The University of the State of New York

The State Education Department
State Review Officer
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No. 21-006

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 petitioner, by Peter G. Albert, Esq.

Judy Nathan, Interim Acting General Corporation Counsel, attorneys for respondent, by Brian Davenport, 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 son's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2020-21 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

Given the undeveloped state of the hearing record in the present matter, a full recitation of facts relating to the student is not possible but is, in any event, unnecessary due to the procedural posture of the impartial hearing proceedings and the limited nature of the appeal.[1] Briefly,

[1] The parents' request for review in this matter challenges an October 14, 2020 interim decision of IHO Rahman; however, the documents submitted as the certified administrative hearing record also relate to a separate proceeding involving the same student before IHO Regenbogen. As described below, IHO Regenbogen was

according to the district, the student attended a district school during the 2018-19 school year (SRO Rec. at p. 87). The district indicated that in December 2018 the CSE found the student eligible for special education as a student with multiple disabilities and for a portion of the 2018-19 and 2019-20 school years, recommended a 12-month program consisting of a 12:1+(3:1) special class placement in a district specialized school along with the individual occupational therapy (OT), physical therapy (PT), speech-language therapy, assistive technology services, and a health paraprofessional, as well as OT in a group setting (id. at pp. 111-14, 118-19). The CSE also recommended that the student receive three 60-minute individual speech-language therapy sessions outside of the school day (id. at pp. 112, 114). The student attended the district's specialized school for the entirety of the 2018-19 school year, after which the district alleges the parents filed a due process complaint notice concerning, among other years, the 2018-19 school year (Req. for Rev. at p. 2; SRO Rec. at p. 87).

The district indicated in written arguments that the student remained in a district school at the beginning of the 2019-20 school year and that the CSE convened on November 26, 2019 to develop the student's IEP for the remainder of the 2019-20 school year (SRO Rec. at pp. 87, 89). The parties indicated that the parents disagreed with the district's recommendations and unilaterally placed the student at the International Institute for the Brain (iBrain) in January 2020 (id. at pp. 16-17, 87).

According to the parents' written arguments, in March 2020, all public school buildings in the district were closed due to the COVID-19 pandemic and remote learning was implemented (see SRO Rec. at pp. 18-21). In April 2020, the parents filed a due process complaint notice alleging, among other things, that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (id. at pp. 16-17, 87).

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subsequently appointed to preside over both matters, but did not preside over this case during the events relevant to this appeal. No documents in this matter were identified as entered into the hearing record, and the IHO decisions in the materials submitted by the district lack exhibit lists that identify what the IHOs considered. The only exhibit list contained in the hearing record is dated November 6, 2020 bearing IHO Regenbogen's name as presiding officer, which postdates IHO Rahman's interim decision by weeks. The documents submitted by the district as the administrative hearing record in this matter consisted of the parents' July 6, 2020 due process complaint notice, two IHO exhibits consisting of IHO Rahman's interim decision and an email dated October 26, 2020, the parents' motion in support of an interim order on pendency with three lettered attachments, the district's brief contesting pendency with four enumerated attachments, a notice of appearance by the district's attorney, IHO Regenbogen's November 6, 2020 interim decision denying consolidation, two orders of extension of the timeline (one by IHO Rahman, the other by IHO Regenbogen), IHO Regenbogen's November 6, 2020 interim decision denying a second request, or reconsideration of IHO Rahman's interim decision, and an IHO record certification by IHO Regenbogen. Thus, the administrative record in this proceeding is in a state of disarray. To reduce confusion and ease the task of referencing documents in this decision, the undersigned consolidated the collection of documents into a consecutively paginated Record on Appeal marked "SRO Rec." (see SRO Rec. at pp. 1-147). A copy of the consecutively paginated Record on Appeal will be provided to the parties. The transcript of the proceedings submitted by the district is separately paginated over two hearing dates, one of which occurred after the interim decision being challenged in this appeal (Tr. pp. 1-25). As many of the papers submitted by the parties were never identified in the record, I remind the IHOs of the critical hearing management practice of ensuring that the administrative record clearly indicates what documents and papers were before an IHO and that documents be clearly be marked and identified in an exhibit list attached the IHO's decision, less the matter be remanded by State-level review officials or the courts for reconstruction of the administrative record.

The district's prior written notice reflects that the CSE convened on June 8, 2020 to develop the student's IEP for the 2020-21 school year (SRO Rec. at p. 70). The CSE determined that the student was eligible for special education as a student with multiple disabilities, and recommended a 12-month program consisting of a 6:1+1 special class placement in a district specialized school together with individual sessions of OT, PT, speech-language therapy, 1:1 health paraprofessional services, as well as assistive technology support (id. at pp. 17, 70).

The parents indicated that they provided the district with written 10-day notice of their intent to unilaterally place the student at iBrain on or about June 26, 2020 (SRO Rec. at p. 17).[2] The student remained at iBrain during the 2020-21 school year (id. at p. 20).

A. Due Process Complaint Notice

In a due process complaint notice dated July 6, 2020, the parents requested an impartial hearing, asserting that for the 2020-21 extended school year (ESY) the district failed to offer the student a free appropriate public education (FAPE), and requesting that this proceeding be consolidated with the proceeding concerning the 2019-20 school year (SRO Rec. at pp. 1-2).[3] With regard to the 2020-21 proceeding, the parents alleged that the district: failed to offer the student a seat in a classroom at a public school site that could implement the IEP, made the assigned public school offer "well after the start" of the extended school year, and failed to recommend an available placement (id. at pp. 3-4). With regard to the public school site, the parents also asserted that the district "did not have an environment properly matched" to the student's academic, behavioral/social, physical, and management needs and that student would be placed with "peers possessing dissimilar needs" (id. at p. 4). As for the June 2020 IEP itself, the parents alleged that the related services listed in the IEP were inadequate, and that the district denied the student access to assistive technology services in the IEP (id. at pp. 4-5). As relief, the parents sought direct funding by the district for the unilateral placement of the student at iBrain for the 2020-21 school year, prospective funding for special education transportation (or reimbursement for such), and an order compelling the district to provide the student with assistive technology services (id. at p. 6). As is relevant to this appeal, the parents requested that the IHO issue an interim decision directing the district to directly fund the student's tuition, costs for related services, and special transportation at iBrain as stay put during the pendency of the underlying due process proceeding (id. at p. 2). The parents asserted that the student's pendency program was found in the district's June 8, 2020 IEP, the IEP challenged by the parents (id.).

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

[2] In view of the timing, this ten-day notice appears to relate to the 2020-21 school year, but the ten-day notice itself is not the hearing record.

[3] In the November 6, 2020 interim decision regarding consolidation IHO Regenbogen declined to consolidate the two proceedings (see Tr. pp. 19-23; SRO Rec. at p. 141).

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]).

On September 15, 2020, an impartial hearing was convened before IHO Rahman, during which the parties briefly addressed the student's pendency placement and thereafter the parents filed a motion and the district filed a brief on the issue (Tr. pp. 1-18; see SRO Rec. at pp. 16-139).[4]

The parties made numerous oral and written arguments before the IHO, disputing which of the student's IEPs prepared by the district should be considered the basis for the student's pendency placement, and they contested numerous theories for stay put including the "substantial similarity" test, the operative placement test, and the relevance of school building closures, remote and/or hybrid learning due to the COVID-19 pandemic (see Tr. pp. 4-6; SRO Rec. at pp. 16-30, 85-94).[5]

In an interim decision dated October 14, 2020, IHO Rahman, citing to Ventura de Paulino, found that because the parents removed the student from the district's public school and unilaterally placed him at iBrain in January 2020, and then filed a due process complaint notice regarding the June 2020 IEP in July 2020, the services subsequently received at iBrain could not be deemed the student's then-current educational placement (SRO Rec. at pp. 9-11). Furthermore, the IHO found that, given the student's receipt of special education services at iBrain starting in January 2020, the parents' arguments pertaining to the district's school closure due to COVID-19 were also unpersuasive (id. at p. 11). Accordingly, the IHO denied the parents' motion and determined that the student was "not entitled to an educational placement at iBRAIN during the pendency of this action" (id.).[6]

IV. Appeal for State-Level Review

The parents appeal from the IHO's October 14, 2020 interim decision, asserting that the IHO erred by failing to find that the student's pendency placement for the 2020-21 school year is the educational program he is receiving at iBrain, and failed to determine what constituted the

[4] No testimony was taken during the hearing (Tr. pp. 1-17).

[5] Neither the parents' motion or the district's brief informed the IHO of the District Court's determination in Araujo, discussed supra, or the J.T. v. de Blasio decision discussed infra.

[6] As clarification of the contents of the hearing record, it appears that IHO Rahman recused himself from the instant matter after he issued the October 14, 2020 interim decision denying the parents' pendency request, and on October 15, 2020 IHO Regenbogen was appointed to continue the case (Req. for Rev. at p. 4; Answer at p. 3; see Tr. pp. 19-23; SRO Rec. at pp. 14, 141, 144). On November 6, 2020 IHO Regenbogen denied the parents' request for reconsideration of IHO Rahman's determination (Tr. pp. 19-24; SRO Rec. at pp. 13, 144-45).

student's pendency placement during the underlying due process proceeding. The parents allege that due to the district's public school closures and subsequent transition to "hybrid" and remote learning resulting from the COVID-19 pandemic, the district unilaterally, substantially, and materially altered the student's educational program as it relates to pendency by 1) altering the location of the student's services from a specialized school classroom to in-home remote services, 2) precluding the student from receiving any in-person services, and 3) by precluding in-person services, the district eliminated the student's 1:1 nurse and all in-person therapy sessions, which according to the parents by definition are services to be provided as a direct service to the student. Therefore, the parents assert that the IHO erred by failing to find that the student's last agreed upon placement is "unavailable as it is no longer providing the services recommended on either" the student's November 2019 or June 2020 IEPs, and that both the last agreed-upon and the most recent district assigned specialized public schools remain closed for in-person services and thus are also "unavailable" for the student. The parents put forth arguments that iBrain is the student's operative placement as it was the school he attended at the time the parents filed the due process complaint notice, and that the student's placement at iBrain is substantially similar to both the last agreed-upon placement and the most recently recommended placement. Finally, the parents assert that the IHO's recusal after the interim decision was issued is not supported by either federal or State statute or regulation, and resulted in the student "essentially having no pendency placement" because the IHO failed to identify one. The parents request that the undersigned reverse the IHO and find that the student's placement for purposes of pendency is the educational program he receives at iBrain.

In an answer, the district responds to the parents' allegation set forth in the request for review with denials of the parents' material allegations, and argues in favor of upholding the IHO's determinations 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 undersigned 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 that District Court's determination in Araujo because that determination is the subject of an appeal to the Second Circuit Court of Appeals.

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 (see Application of a Student with a Disability, Appeal No. 20-201; Application of a Student with a Disability, Appeal No. 20-196; Application of a Student with a Disability, Appeal No. 20-194; Application of a Student with a Disability, Appeal No. 20-178; Application of a Student with a Disability, Appeal No. 20-184). 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 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....

> 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),[7] 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 therefore 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 argues 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.[8]

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[7] 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.

[8] In footnote 65, the Second Circuit stated

> "[w]e do not consider here, much less resolve, any question presented where the school providing the

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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> 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.

> 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).

(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 parents' unilateral placement of the student at iBrain thereafter into the student's publicly funded pendency placement.

VII. Conclusion

Since the District Court's determination 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, I find that the IHO, while not explicitly finding that the district would be responsible to implement the December 2018 IEP in a public or State-approved nonpublic school should the parents seek it,[9] nonetheless properly determined that the parents were not entitled to public funding of iBrain as the student's pendency placement, albeit I also reach the latter determination based upon information that the record does not show was provided to IHO Rahman by counsel for the parties (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 parents' 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**
February 3, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER

[9] If the parents wish to avail themselves of a publicly-funded pendency placement while the proceedings are pending, under the facts at present in which they have yet to prevail on the merits, they would have to remove the student from iBrain and return the student to the public school, which seems unlikely since they rejected the district's proposed programming and are perusing a unilateral placement claim.