The University of the State of New York

The State Education Department
State Review Officer
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No. 20-199

Application of a STUDENT WITH A DISABILITY, by her 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 Peter Albert, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathaniel Luken, 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 an interim decision of an impartial hearing officer (IHO) determining their 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 2019-20 and 2020-21 school years. 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

According to the parents, prior to the 2019-20 school year, the student lived in another country, where she received special education instruction and related services (Parent Ex. A at p. 2; see Parent Ex. E at p. 1).[1] On January 3, 2020, the parents enrolled the student in the district, and the district formulated a "[c]omparable [s]ervice [p]lan" in which it recommended for the student a 12:1+(3+1) special class placement in a specialized school, along with individual sessions of occupational therapy (OT), physical therapy (PT), and speech-language therapy as well

[1] The student's aunt and uncle are the student's legal guardians; therefore, consistent with State regulation, they will be referred to as the "parents" throughout this decision (see Parent Ex. E at p. 1; Req. for Rev. at p. 1; see also 8 NYCRR 200.1[ii][1]).

as special transportation services (Parent Ex. A at p. 2; Dist. Ex. 1 at pp. 1-3).[2] In a letter dated January 3, 2020, the district notified the parents of the location where the student was to receive the services recommended in the comparable service plan (Dist. Ex. 2).

In a January 16, 2020 email, the parents notified the district that they had visited the assigned public school site, which they determined was not appropriate to meet the student's needs due to the lack of 1:1 adult support, the duration of related services, and the wide range of needs of the students in the proposed classroom (Dist. Ex. 3). The parents also stated that they would not be enrolling the student in the district's assigned public school site (id.).

According to the parents, they disagreed with the district's recommendations, and on February 12, 2020, they provided written 10-day notice of their intention to unilaterally place the student at the International Institute for the Brain (iBrain) and seek public funding for that placement (Parent Ex. A at p. 2).[3] The parents indicated that the student began attending iBrain on February 25, 2020 in a 6:1:1 classroom, and receiving OT, PT, speech-language and 1:1 paraprofessional services (id. at p. 3; see Parent Ex. D at pp. 1, 7).

A. Due Process Complaint Notice

In a March 24, 2020 due process complaint notice the parents requested an impartial hearing, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (Parent Ex. A). Among other things, the parents asserted that the district failed to timely and sufficiently evaluate the student in all areas of suspected need; failed to develop measurable, specific, and appropriate goals; failed to recommend an appropriate placement to address the student's highly intensive management needs; and failed to recommend the appropriate, type, amount, and duration of related services required to address the student's needs (id. at pp. 3-4). For relief, the parents sought an order from an IHO directing the district to conduct OT, PT, speech-language, and neuropsychological evaluations, and fund the student's program at iBrain for the 2019-20 school year as well as door-to-door non-public transportation, including a travel paraprofessional, in an air conditioned vehicle (id. at pp. 4-5).

[2] Although the need for IDEA services and the district's obligation to offer the student a FAPE going forward does not appear to be a disputed issue, the rules governing transfers of students from a public agency within the State or from a public agency in another state in which the IDEA applies do not address the situation when a student newly arrives in the district from a foreign nation where the IDEA did not apply. The use of a comparable services plan tends to arise when the CSE or IEP team of a public agency has met, evaluated the student, and the student has already been found eligible for services in accordance with the IDEA's procedures. For example, when a student with a disability has an IEP in effect in a public agency in one state and then transfers to another public agency in the different state, and enrolls in the new school within the same school year, the new public agency must provide "comparable services" to those services described in the student's IEP from the prior public agency. Those comparable services must be provided until the new public agency conducts an evaluation and develops, adopts, and implements a new IEP, if appropriate (34 CFR 300.323[f][1], [2]; 8 NYCRR 200.4[e][8][ii]). "Comparable services" means services that are "'similar'" or "'equivalent'" to those described in the student's IEP from the previous public agency (IEPs for Children Who Transfer Public Agencies in the Same State, 71 Fed. Reg. 46681 [Aug. 14, 2006]).

