The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 22-133

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:
Liz Vladeck, General Counsel, attorneys for petitioner, by Brian Davenport, Esq.

Brain Injury Rights Group, attorneys for respondent, by John Henry Olthoff, 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, 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 the student's pendency placement during a due process proceeding challenging the appropriateness of petitioner's recommended educational program for the student for the 2021-22 and 2022-23 school years. The IHO found that the student's pendency placement was at International Institute for the Brain (iBrain). The appeal must be sustained.

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]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but

is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). 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 received diagnoses of hypoxic ischemic encephalopathy, spastic diplegia cerebral palsy, seizures, and verbal apraxia (Dist. Ex. 2 at pp. 5, 12). The student has "global developmental delays" and is non-ambulatory (Dist. Ex. 2 at p. 5; SRO Ex. 1 at pp. 5, 9).[1]

According to the evidence in the hearing record, the student began attending Stepping Stone Day School, Inc. (Stepping Stone) beginning in September 2020 (IHO Ex. I at pp. 11-12).[2]

On December 14, 2020, the CPSE found the student remained eligible for special education as a preschool student with a disability (Dist. Ex. 1 at p. 2).[3] The CPSE recommended 12-month programming consisting of a 12:1+2 special class placement in an "[a]pproved [s]pecial [e]ducation [p]rogram" with a 1:1 paraprofessional and an augmentative and alternative communication (AAC) device and related services consisting of three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual occupational therapy (OT), and three 30-minute sessions per week of individual physical therapy (PT), together with a "dual recommendation" for two 30-minute sessions per week of individual speech-language therapy at home/clinic, two 30-minute sessions per week of individual OT at home/clinic, and two 30-minute sessions per week of individual PT at home/clinic (id. at pp. 2, 13-14, 16).[4] The December 2020 CPSE recommended special transportation of a mini-bus and

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[1] Upon review of the evidence in the hearing record the undersigned determined that it was necessary to seek additional evidence from the district pursuant to 8 NYCRR 279.10(b). Specifically, in the hearing record there were several references to a December 16, 2021 IEP, which had apparently been implemented prior to the student's enrollment at iBrain in March 2022; however, the hearing record did not include a copy of the December 2021 IEP (see IHO Ex. I at pp. 10-11). Pursuant to the undersigned's directive, the district provided a copy of the December 2021 IEP (see SRO Ex. 1). No objections to the undersigned's consideration of the document were received by either party. Accordingly, the December 16, 2021 IEP is admitted into the hearing record for the purpose of determining the student's stay-put placement during the pendency of these proceedings. For purposes of this decision, the December 2021 IEP will be cited as SRO exhibit "1."

[2] The parent's pendency brief with two attachments was entered into evidence during the impartial hearing as IHO exhibit I (see Tr. p. 41). The brief was included with the hearing record on appeal but is not marked as an IHO exhibit. For purposes of this decision, the document is cited as IHO exhibit I and by reference to its consecutive pagination inclusive of attachments thereto (e.g., IHO Ex. I at pp. 1-13).

[3] According to the parent, a CPSE convened on January 14, 2020, and again in June 2020, August 2020, and October 2020 to develop and amend an IEP for the student (Due Process Compl. Not. at p. 3). Copies of these earlier IEPs were not included in the hearing record.

[4] The phrase "dual recommendation" is not defined in the hearing record. The due process complaint notice references the dual recommendation stating that the related services were to be "provided at school or at home" (Due Proc. Compl. Not. at p. 3). For purposes of this decision, the phrase is understood to mean a recommendation for services to be delivered after school, whether in the student's home or in another location such as a provider's office, which are in addition to the recommendation for special education services during the school day (see, e.g., Application of a Student with a Disability, Appeal No. 16-028; Application of a Student with a Disability, Appeal No. 14-040; Application of the Dep't of Educ., Appeal No. 13-049; Application of a Student with a Disability, Appeal No. 12-162; see also "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at p. 38, Office of Special Educ. Mem. [Apr. 2011] [referring to a CSE's recommendation for "an extended school day"], available at

nurse supervision (id. at p. 16). The district identified Stepping Stone as the location at which the student would receive the recommended programming and services (Dist. Ex. 3 at pp. 1-2). The student attended the recommended program (see Dist. Ex. 2; IHO Ex. I at p. 11).

