative due process proceeding. The parent's assertion that the student should receive a publicly funded pendency placement at iBrain because the student's IEP was "being implemented" at iBrain is just rehashing the operative placement argument that was already rejected by the district court (see Araujo, 2020 WL 5701828 at *4). There is no evidence since the parties were before the district court that the district has agreed to provide public funding of the student's placement at iBrain or that there has been a final determination in favor of the parent's unilateral placement of the student at iBrain. The argument that I am not bound to "one determination" of the student's pendency placement and should issue a determination in conflict with the district court's determination is ridiculous.

To the extent that the parent cites to footnote 65 in Ventura de Paulino and argues that "a parent may exercise self-help and seek an injunction to modify the student's pendency placement," the parent should have pursued that argument in district court because an administrative hearing officer does not have authority to issue a traditional injunction like a district court to order a change in a student's stay-put placement.[7]

To the extent that the parent asserts that the district's closure of public school buildings and use of remote or hybrid learning processes as a result of the COVID-19 pandemic has violated the status quo and materially altered the student's programming, that argument does not shift the student's stay-put placement to the parent's unilateral placement of the student at iBrain. It is not

[6] As the Second Circuit has explained "'an action alleging violation of the stay-put provision falls within one, if not more, of the enumerated exceptions to' the IDEA's exhaustion requirement" Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 455 [2d Cir. 2015]). It should go without saying that it is incumbent on the parties to notify the administrative hearing officers of any ruling issued with respect to the student that is the subject of the administrative proceedings.

[7] In footnote 65, the Second Circuit stated

> "[w]e do not consider here, much less resolve, 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. Those circumstances are not present here. We note, however, that at least one of our sister Circuits has acknowledged that, under certain extraordinary circumstances not presented here, a parent may seek injunctive relief to modify a student's placement pursuant to the equitable authority provided in 20 U.S.C. § 1415[i][2][B][iii]. See Wagner v. Bd. of Educ. of Montgomery Cty., 335 F.3d 297, 302–03 [4th Cir. 2003] [involving a situation in which the pendency placement was no longer available, and the school district had failed to propose an alternative, equivalent placement]"

(Ventura de Paulino, 959 F.3d 519, 534).

the first attempt at this argument either. In a putative class action, brought by parents represented by the same counsel in this case,[8] the District Court has ruled that:

> First, the agency charged with administering the IDEA program has issued guidance indicating that the provision of remote services does not work a change in placement.
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> * * *
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> Second, plaintiffs are challenging a system-side administrative decision of general applicability – an order shutting schools to all students (abled and disabled) and all staff during an unprecedented and life-threatening health crisis. There can be no question that the order applied to the entire school system and that it was of general applicability – that is, it applied equally to abled and disabled students. Such an order does not work a change in pendency.
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> The two reasons discussed above are dispositive – and, indeed, require dismissal of the Plaintiff Students' pendency claims.
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> Because the court has concluded that [1] no change in pendency has been worked by the emergency closure of the schools, and [2] plaintiffs cannot complain about an administrative order of general applicability to all students [see supra pp. 66-73], Count IV, the count that seeks a stay-put injunction, must also be dismissed, for failure to state a claim on which relief may be granted. Fed. R. Civ. P. 12[b][6]. This dismissal does not preclude individual students from asserting in appropriately commenced lawsuits that something other than the closure of the schools and the provision of remote educational services during the pandemic worked a change in pendency.

(J.T. v. de Blasio, 2020 WL 6748484, at *37-*38, *40, *44 [S.D.N.Y. Nov. 13, 2020] [emphasis added]). Applying the Court's reasoning in J.T. v. de Blasio—which was far more extensive than the portions quoted above—the system-wide closure of the district's public school buildings due to the COVID-19 pandemic and resultant remote or hybrid learning was not a change in placement and in no way transformed the parent's unilateral placement of the student at iBrain thereafter into the student's publicly funded pendency placement.

[8] The parent's and student's initials in this administrative appeal are also paired together as parent and child in the appendix to the District Court's order in J.T. v. de Blasio (2020 WL 6748484, at *45). It seems extremely likely the same parent and student from this appeal were the ones referenced in the District Court's appendix when they have the exact same initials, it was brought by the same law firm, against the same school district, using the same arguments. If so, it would not be permissible to collaterally attack the district court's pendency determination in an administrative due process proceeding on the same basis—the COVID-19 related building closures discussed by the district court.

VII. Conclusion

Based on the discussion above, I find that the IHO properly determined that the student's January 2020 IEP was the basis of the pendency placement, and that iBrain was not the student's pendency placement, albeit I reach the latter determination based upon information that counsel for the parent neglected to provide to the IHO (Araujo, 2020 WL 5701828 *3-*4 [Sept. 24, 2020] reconsideration denied, 2020 WL 6392818 [Nov. 2, 2020]; see Ventura de Paulino, 959 F.3d at 526, 536).

The parent's remaining argument, that the IHO's recusal after issuing the interim decision was impermissible is not a pendency determination and, therefore, is not subject to an interlocutory appeal for State-level review (see 8 NYCRR 279.10 [d]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 6, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER