The University of the State of New York

The State Education Department
State Review Officer
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**No. 20-198**

**Application of a STUDENT WITH A DISABILITY, by his parents, 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 petitioners, by Sung Eun Lim, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Hae Jin Liu, 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. Petitioners (the parents) appeal, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from the interim decision of an impartial hearing officer (IHO) determining their 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 2019-20 school year. The district cross-appeals that portion of the IHO's determination which found that the student's programming at the International Academy of Hope (iHope) and the International Institute for the Brain (iBrain) were substantially similar. The appeal must be dismissed. The cross-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

The hearing record shows that the student had been unilaterally placed in a private school, iHope, during the 2015-16, 2016-17, and 2017-18 school years (Parent Exs. O at p. 1; P at p. 3; Q at p. 3).[1] The student has also been the subject of prior State-level appeals (Application of a Student

[1] Parent exhibit Q—the affidavit of the director of special education at iBrain—is not paginated. For ease of reference in this decision, citations to Parent exhibit Q will reflect pages numbered "1" through "4" accordingly.

with a Disability, Appeal No. 20-068; Application of the Dep't of Educ., Appeal No. 18-127). The parents pursued tuition reimbursement in due process litigation against the district, and in a March 5, 2018 IHO decision concerning the 2017-18 school year, IHO Peyser determined that iHope was an appropriate unilateral placement for the student and awarded the parents "full payment of tuition and cost of related services" at iHope (Parent Ex. P at pp. 10-11).

On July 9, 2018, the parents unilaterally placed the student at iBrain for the 2018-19 school year, during which he received a 12-month, extended school day program consisting of a 6:1:1 special class; five 60-minute sessions per week of individual physical therapy (PT), four 60-minute sessions per week of individual occupational therapy (OT), five 60-minute sessions per week of individual speech-language, three 60-minute sessions per week of individual vision education services, and two 60-minute sessions per week of individual hearing education services; daily use of assistive technology devices; full-time individual paraprofessional services; school nurse services; and special transportation services including limited travel time, air conditioning, a lift bus, and transportation paraprofessional services (Parent Ex. Q at p. 3).

On July 9, 2018 the parents also filed a due process complaint notice concerning the 2018-19 school year (Parent Ex. B at p. 1). In an interim decision issued during that proceeding, IHO Hill determined that the parents were requesting a change of schools from iHope to iBrain for the pendency of the 2018-19 school year action and that the student's iHope and iBrain programs were substantially similar, and ordered the district to directly fund the student's education at iBrain during the pendency of that action (Parent Ex. B at pp. 1-3).[2, 3]

On June 14, 2019 the CSE convened to develop the student's IEP for the 2019-20 school year (see Parent Ex. A).[4] By letter dated June 21, 2019 the parents notified the district of their intention to unilaterally place the student at iBrain for the 2019-20 extended school year (Parent Ex. J). The student attended iBrain during the 2019-20 school year (see Parent Exs. A at p. 1; C at p. 1; D; E; G).

[2] In Application of a Student with a Disability, Appeal No. 20-068, an SRO found that IHO De Leon erroneously dismissed the parents' 2018-19 tuition reimbursement claims as moot, a point upon which the parties agreed was error and, according to the parents, the merits of that dispute remain pending (see Req. for Rev. at n.1).

[3] The parents subsequently filed a complaint in U.S. District Court seeking a "temporary restraining order ("TRO") requiring the [district] to fund [the student's] placement at [iBRAIN], pending [the district's] appeal in a parallel state administrative proceeding" (C. v. New York City Dep't of Educ., 2018 WL 6528241 [Dec. 12, 2018]). Judge Furman denied the parents' request on numerous grounds (id.). As noted by the Court, the district appealed IHO Hill's interim decision to the Office of State Review, and in a decision dated December 31, 2018, an SRO overturned IHO Hill's pendency determination (Application of the Dep't of Educ., Appeal No. 18-127). The parents filed a second complaint in District Court challenging the SRO's determination in Application of the Dep't of Educ., Appeal No. 18-127 and again sought a TRO, which motion was denied in July 2019 by Judge Swain (C. v. New York City Dep't of Educ., No. 19-cv-3863 [S.D.N.Y. July 17, 2019]). That interlocutory order was, in turn, appealed to the Second Circuit Court of Appeals. The Second Circuit dismissed the parents' appeal for lack of jurisdiction (C. v. New York City Dep't of Educ., No. 19-2527 [2d. Cir Sept. 1, 2020]; see Tr. pp. 51-52).

[4] The student's June 14, 2019 IEP was not made part of the hearing record (see Tr. pp. 1-77; Parent Exs. A-P).

### A. Due Process Complaint Notice

In a July 8, 2019 due process complaint notice the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year and requested that proceeding be consolidated with the tuition reimbursement proceeding concerning the 2018-19 school year (Parent Ex. A at p. 1).[5] With regard to the 2019-20 proceeding, the parents asserted, among other things, that the district failed to hold the June 14, 2019 CSE meeting at a mutually agreeable time and without a school physician and additional parent member that were requested by the parents (id. at p. 2). The parents also argued that the June 14, 2019 IEP provided insufficient related services, an inappropriate placement, and an inappropriate disability classification (id. at pp. 2-3). As relevant to this appeal, the parents asserted that the unappealed March 5, 2018 interim decision issued by IHO Peyser was the basis for pendency, and the parents' specific pendency request was that the district "prospectively pay for the student's [f]ull [t]uition at iBrain," including academic instruction and related, 1:1 paraprofessional, and special transportation services (id. at p. 2). As relief, the parents sought direct payment by the district for the student's tuition at iBrain and costs of transportation including 1:1 travel paraprofessional services for the 2019-20 extended school year (id. at p. 3).

### B. Impartial Hearing Officer Decision

While the administrative claims were pending the parents filed another lawsuit. Along with 32 other parents of children at iBrain, the parents 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 parents of the student in this case. With respect to the parents in this case, along with the request of four other students, the court held that the case fell squarely within the Second Circuit's recent holding that parents could not choose to place students at iBrain unilaterally, without input from the district, and then recover the costs of such placement under pendency (Araujo, 2020 WL 5701828, at *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]).

An impartial hearing convened before IHO Kehoe on November 27, 2019 and concluded on October 30, 2020 after five days of proceedings, during which the parties addressed the issue of the student's pendency placement (Tr. pp. 1-77).[6] During the course of the hearing, the parties made numerous oral and written arguments before the IHO, including that the March 5, 2018 IHO

[5] In a July 23, 2019 interim decision regarding consolidation, IHO De Leon declined to consolidate the two proceedings (see July 23, 2019 Interim Order on Consolidation).

[6] The IHO admitted the parents' evidence into the hearing record on January 29, 2020, and on February 25, 2020, heard one witness testify on cross-examination from her affidavit testimony; with the remainder of the hearings involving discussions between the IHO and counsel for the parties (see Tr. pp. 1-77).

Peyser decision determined that iHope was an appropriate unilateral placement for a prior school year, that the student's educational program at iBrain during the 2019-20 school year was substantially similarity to the iHope program such that iBrain was the student's pendency placement, that the parents failed to establish that the iHope program was not available, that the district was not obligated to provide a pendency placement at iHope to a student unilaterally placed at iBrain, as well as the relevance of District Court and Second Circuit decisions in relation to the instant matter (see Tr. pp. 18-22, 42-44, 50-68).[7]

In an interim decision dated November 9, 2020, the IHO found that the student's 2017-18 iHope program and placement was substantially similar to that of the student's 2019-20 program at iBrain; however, he rejected the parents' argument that footnote 65 of Ventura de Paulino was applicable, and found that contrary to the parents' assertion that the district failed to demonstrate that iHope was an available pendency placement, it was the parents—who moved the student from iHope to iBrain—who had the obligation to demonstrate iHope was no longer available (IHO Interim Decision at pp. 3, 6-7). The IHO directed that, unless the parties otherwise agreed, the student's pendency was found in the program and placement at iHope (id. at p. 7).

## IV. Appeal for State-Level Review

The parents appeal from the IHO's interim decision, asserting that the he erred in failing to find that the student's pendency placement for the 2019-20 school year was the educational program the student received at iBrain. The parents assert that during the 2019-20 school year iBrain provided the student with a "substantially similar educational program" to the program that the student had received at iHope; that the IHO erred by failing to find that the district's assigned public school site for the 2019-20 school year was unavailable to implement the June 14, 2020 IEP—which did not provide for remote or hybrid learning—as of March 2020 due to COVID-19 related school closures; and that the IHO erred by failing to find that during the 2019-20 school year, iHope (the last agreed-upon placement) was not available, therefore, the district failed to offer or provide a program and placement that would maintain the student's "educational status quo during the pendency of the due process proceeding." Next, the parents assert that the IHO erred in failing to determine the financial "implications of the unavailability" of iHope on them, specifically alleging that iHope had become unavailable due to "significant changes in the administration" of the iHope program, and that the cost of iHope for the 2018-19 school year became untenable. The parents further assert that the IHO erred in not finding that iBrain is the student's "operative placement" for purposes of pendency. The parents request that the undersigned vacate the IHO's interim decision, find that the student's pendency placement is at iBrain, and order the district to fund the student's cost there during the pendency of the underlying due process proceeding.

[7] On appeal for State-level review, the district submitted the district's undated Brief and Memorandum of Law which appears to be what the IHO referred to as "IHO#1"; the parents' March 16, 2020 Memorandum of Law in Support of an Order on Pendency which the IHO identified as "IHO#2"; the district's undated Supplemental Brief and Memorandum of Law, which appears to be referred to by the IHO as "IHO#3"; and, the parents' August 26, 2020 Supplemental Memorandum of Law in Support of an Order on Pendency which the IHO appears to identify as "IHO#4." Unfortunately, the submissions to the Office of State Review were not actually marked as such, and it is exasperating that the attorney for the district would file undated legal briefs.

In an answer with cross-appeal, the district denies the material allegations set forth in the parents' request for review. The district asserts that the undersigned is bound by the District Court's pendency determination in Araujo, which specifically rejected the parents' arguments that the district failed to offer the student a pendency placement for the 2020-21 school year, and that iBrain could therefore serve as the student's operative pendency placement. Although the district acknowledged that the instant matter concerns the 2019-20 school year, the district argues that "the pendency inquiry and arguments remain the same, as there can be only one pendency placement functioning at a time." Additionally, the district asserts that "there have been no intervening events that would warrant a different pendency finding, such as a pendency agreement or a merits determination in favor of the [p]arents' unilateral placement." In a cross-appeal, the district argues that the IHO's determination that the student's pendency program at iHope was substantially similar to the student's programming at iBrain was an error, as the IHO "should never have compared the two programs because it runs afoul of Ventura de Paulino's central holding." The district requests that the undersigned disregard the additional evidence submitted with the parents' request for review, dismiss the request for review, and overturn the IHO's substantial similarity finding.

In a reply, the parents argue, among other things, that the undersigned is not bound by the District Court's opinion in Araujo, as that decision was not a final determination on the merits, and therefore, the district's assertion that the parents' claim is barred by collateral estoppel is erroneous.

**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] cert. denied sub nom. Paulino v. NYC Dep't of Educ., 2021 WL 78218 (U.S. Jan. 11, 2021); 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 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**

This appeal consists of a dispute that is almost identical to several others brought by counsel for the parents for other similarly situated students (Application of a Student with a Disability, Appeal No. 21-006; Application of a Student with a Disability, Appeal No. 20-196; Application of a Student with a Disability, Appeal No. 20-201; Application of a Student with a Disability, Appeal No. 20-178; Application of a Student with a Disability, Appeal No. 20-184; Application of a Student with a Disability, Appeal No. 20-194). 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 parents assert in the reply that the determinations contained in Araujo are on appeal at the Second Circuit, and that the District Court's 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). The parents' counsel, Brain Injury Rights Group, made a similar stay-put argument on behalf of another student at iBrain to the District Court—that a court decision was on appeal and therefore nonbinding—but that argument was squarely rejected by the District Court, which explained "[t]his Court will not engage in judicial forecasting. It takes the law as it finds it and will apply the controlling precedent

of the Second Circuit" (Ferreira v. New York City Dep't of Educ., 2021 WL 76808, at *1 [E.D.N.Y. Jan. 8, 2021]). The court's reasoning in Ferreira applies to the arguments here as well.

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),[8] 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 parents' 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 parents' 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 nonsensical.

To the extent that the parents cite to footnote 65 in Ventura de Paulino and argue that "a parent may exercise self-help and seek an injunction to modify the student's pendency placement," the parents 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.[9]

To the extent that the parents assert that the State's ordered closure of all school buildings and the 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 parents' unilateral placement of the student at iBrain.

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[8] 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.

[9] 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).

It is not the first attempt at this argument either. In a putative class action, brought by parents represented by the same counsel in this case, 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 all schools 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. For the same reasons, the parents' argument and proffered evidence that iHope was unavailable because it shifted to remote and/or hybrid learning

due to the closure of physical buildings as a response to the global pandemic is equally unavailing.[10]

Turning to the district's cross-appeal of the IHO's substantial similarity finding between iHope and iBrain, the fact finding is legally irrelevant to the disputed issue in this appeal, and the IHO found as much, relying on language from Ventura de Paulino to conclude that the parents are not entitled to public funding for iBrain as the student's pendency placement and that iHope would be the student's pendency placement (IHO Interim Decision at pp. 3, 5-7). As such, the district is not aggrieved and its cross-appeal will be dismissed.

## VII. Conclusion

Since the District Court's determination in Araujo that the student was not entitled to stay put funding at iBrain, there are no new facts, such as a subsequent unappealed determination on the merits in favor of the parents granting reimbursement for a unilateral placement of the student at iBrain or a new agreement between the parties for stay-put purposes that would warrant funding at iBrain as a pendency placement. Based on the discussion above, there is no reason to disturb the IHO's determination that the student's pendency placement is the programming that student received at iHope during the 2017-18 school year upon which the parents prevailed on the merits at an impartial hearing, and that the parents were not entitled to public funding of iBrain as the student's pendency placement.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated: Albany, New York**
**February 9, 2021**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**

[10] The parents also proffer contractual documents from the 2017-18 (executed) and 2018-19 school years (unexecuted) at iHope and assert financial hardship as a reason why iHope would not be available, but that point is inapposite because the parties already agreed that IHO Peyser's March 2018 decision finding in favor of the student's unilateral placement at iHope was not appealed. By operation of law, the district would be responsible for funding the student's continued placement at iHope (see Neske v. New York City Dep't of Educ., 2020 WL 5868279, at *1 [2d Cir. Oct. 2, 2020]), but the parents chose to move the student to iBrain.