On December 16, 2021, the CPSE convened for an annual review (see SRO Ex. 1). The CPSE determined that the student did not require a change to her special education services and continued to recommend a 12-month program consisting of a 12:1+2 special class placement with a 1:1 paraprofessional and an AAC device together with three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, together with a "dual recommendation" for two 30-minute sessions per week of individual speech-language therapy at home/clinic, two 30-minute sessions per week of individual OT at home/clinic, and two 30-minute sessions per week of individual PT at home/clinic (id. at pp. 1-2, 4, 16-17, 19). In a final notice of recommendation dated December 16, 2021, the district again identified Stepping Stone as the location at which the student would receive the programming and services recommended in the December 2021 IEP (id. at p. 2).

On February 25, 2022, the parent notified the district of her disagreement with the December 16, 2021 IEP and the continued implementation of the student's IEP at Stepping Stone and stated her intent to place the student at iBrain for the remainder of the 2021-22 school year (see IHO Ex. I at pp. 9-10).[5] On March 9, 2022, the district sent the parent a prior written notice in response to the February 2022 10-day notice (id. at pp. 11-13). The prior written notice stated that, according to the progress reports provided to the CPSE at the December 2021 annual review, no changes to the recommended IEP program and services were warranted at that time (id. at p. 11). Accordingly, the district stated that there was "no data provided that would deem another meeting necessary" (id.). Lastly, the prior written notice stated that the program and services recommended in the December 2021 IEP were appropriate for the student (id. at p. 12).

In March 2022, the student was enrolled by her parent and began attending iBrain (IHO Ex. I at p. 2). According to the parent, a CSE convened on May 24, 2022 to develop the student's school age IEP for the 2022-23 school year (kindergarten), the district thereafter identified school locations for the student to attend, and the parent disagreed with the IEP and proposed school locations (Due Process Compl. Not. at pp. 3-5; see Tr. pp. 13-16).

A. Due Process Complaint Notice

In a due process complaint notice, dated August 4, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years based upon various procedural and substantive violations (Due Process Compl. Not. at pp. 4-5).[6] The parent specified that the IEPs developed on October 14, 2020 and December

http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

[5] 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).

[6] Although the hearing record on appeal includes three parent exhibits, review of the transcripts of the impartial

16, 2021 and the proposed school locations formed the basis of her allegations that the district failed to offer the student a FAPE (id.).[7] As relevant to this appeal, the parent requested a pendency placement for the student and asserted that the student's placement for the pendency of this proceeding consisted of "the direct payment of tuition, all related services, and transportation at iBRAIN" (id. at p. 2). According to the parent, "iBRAIN [was] the operative placement for [the student] during the 2022-[]23 school year" (id.).

B. Impartial Hearing Officer Decision

On August 24, 2022, the parties and the IHO participated in a prehearing conference, after which, they continued with a hearing session devoted to determining the student's stay-put placement during the pendency of the proceedings (Tr. pp. 1-59).[8]

The parent submitted a brief setting forth her position that iBrain constituted the student's pendency placement (Tr. pp. 39-41; see IHO Ex. I). The parent argued that the student was entitled to pendency at iBrain because she aged out of preschool and, therefore, Stepping Stone was "unavailable" for the 2022-23 school year (IHO Ex. I at pp. 5-7). At the pendency hearing, the district entered three exhibits into evidence and argued that the December 2020 IEP formed the basis for pendency as it was the "last implemented IEP for the student at the filing of this due process complaint" (Tr. pp. 41-56; see Dist. Exs. 1-3).

The IHO issued an interim decision on pendency dated August 30, 2022 (Interim IHO Decision). Initially, the IHO held that the December 2020 IEP on its own did not provide enough guidance to define pendency because a bricks and mortar location was not identified on the IEP (id. at p. 7). Further, the IHO held that Stepping Stone was unavailable because it was a preschool and the student aged out of preschool for the 2022-23 school year (id. at pp. 7-8). Under the circumstances, the IHO held that it was proper to base pendency on the operative placement and that, since the student had attended iBrain since March 2022 and the due process complaint notice was filed on August 4, 2022, iBrain was the operative placement (id. at p. 8). While the IHO found iBrain to be the student's pendency placement, he rejected the parent's position that he could reach that conclusion by exercising his equitable authority (id. at pp. 9-11). Ultimately, the IHO found

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hearing reveals that they were not entered into evidence prior to the issuance of the IHO's interim decision that is the subject of this appeal. Accordingly, the parent exhibits have not been considered as part of this appeal (see 8 NYCRR 279[d]), and citations to the due process complaint notice are to the unmarked copy included with the hearing record filed with the Office of State Review.

[7] The reference to an October 14, 2020 IEP may have been a typographical error; for purposes of this decision, it is understood that the August 2022 due process complaint notice challenged the IEP that was in effect at the beginning of the 2021-22 school year, which according to the evidence in the hearing record was the IEP developed at the December 14, 2020 CSE meeting (see Dist. Ex. 1).

[8] As part of the hearing record on appeal, the Office of State Review received a transcript of a status conference held on September 14, 2022, which contains pagination that overlaps with that of the prior proceedings (see Sept. 14, 2022 Tr. pp. 36-50); however, as those proceedings post-dated the IHO's interim decision from which the parties appeal from, it is not germane to the issues on appeal (see 8 NYCRR 279.9[d]), and any transcript citations within this decision refer to the proceedings held on August 24, 2022.

pendency at iBrain and directed the district to fund placement there from August 4, 2022 and continuing through the proceedings (id. at p. 11).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in finding that the student's pendency placement was at iBrain. Specifically, the district asserts that the IHO misapplied the theory of "operative placement."

The district argues that the IHO erred in finding that the December 2020 IEP failed to contain "enough guidance" for pendency because the December 2020 IEP did not identify a "bricks and mortar location" and placement at Stepping Stone was unavailable. Additionally, the district asserts that, since the December 2020 IEP was implemented at Stepping Stone until the student was unilaterally placed at iBrain, "an analysis of operative placement was not applicable" (id.). Here, the district argues that this is not a case where the district attempted to move the student to another school without parental consent, or there was no previously implemented IEP. Although the district agrees that the student "aged out" of the preschool program at Stepping Stone, it argues that the program recommended in the December 2020 IEP was the applicable pendency program and that it would have been obligated to provide the student with "comparable special education services during" pendency. However, since the parent placed the student at iBrain, the district argues it was not obligated to identify a placement to implement pendency. Accordingly, the district seeks a reversal of the IHO's pendency order and a finding that pendency lies in the December 2020 IEP.

The parent generally denies the material allegations contained in the district's request for review and seeks to uphold the IHO's finding that the student's pendency placement was at iBrain.

V. Applicable Standards

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, 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 (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the 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]).[9] 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.

[9] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

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 to "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). 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 v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; 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

Here, the placement set forth in the student's most recently implemented IEPs is the 12:1+2 special class placement in an "[a]pproved [s]pecial [e]ducation [p]rogram" with a 1:1

paraprofessional and an AAC device, as well as school- and home/clinic-based related services of speech-language therapy, OT, and PT, and special transportation, all for a 12-month school year (Dist. Ex. 1 at pp. 2, 13-14, 16; SRO Ex. 1 at pp. 4, 16-17, 19). Insofar as the parent challenges the program and placement set forth in the December 2020 and/or December 2021 IEPs in the August 2022 due process complaint notice by alleging a denial of a FAPE for the 2021-22 and 2022-23 school years, such allegations could arguably call into question whether the placement was "agreed upon" for purposes of pendency. Here, however, the placement in question was also in place for the 2020-21 school year and the parent has not challenged the adequacy of the placement for that school year (see Dist. Ex. 1).[10]

As pendency is the placement in the student's most recently implemented IEP, the operative placement test is not applicable in these circumstances and the parent's unilateral enrollment of the student at iBrain—a placement that the district has not agreed to and which has not been found appropriate in any administrative proceeding—before the filing of the due process complaint notice did not change pendency (Ventura de Paulino, 959 F.3d at 536). In declining to apply "operative placement" as requested by the parents in Ventura de Paulino, the Second Circuit Court of Appeals stated that:

> It bears recalling that the term "operative placement" has its origin in cases where the school district attempts to move the child to a new school without the parents' consent, [citation omitted] or where there is no previously implemented IEP so that the current placement provided by the school district is considered to be the pendency placement for purposes of the stay-put provision [citation omitted]. Neither circumstance is presented here.

(Ventura de Paulino, 959 F.3d at 536).

Likewise, in this appeal, neither of the above circumstances are present. Moreover, courts have typically only relied on the "operative placement" to determine pendency when there is "no previously-implemented IEP," which is not the case here (see Melendez v. New York City Dep't of Educ., 420 F. Supp. 3d 107, 122-23 [S.D.N.Y. 2019]).[11] Accordingly, I find that the IHO's

[10] While the parent generally states that she disagreed with the IEPs in place for the student during preschool, including the 2020-21 school year (see Answer at ¶ 4), here, where the student attended the programs for more than a year and the parent did not allege that the program or placement denied the student a FAPE, the program is deemed agreed upon for purposes of pendency. Moreover, even if the parent challenged all of the IEPs developed for the student for preschool, the outcome would be the same, insofar as State law provides that pendency for a preschool student with a disability will be the preschool services delivered or, if no services were delivered, the recommended preschool program (Educ. Law § 4410[7][a], [c]; see 34 CFR 300.518[c]; Letter to Klebanoff, 28 IDELR 478 [OSEP 1997]).

[11] While the application of "operative placement" is the rare case, it still survives under certain circumstances. With respect to cases such as Angamarca and Hidalgo, I believe that to the extent these cases rely on the operative placement test, they may be outdated as there is no clear test for when an IEP is "too old," and where that line is drawn, for example whether it is two years, or four years, or six years, or more. And that that determination as well, relies on the idea of "appropriateness" to some extent, when stay-put should operate more as an automatic injunction and need not be substantively appropriate. For example, the court in Angamarca, as referenced by the IHO in his decision, found that it was "not reasonable to conclude" that a 5-year old placement was "appropriate

rationale which determined that it was "proper to base pendency on the operative placement in effect when the due process complaint was filed on August 4, 2022" was error must be vacated.

While I have determined that the program and placement described in the December 2020 IEP forms the basis of the student's pendency, I will further address the IHO's reasoning, which seemed to focus on where the pendency placement would be implemented. However, as noted above, pendency is not based upon a particular location but is focused on the general level and type of services (see Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents., 629 F.2d at 753, 756).[12] Thus, notwithstanding that the student "aged out" of the programs available at the preschool location, Stepping Stone, the December 2020 IEP remained the pendency IEP (see L.B. v. New York City Dep't of Educ., 2022 WL 220085, at *3 [S.D.N.Y. Jan. 25, 2022]).

Although State regulations do not require that a student who had previously been identified as a preschool student with a disability remain in a preschool program for which he or she is no longer eligible by reason of age (8 NYCRR 200.16[h][3][i]; see 8 NYCRR 200.5[m]), SROs have long noted that the IDEA makes no distinction between preschool and school-age children and consequently, if a student is no longer eligible to remain in a particular preschool program, the district remains obligated to provide the student with "comparable special education services during the pendency of an appeal from the CSE's recommendation for [the student's] first year of education as a school age child" (Application of a Child with a Handicapping Condition, Appeal No. 91-25; see Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 61 [D.N.H. 1999] [holding that when a student has aged out of a particular program, the district "must fulfill its stay-put obligation by placing a disabled student at a comparable facility"]; Application of a Student with a Disability, Appeal No. 16-020; see also Makiko D. v. Hawaii, 2007 WL 1153811, at *10 [D. Haw. Apr. 17, 2007]; Laster v. Dist. of Columbia, 394 F. Supp. 2d 60, 65-66 [D.D.C. 2005]; Letter to Harris, 20 IDELR 1225 [OSEP 1993]).[13]

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now" (Angamarca, 2019 WL 3034912 at 6). While it is understandable that a court would be reluctant to find pendency in an outdated placement that likely is no longer appropriate to address the student's current needs, the creation of an "appropriateness" standard for pendency is to fall into making stay-put findings on a basis of the substantive adequacy the student's special education programing, which is not supported by the IDEA or the foundational case law on the issue is not a tenable solution. It runs afoul of the principle that "[w]hether the district has failed to provide a child's pendency entitlements is "evaluated independently" from the parents' claim as to the inadequacy of the IEP "because pendency placement and appropriate placement are separate and distinct concepts" (J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 642 [S.D.N.Y. 2011], quoting Mackey, 386 F.3d at 162, and O'Shea, 353 F.Supp.2d at 459).

[12] Similarly, contrary to the IHO's implication that the December 2020 IEP could not form the basis for pendency because it did not identify a bricks and mortar location for implementation (Interim IHO Decision at p. 7), there is no requirement in the IDEA that a student's IEP name a specific school location (see, e.g., T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see Concerned Parents, 629 F.2d at 756).

[13] To the extent placement at Stepping Stone became "unavailable," contrary to the parent's argument, the current matter would not fall under the auspices of a footnote contained in the Second Circuit's decision in Ventura de Paulino (see . In that footnote, the Second Circuit noted:

> We do not consider here, much less resolve, any question presented where the

Here, had the district been required to implement the pendency placement, it would have had to identify a comparable special education program. This point leads to the remaining dispute between the parties, as it arises in the pendency aspects of this proceeding: whether the district was required to locate a school to implement the pendency program after the parents had already unilaterally placed the student at iBrain. The substance of this inquiry was directly addressed by the Second Circuit; the Court found that the district had the authority "to determine how to provide the most-recently-agreed-upon educational program" (Ventura de Paulino, 959 F.3d at 534). More specifically, the Second Circuit held that if a parent disagrees with a district's decision on how to provide a student's educational program, the parent could either argue that the district's decision unilaterally modifies the student's pendency placement and invoke the stay-put provision, seek to persuade the district to agree to pay for the student's program in the parent's chosen school placement, or enroll the student in the new school and seek retroactive reimbursement from the district after the IEP dispute is resolved (id.). According to the Court, "what the parent cannot do is determine that the child's pendency placement would be better provided somewhere else, enroll the child in a new school, and then invoke the stay-put provision to force the school district to pay for the new school's services on a pendency basis" (id.).

Based on the parent's due process complaint notice the parent unilaterally placed the student at iBrain during the 2021-22 school year, then subsequent to placing the student at iBrain, the filed for due process on August 4, 2022 and explicitly requested that the district fund the student's placement at iBrain during pendency as iBrain was the student's "operative placement" for the 2022-23 school year (Due Proc. Compl. Not. at p. 2). Accordingly, the parent appears to have done exactly what the Second Circuit determined was not permissible, i.e., enrolled the

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> 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). Here, the district has not refused to provide pendency services to the student. Moreover, "[t]o the extent that the parents cite to footnote 65 in Ventura de Paulino and argue[] that 'a parent may exercise self-help and seek an injunction to modify the student's pendency placement,' the parent should have pursued that argument in District Court because an administrative hearing officer does not have authority to issue a traditional injunction like a District Court to order a change in a student's stay-put placement" (Application of a Student with a Disability, Appeal No. 20-199; Application of a Student with a Disability, Appeal No. 20-198; Application of a Student with a Disability, Appeal No. 21-006; Application of a Student with a Disability, Appeal No. 20-196; Application of a Student with a Disability, Appeal No. 20-194; Application of a Student with a Disability, Appeal No. 20-201; Application of a Student with a Disability, Appeal No. 20-184). Additionally, at this point, the parents have not pointed to any cases in a district court where they have had any success with this argument; in fact, at least one district court decision has advised counsel for the parents that "[i]f [their clients'] 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" (Araujo v. New York City Dep't of Educ., 2020 WL 5701828, at *4 [Sept. 24, 2020]).

student at iBrain and thereafter invoked the stay-put provision to force the district to pay for the student's placement at iBrain on a pendency basis.

Considering the above, the parent cannot obtain the relief she is seeking—the district funding the cost of the student's attendance at iBrain on a pendency basis. Rather, if the parent is interested in having the district provide for the student's pendency programming, she may remove the student from iBrain, return the student to the public programming,[14] and request to have the district implement the services described in the December 2020 IEP during the pendency of this proceeding. Alternatively, should the parent continue to seek funding for the student's attendance at iBrain for the pendency of this proceeding, the parent may seek a preliminary injunction requesting a change in the student's educational placement, an injunction for which the parent "bears the burden of demonstrating entitlement to such relief under the standards generally governing requests for preliminary injunctive relief" (Wagner v. Bd. of Educ. of Montgomery Cty., 335 F.3d 297, 302 [4th Cir. 2003]).

Finally, turning to the parent's request to receive funding for the student's placement at iBrain up to the amount of money the district would have spent in order to provide the student with a pendency program at her preschool placement under the Second Circuit's decision in T.M., the Second Circuit decision addressed reimbursement for private related service providers who were providing the same services the district was offering to provide as pendency (T.M., 752 F.3d at 172). In this instance, even if the holding in T.M. could be stretched to include reimbursement for private school tuition instead of just providers of related services, the hearing record fails to contain evidence that iBrain could implement the student's December 2020 IEP. Accordingly, any comparison to T.M. is misplaced and the parent's argument does not merit further consideration.

VII. Conclusion

Having concluded that the student's pendency placement consists of the special education program set forth in the student's December 2020 CPSE IEP and that the IHO erred by finding that the district must implement, and fund, the student's pendency placement at iBrain, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's interim order on pendency, dated August 30, 2022, is modified by reversing those portions which directed the district to implement and fund the student's pendency placement at iBrain during the pendency of these proceedings.

Dated: **Albany, New York**
November 10, 2022

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[14] If the parent were to return the student to public programing, it bears repeating that the pendency provision does not require that a student remain in a particular site or location (see Ventura de Paulino, 959 F.3d at 532).