[3] The February 12, 2020 10-day notice was not made a part of the hearing record.

On July 6, 2020, the parents filed a second due process complaint notice alleging that the district failed to offer the student a FAPE for the 2020-21 school year (see IHO Interim Order on Consolidation at p. 2).[4]

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 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]).

In the administrative proceeding, a prehearing conference was held before an IHO on September 11, 2020, wherein the parties discussed the potential for consolidating both underlying due process proceedings and set a date for a status conference (Tr. pp. 1-5). On September 23, 2020, the parties participated in a status conference wherein the hearing date to address pendency was scheduled (Tr. pp. 6-10). On October 19, 2020, an impartial hearing convened for the purpose of determining the student's pendency placement during the underlying 2019-20 school year due process proceeding (Tr. pp. 11-38). During the hearing no testimony was taken, some exhibits were marked and entered into evidence, and the parties presented arguments to the IHO concerning the student's pendency placement (Tr. pp. 14-35). Specifically, during the hearing the parents asserted that due to the COVID-19 pandemic and the resulting ordered school closings, the district was not able to make the assigned public school site available to implement the student's comparable service plan—which did not provide for remote instruction—and as such, footnote 65 of Ventura de Paulino applied, allowing the student's pendency placement to be made at iBrain (Tr. pp. 29-31). The parents also argued that iBrain was the student's "operative placement" because that was the school she was attending at the time the parents filed their due process complaint notice, the district's recommended program was unavailable, and the district did not make an effort to find an alternate pendency placement (Tr. pp. 30-31). The district argued, among other things, that the IHO should not make a pendency determination due to ongoing federal litigation at the district court level, as well as a possible appeal to the Second Circuit and further, that the parents should be estopped from seeking pendency at the administrative level when that issue for this student was already decided at the district court level (Tr. pp. 32-33; see Tr. pp. 34-35).

[4] The due process complaint notice relating to the 2020-21 school year was not made part of the hearing record.

In an interim decision dated October 22, 2020, the IHO granted the request to consolidate the 2019-20 and 2020-21 school year due process proceedings (IHO Interim Order on Consolidation).

In an interim decision dated November 9, 2020, the IHO found that contrary to the parents' repeated assertions, the March 24, 2020 due process complaint notice did not contain a request for an interim pendency order, and therefore they were precluded from requesting it at the hearing (see IHO Interim Decision at p. 3). The IHO further found that even if the request for an interim pendency order was properly before him, he would still deny the relief the parents sought based on the Court's decision in Ventura de Paulino, applying the doctrine of collateral estoppel (id. at pp. 3, 5).

IV. Appeal for State-Level Review

The parents appeal from the IHO's interim decision, asserting, among other things, that the IHO erred in failing to find that the student's pendency placement for the 2019-20 and 2020-21 school years is the educational program the student is receiving at iBrain. Specifically, the parents first assert that the IHO erred in determining that their July 6, 2020 due process complaint notice did not contain a request for a pendency determination and order as interim relief.[5] The parents next assert that because the district closed all public school buildings in March 2020 for the

[5] The parties and the IHO waste time arguing over whether the due process complaints contain request(s) for pendency, time which could be better spent on the resolving whether the district denied the student a FAPE and if so whether iBrain is an appropriate unilateral placement. In the request for review the parents assert that the July 6, 2020 due process complaint notice "clearly requested an order of pendency" and that the July 2020 due process complaint notice is attached to the request for review as "Proposed SRO Ex. A" (Req. for Rev. at p. 3). However, the attachment submitted with the parents' request for review was a duplicate of the March 24, 2020 due process complaint notice, and the hearing record does not otherwise contain the due process complaint notice dated July 6, 2020 (see Parent Exs. A; D; E; Dist. Exs. 1-6). But whether the parents requested pendency in a due process complaint notice is irrelevant because the controlling law in this circuit requires the district to provide the student with stay put services, assuming the parents are willing to avail themselves of those services. As the Second Circuit has explained "[t]his provision is, in effect, an automatic preliminary injunction" (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]), and the district's and IHO's assertion that parents must dispute pendency in the very due process complaint notice that gives rise to the right to pendency is baseless (Doe v. E. Lyme Bd. of Educ., 962 F.3d 649, 659 [2d Cir. 2020] ["To that end, we again emphasize that once a party has filed an administrative due process complaint, the IDEA's stay-put provision provides that 'during the pendency of any proceedings conducted pursuant to [20 U.S.C. § 1415] ... the child shall remain in the then-current educational placement of the child.' 20 U.S.C. § 1415(j)] [emphasis added]). However, the error is harmless because, Zvi D. also explained long ago that "[t]he public agency, however, is not required to pay for the parent-initiated placement" (Zvi D., 694 F.2d 904, 907 [2d Cir. 1982]), which is essentially what the parents did in this case. In Ventura de Paulino the Second Circuit made this more clear when discussing the parent-initiated placements at iBrain therein, explaining that the rule applied even in those cases in which the parents had already prevailed in prior tuition reimbursement cases against the district involving a similar private school. Thus, assuming, without deciding, that the student is eligible for a pendency placement upon transfer into the district from a foreign country, the Second Circuit has indicated that "[a]s we have recognized, '[i]t is up to the school district,' not the parent, 'to decide how to provide that educational program [until the IEP dispute is resolved], so long as the decision is made in good faith'" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 534 [2d Cir. 2020]). Regardless of the IHO's error in finding that a pendency dispute must be set forth in the parents' due process complaint notice, such error was harmless in this instance because as described below, the IHO was nevertheless correct that the parents' were not eligible to obtain public funding for iBrain as the student's pendency placement.

remainder of the 2019-20 school year due to the COVID-19 pandemic and only offered instruction and related services via remote learning, the district "unilaterally, substantially, and materially altered" the student's educational program by changing the location of where the student was to receive her services, from a district specialized school to in-home remote services. Further, the parents assert that due to the COVID-19 related closures, the assigned specialized public-school sites the district offered the student in both January and June 2020 were "unavailable" to her. As such, the parents argue that the IHO erred by failing to find that 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." Additionally, the parents further argue that the IHO erred in not finding that iBrain is the student's operative placement for purposes of pendency. Finally, the parents assert that the IHO erred by finding that collateral estoppel prevented a finding of pendency at iBrain, because the District Court decision the IHO applied is currently on appeal to the Second Circuit. The parents request that this SRO vacate the IHO's interim decision and find that the student's pendency placement is at iBrain and order the district to fund the costs of the student's iBrain program during the pendency of the underlying due process proceeding.

In its answer, the district generally responds to the parents' allegations with admissions, denials, or various combinations of the same and argues in favor of the IHO's determination that the student's pendency placement was not at iBrain. The district also asserts, among other things, that the parents' March 2020 due process complaint notice did not contain a request for pendency, and that the IHO correctly denied the parents' pendency request on the basis of collateral estoppel. Additionally, the district asserts that the parents' argument that the assigned specialized public school was unavailable because it offered remote services after the parents unilaterally placed the student at iBrain, and that iBrain is the student's operative placement must be rejected. Further, the district argues that the undersigned is bound by the District Court's determination in Araujo that the student is not entitled to a publicly funded pendency placement at iBrain. The district requests that the SRO dismiss the parents' appeal with prejudice.

In a reply to the district's answer the parents assert, 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 very similar fact pattern and the same pendency arguments as several others brought by counsel for the parents for other similarly situated students (Application of a Student with a Disability, Appeal No. 20-196; Application of a Student with a Disability, Appeal No. 20-198; Application of a Student with a Disability, Appeal No. 20-201; Application of a Student with a Disability, Appeal No. 21-006; 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 their Memorandum of Law that the determinations contained in Araujo are not binding because the case is 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). 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),[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 parents' assertion that the student should receive a publicly funded pendency placement at iBrain because there is no last agreed upon placement 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 defies logic.

To the extent that the parents cite 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

[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.

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 parents assert 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 parents' unilateral placement of the student at iBrain. 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

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[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).

> 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 district's 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.

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 the 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 determinations.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
February 10, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER