The University of the State of New York

The State Education Department
State Review Officer
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No. 21-060

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) determining the pendency placement of respondents' (the parents') son during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student for the 2019-20 school year and dismissing the merits of the matter as moot. The appeal must be sustained, and the matter remanded to the IHO for further administrative proceedings.

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 student has been subject of two prior State-level administrative appeals (see Application of the Dep't of Educ., Appeal No. 19-117; Application of a Student with a Disability Appeal No. 14-049).

The district was required to fund the student's attendance at the International Academy of Hope (iHope), a nonpublic school for students with traumatic brain injury (TBI), pursuant to an IHO decision dated March 27, 2018, which arose from proceedings in which the parents challenged the district's offer of a free appropriate public education (FAPE) to the student for the 2017-18 school year (2017-18 proceeding) (see Parent Ex. K at pp. 13-23).

For the 2018-19 school year, the student attended the International Academy of the Brain (iBrain) (see Application of the Dep't of Educ., Appeal No. 19-117).[1] The district's offer of a FAPE for the student for the 2018-19 school year was the subject of a prior impartial hearing and subsequent State-level administrative review (2018-19 proceeding) (see id.). The SRO in that matter determined that the district offered the student a FAPE and, therefore, reversed the a decision of an IHO and concluded that the parents were not entitled to district funding of the costs of the student's attendance at iBrain for the 2018-19 school year (see id.).[2]

The district conducted a re-evaluation of the student consisting of a February 2019 social history update, a February 2019 psychoeducational evaluation, and a March 2019 classroom observation of the student at iBrain (see Dist. Exs. 6-8). In preparing to schedule a CSE meeting to review the evaluations and engage in educational planning for the student for the 2019-20 school year, the parent proposed dates and times for the meeting and later requested, among other things, that a district physician and additional parent member attend the meeting in person; the meeting was scheduled for April 10, 2019 and then re-scheduled for June 3, 2019 (see Parent Exs. G; H; Dist. Exs. 10; 11).

A CSE convened on June 3, 2019 to conduct the student's annual review and develop an IEP for the student for the 2019-20 school year (see Dist. Ex. 12). Neither the parents, nor staff from iBrain, attended the meeting (see id. at p. 29).[3] Having found that the student continued to be eligible for special education as a student with multiple disabilities, the CSE recommended a 12-month school year program in a 6:1+1 special class in a specialized school with adapted physical education and related services consisting of three 40-minute sessions per week of individual occupational therapy (OT), five 40-minute sessions per week of individual physical therapy (PT), five 40-minute sessions per week of individual speech-language therapy, two 40-minute sessions per week of individual vision education services, and one 40-minute session per month of parent counseling and training (id. at pp. 1, 22-23, 26; see Dist. Ex. 9 at p. 1).[4] The June

[1] The Commissioner of Education has not approved iBrain as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] The IHO in the 2018-19 proceeding denied the parents' request for pendency at iBrain, and the parents filed a lawsuit directly in the United State District Court for the Southern District of New York to challenge that decision; the District Court denied the parents' request for a preliminary injunction in an order dated August 23, 2019 and dismissed the parents' motion to amend their complaint in a decision made on January 8, 2021 and memorialized in an order dated January 15, 2021 (E. v. New York City Dep't of Educ., 19-cv-2946 [S.D.N.Y. filed Apr 2, 2019]; see SRO Exs. 3; 4 at pp. 1, 26-29). In addition, the parents appealed the decision of the SRO in Appeal No. 19-117 to the United States District Court for the Eastern District of New York, and that appeal is still pending (E. v. Carranza, 20-cv-2181 [E.D.N.Y. filed May 13, 2020]).

[3] According to the meeting minutes, the CSE called the student's father but the father would not attend or participate in the meeting, citing the lack of updated medical forms available to the CSE and the fact that the district physician was present at the meeting only by telephone (Dist. Ex. 13 at pp. 1-2; see Dist. Ex. 12 at p. 19).

[4] While the student's eligibility for special education and related services is not in dispute, the parent alleged that multiple disabilities was not the most appropriate disability category for the student (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]; see also Parent Ex. A at p. 2).

2019 CSE also recommended special transportation, including a transportation paraprofessional, and assistive technology (Dist. Ex. 12 at pp. 9, 23, 25).

In a prior written notice and school location letter dated June 25, 2019, the district summarized the recommendations of the June 2019 CSE and notified the parents of the particular public school location to which the district assigned the student to attend for the 2019-20 school year (Dist. Ex. 14).

In a letter to the district dated June 21, 2019, the parents notified the district of their intent to unilaterally place the student at iBrain for the 2019-20 school year and seek public funding for the student's attendance (Parent Ex. J). On June 26, 2019, the parents executed a contract for the student's attendance at iBrain for the 2019-20 school year (Parent Ex. C). In addition, on July 8, 2019, the parents entered into a contract with Sisters Travel and Transportation Services for the student's transportation to and from iBrain for the 2019-20 school year (Parent Ex. D).

A. Due Process Complaint Notice

By due process complaint notice dated July 8, 2019, the parents alleged that the district failed to offer the student a FAPE for the 2019-20 school year, and requested an interim order of pendency, asserting that the basis for pendency during the instant matter was the March 2018 unappealed IHO decision (Parent Ex. A at pp. 1-2). Specifically, the parents' pendency request was that the district prospectively pay for the student's full tuition at iBrain that included academics, therapies, a 1:1 professional, and a 1:1 nurse, as well as special transportation accommodations including limited travel time, a wheelchair accessible vehicle, air conditioning, flexible pick-up and drop off schedule, and a 1:1 nurse for transportation (id. at p. 2).

Regarding the district's offer of a FAPE, the parents asserted that the district committed "many substantive and procedural errors" in the development of the June 2019 IEP and regarding the "subsequent placement recommendation" at the assigned public school site (Parent Ex. A at p. 2). The parents noted that they rejected both the June 2019 IEP and the assigned public school site "in their entirety" (id.).

The parents alleged that the June 2019 CSE failed to hold the "annual review meeting at a time that was mutually agreeable" with the parents and that complied with the parents' request for a "Full Committee" meeting that included a district school physician and an additional parent member participating in person to discuss the student's needs for the "extended school year 2019-2020" (Parent Ex. A at p. 2).

In addition, the parents alleged that the June 2019 IEP was not appropriate because it failed to identify the student's eligibility category as traumatic brain injury (TBI) or reflect his needs "as a student with brain injury" (Parent Ex. A at p. 2). The parents further asserted that the June 2019 IEP was not based upon "any individualized assessment" of all of the student's needs and, thus, would fail to "confer any meaningful educational benefit" to the student during the 2019-20 school year (id.). Next, the parents asserted that the student would be "expose[d]" to substantial regression as a result of the "significant and unsubstantiated reduction in the related services mandates" in the IEP, as well as in "the student-to-teacher ratio of the recommended class size" (id.). With respect to the "recommended program and placement," the parents alleged that it failed to meet the

student's "highly intensive management needs [that] requir[ed] a high degree of individualized attention and intervention," it did not constitute the student's least restrictive environment (LRE), and the student-to-teacher ratio of the special class placement—here, 6:1+1—did "not offer the 1:1 direct instruction and support [the student] require[d] to make any progress" (id. at pp. 2-3). The parents further asserted that the district's "specialized program" did not offer an "extended school day" that was "necessary" for the student "to make meaningful progress" (id. at p. 3).

As relief, the parents requested an order directing the district to directly pay iBrain for the costs of the student's full tuition for the 2019-20 extended school year including the costs of a 1:1 nurse, to pay the student's transportation costs that included the costs of a 1:1 nurse, and to reconvene a CSE meeting for the student (see Parent Ex. A at p. 3).

B. Impartial Hearing and Intervening District Court Litigation

While the administrative claims were pending, the parents filed lawsuits in district court. First, the parents brought a proceeding against the district in the United States District Court for the Southern District of New York seeking a preliminary injunction directing the district to fund iBrain as the student's pendency placement (E. v. Carranza, 19-cv-8401 [S.D.N.Y., filed Sept. 10, 2019]; see SRO Ex. 1). In an oral decision issued on July 23, 2020, the District Court dismissed the parents' claims "in light of Ventura de Paulino" (SRO Ex. 4 at p. 26; 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], reh'g denied sub nom., De Paulino v. NYC Dep't of Educ., 2021 WL 850719 [U.S. Mar. 8, 2021]).

On July 30, 2020, after the parents initiated the first federal court lawsuit, an impartial hearing convened in the present matter for the purpose of determining the student's stay-put placement during the pendency of the proceedings (see Tr. pp. 1-48). During the impartial hearing, the parties agreed that the student's pendency lay in the March 2018 unappealed IHO decision, which found that iHope was an appropriate unilateral placement for the student for the 2017-18 school year (see Tr. pp. 7, 10). However, the parents' attorney argued that iBrain should be deemed the student's pendency placement because it was the student's operative placement at the time the parents filed the July 2019 due process complaint notice and because it was substantially similar to the student's placement at iHope for the 2017-18 school year (Tr. pp. 7-8). The parents' attorney added that the district had failed to offer or provide any other pendency placement for the student or to secure a seat for the student at iHope and, therefore, the matter was distinguishable from the case recently ruled upon by the Second Circuit Court of Appeals in Ventura de Paulino (Tr. pp. 8-10). The district's attorney, in turn, argued that, based on the decision in Ventura de Paulino, the parents could not invoke the substantial similarity test or the operative placement test to secure the student's placement at iBrain pursuant to pendency (Tr. pp. 10-13). The district further argued that nothing indicated that iHope was unavailable (Tr. p. 11). The district asserted that, because the parents unilaterally moved the student to iBrain, the parents did so at their own financial risk and could not seek funding for the placement from the district pursuant to pendency (Tr. pp. 11-13). On August 24 and 25, respectively, the parties submitted written briefs to the IHO on the issue of pendency (Parent Ex. K; Dist. Ex. 17).

Before the IHO issues his pendency decision, the parents filed another lawsuit. Along with 32 other parents of children at iBrain, the parents brought another proceeding against the district

in the United States District Court for the Southern District 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], reconsideration denied, 2019 WL 6392818 [S.D.N.Y. Nov. 2, 2020]).

On September 24, 2020, the District Court in Araujo 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 District Court held that the argument for pendency funding at iBrain failed under Ventura de Paulino (Araujo, 2020 WL 5701828, at *3-*4; see Ventura de Paulino, 959 F.3d at 531).

Subsequently, on January 8, 2021, the District Court in E. v. Carranza issued an oral decision denying the parents' request to amend their complaints in light of Ventura de Paulino, finding that the matter was not distinguishable from Ventura de Paulino and did not fall within an exception contained at footnote 65 of the Second Circuit's decision in Ventura de Paulino (see SRO Exs. 3; 4 at pp. 1, 26-29).

C. Impartial Hearing Officer Decision

In a final decision dated January 12, 2021, IHO DeLeon determined that iBrain was the student's stay-put placement during the pendency of these proceedings (IHO Decision at p. 22). The IHO found that his "[d]etermination in this case . . . hinge[d] on whether the [district] offered a pendency placement for the student for the 2019-2020 school year that mirror[ed]" the March 2018 IHO decision arising from the 2017-18 proceeding (id. at p. 21). The IHO opined that the parents did not "unilaterally place[]" the student at iBrain for the 2019-20 school year, and that, although the district might argue that the student had been unilaterally placed at iBrain for the 2018-19 school year, "that school year [wa]s not the subject of th[e] hearing" (id. at p. 20). Given that the student attended iBrain during the 2018-19 school year, the IHO rejected the district's argument that the student's placement at iHope would have continued by operation of law for the 2019-20 school year during the pendency of this matter (id.). In addition, the IHO found no evidence that the district offered to place the student at iHope during the pendency of the proceedings (id. at p. 22). The IHO also indicated that iHope and iBrain offered substantially similar programs (id. at pp. 20-21).

The IHO next determined that the parents' request for the costs of the student's tuition at iBrain had become moot given that the 12-month 2019-20 school year was over and the student was entitled to attend iBrain at district expense pursuant to pendency for the entire school year (IHO Decision at pp. 22-28, 30). The IHO also found that the matter did not fall within an exception to the mootness doctrine in that it was "not capable of repetition and would not evade review" (id. at pp. 28-29).

Based on the foregoing, the IHO ordered the district, "pursuant to the pendency provisions," to fund "the cost of the student's tuition at his current private school, the cost of the student's receipt of a 1:1 Nurse during the school day, and the cost of the student's transportation to and from his current private school, including a 1:1 nurse, for the entirety of the student's 12-month 2019-2020 school year thereat" (IHO Decision at p. 29). The IHO also ordered the district

to "conduct a re-evaluation of the student in all areas of his suspected disabilities, not evaluated within the last two years" and reconvene the CSE to consider such evaluations and develop an IEP for the 2021-22 school year (id.). Finally, the IHO held that "any of the other relief sought by the Parent not addressed by th[e] decision [wa]s found to be either agreed upon by the parties, withdrawn by the Parent, outside the scope of the IHO's authority, [or] unsupported by the record" (id. at p. 28).[5]

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in dismissing the matter claims as moot by operation of pendency. Specifically, the district argues that the IHO and the undersigned are bound by the District Court's determination in E. v. Carranza that the student is not entitled to a publicly funded pendency placement at iBrain. In addition, the district asserts that the IHO erred in finding that the student's pendency was at iBrain due to the district's failure to offer the student a pendency program and that such a finding is contrary to the Second Circuit's decision in Neske v. New York City Department of Education (2020 WL 5868279, at *1 [2d Cir. Oct. 2, 2020]). The district argues that, because the IHO erred in finding that the student was entitled to attend iBrain for the 2019-20 school year at district expense pursuant to pendency, he also erred in finding the parent's request for tuition reimbursement moot. Based on the foregoing, the district requests that the merits of the matter be remanded to the IHO for a full hearing.

The parents did not file an answer to the district's request for review.

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, 959 F.3d at 531; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; 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,

[5] The parents have brought another proceeding against the district in the United State District Court for the Eastern District of New York seeking a preliminary injunction and temporary restraining order to direct the district to implement the IHO's January 12, 2021 decision (E. v. Carranza, 21-cv-514 [filed Jan. 30, 2021]).

1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

VI. Discussion

As a threshold issue, the district correctly argues that the student's pendency placement was already ruled upon by the District Court in E. v. Carranza, wherein it was determined that the student was not entitled to a publicly funded pendency placement at iBrain (SRO Exs. 3; 4 at pp. 1, 26-29; see 19-cv-8401).

Moreover, while the district does not cite it, the District Court in Arujo also ruled upon this student's pendency placement (see 2020 WL 5701828 *3-*4). In Arujo, 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.

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:

> 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, 2020 WL 5701828, at *4).

In addition, the District Court in E. v. Carranza put to rest any argument that this matter was distinguishable from or fell within an exception to the Second Circuit's decision in Ventura de Paulino (SRO Ex. 4 at pp. 27-28). Specifically, citing Neske v. New York City Department of Education, 824 Fed. App'x 81 (2d Cir. Oct. 2, 2020), the District Court noted that iHope had become the student's pendency placement by operation of law and that the matter did not fall within

an exception to Venutra de Paulino by reason of iHope's purported unavailability (SRO Ex. 4 at p. 28).

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 decisions with respect to this student cannot be collaterally attacked in an IDEA administrative due process proceeding. The parents' assertion before the IHO 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 in either E. v. Carranza or Arujo 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.

Having erred in his pendency determination, the IHO then also erred in relying on said determination to find that the parents' request for tuition reimbursement was moot.[7] When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may remand the matter to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims

[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" (E. Lyme, 790 F.3d at 455). It should go without saying that it is incumbent on the parties to notify the administrative hearing officers of any ruling issued with respect to the student that is the subject of the administrative proceedings.

[7] A dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X, 2008 WL 4890440, at *12; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). A claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig, 484 U.S. at 318-23; Toth, 720 Fed. App'x at 51; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040).

set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Having no hearing record developed on the merits or substantive decision from the IHO, I must remand this matter for further administrative proceedings.

VII. Conclusion

Since the District Court's determinations in E. v. Carranza and 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. Therefore, IHO De Leon's decision finding that the district was required to fund the student's attendance at iBrain pursuant to its pendency obligations and dismissing the parents' claims relating to the district's offer of a FAPE to the student for the 2019-20 school year as moot must be vacated. The matter is remanded to IHO De Leon for development of the record on the issues of whether the district offered the student a FAPE for the 2019-20 school year, whether the parents' unilateral placement of the student at iBrain for the 2019-20 school year was appropriate, and whether equitable considerations weigh in favor of an award of tuition reimbursement.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated January 12, 2021 is vacated; and

IT IS FURTHER ORDERED that this matter is remanded to IHO De Leon to resume the impartial hearing and issue a determination on the merits of the parents' claims and requests for relief as set forth their due process complaint notice.

Dated: **Albany, New York**
March 17, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER