The University of the State of New York

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

No. 23-042

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioners, by Peter G. Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nathaniel Luken, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining their daughter's pendency placement during a due process proceeding challenging the appropriateness of the respondent's (the district's) recommended educational program for the student from May 10, 2021 through September 13, 2021. 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

This appeal arises from an IHO's interim decision related to the student's pendency (stay-put) placement issued after remand by an SRO (see Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248).[1] The student has also been the subject of prior State-level

[1] Appeal No. 21-247 and Appeal No. 21-248 were issued as a combined decision (see Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248). Although Appeal No. 21-247 was dismissed, the SRO in a footnote left to the IHO's discretion on remand whether or not to consider the time period between the effective date of the Commissioner's stay issued in the course of an appeal pursuant to section 310 of the Education Law and the anticipated implementation date of the student's May 2021 IEP (i.e., a portion of the 2020-21 school year). The SRO declined to remand such a limited period of time but did not foreclose the IHO from determining if there were issues remaining with respect to the district's offer of a free appropriate public education for that period

administrative appeals (see Application of a Student with a Disability, Appeal No. 22-136; Application of a Student with a Disability, Appeal No. 20-199). In addition, the student has been the subject of federal (R.A. and D.A. v. New York City Dep't of Educ., No. 22-cv-05516 [S.D.N.Y. filed Jun. 28, 2022]; Araujo v. New York City Dep't of Educ., 2020 WL 5701828 [S.D.N.Y. Sept. 24, 2020]) and State-level (R.A. and D.A. v. Rosa, [Sup. Ct., Albany County, July 1, 2022, Walsh, J., index No. 910331-21]) appeals from State-level administrative determinations. While the parties' familiarity with the student's educational history is presumed, this matter has a lengthy procedural history due to multiple consolidations and appeals, as well as the current pending remand, and therefore is recounted below as relevant to the instant matter.

A. Prior Due Process Complaint Notices and Previous Events

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

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

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of time.

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

[3] As noted in Application of a Student with a Disability, Appeal No. 20-199, the rules governing transfers of students from a public agency within the State or from a public agency in another state in which the IDEA applies do not address the situation when a student newly arrives in the district from a foreign nation where the IDEA did not apply. The use of a comparable services plan tends to arise when a CSE or IEP team of a public agency in another jurisdiction within the United States has met, evaluated the student, and the student has already been found eligible for services in accordance with the IDEA's procedures. For example, when a student with a disability has an IEP in effect in a public agency in one state and then transfers to another public agency in the different state and enrolls in the new school within the same school year, the new public agency must provide "comparable services" to those services described in the student's IEP from the prior public agency. Those comparable services must be provided until the new public agency conducts an evaluation and develops, adopts, and implements a new IEP, if appropriate (34 CFR 300.323[f][1], [2]; 8 NYCRR 200.4[e][8][ii]). "Comparable services" means services that are "'similar'" or "'equivalent'" to those described in the student's IEP from the previous public agency (IEPs for Children Who Transfer Public Agencies in the Same State, 71 Fed. Reg. 46681 [Aug. 14, 2006]).

By ten-day written notice dated February 12, 2020, the parents advised the district of their disagreement with the district's recommendations, their intention to unilaterally place the student at iBrain, and to seek public funding for that placement (Parent Ex. Q at p. 1). According to the parents, the student began attending iBrain on February 25, 2020 in a 6:1+1 classroom, and receiving OT, PT, speech-language therapy and 1:1 paraprofessional services (Parent Ex. A at p. 3; see Parent Ex. D at pp. 1, 7).

The parents filed a due process complaint notice dated March 24, 2020 and alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (IHO case number 193417) (Parent Ex. A). On July 6, 2020, the parents filed a second due process complaint notice alleging that the district failed to offer the student a FAPE for the 2020-21 school year (IHO case number 196227) (Parent Ex. K).

While the administrative claims concerning the 2019-20 and 2020-21 school years were pending, the parents filed a lawsuit in federal court. Along with 32 other parents of children at iBrain, the parents commenced an action against the district in the United States District Court for the Southern District Court of New York seeking damages and a preliminary injunction directing the district to fund iBrain as the student's pendency placement (Araujo v. New York City Dep't of Educ., 2020 WL 5701828 [S.D.N.Y. Sept. 24, 2020] reconsideration denied, 2020 WL 6392818 [Nov. 2, 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' requests for pendency funding at iBrain, including the parents of the student in this case. With respect to the parents in this case, along with the requests 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]).

A pendency hearing was held before a prior IHO on October 19, 2020, for the purpose of determining the student's pendency placement during the underlying 2019-20 school year due process proceeding (IHO case number 193417) (Oct. 19, 2020 Tr. pp. 11-38).[4] During the October 2020 pendency hearing, no testimony was taken, some exhibits were marked and entered into evidence, and the parties presented arguments concerning the student's pendency placement (Oct. 19, 2020 Tr. pp. 14-35). Specifically, during the hearing the parents asserted that due to the COVID-19 pandemic and the resulting ordered school closings, the district was not able to make the assigned public school site available to implement the student's comparable service plan—which did not provide for remote instruction—and as such, footnote 65 of Ventura de Paulino applied, allowing the student's pendency placement to be made at iBrain (Oct. 19, 2020 Tr. pp. 29-31). The parents also argued that iBrain was the student's "operative placement" because that was the school she was attending at the time the parents filed their March 24, 2020 due process complaint notice, the district's recommended program was unavailable, and the district did not make an effort to find an alternate pendency placement (Oct. 19, 2020 Tr. pp. 30-31). The district

[4] Due to the consolidation of prior proceedings after hearing dates were held and transcripts were produced, as well as due to the transcript not being numbered consecutively after remand, each transcript will be cited to by its date and corresponding page number.

argued, among other things, that the IHO should not make a pendency determination due to ongoing federal litigation at the district court level, as well as a possible appeal to the Second Circuit and further, that the parents should be estopped from seeking pendency at the administrative level when that issue for this student was already decided at the district court level (Oct. 19, 2020 Tr. pp. 32-33, 34-35). By interim decision dated October 22, 2020, a prior IHO consolidated both matters into IHO case number 193417 (see Oct. 22, 2020 Order on Consolidation at p. 2).

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

The parents appealed the prior IHO's November 9, 2020 interim decision addressing pendency to the undersigned (Application of a Student with a Disability, Appeal No. 20-199). In that matter I first addressed the prior IHO's determination that the parents' March 24, 2020 due process complaint notice did not contain a request for pendency. In a footnote, I stated that whether or not the parents requested pendency in a due process complaint notice was irrelevant because the controlling law in the Second Circuit required the district to provide the student with pendency services, assuming the parents were willing to avail themselves of those services. The undersigned reiterated the Second Circuit's well-settled holding that the IDEA's pendency provision "is, in effect, an automatic preliminary injunction" (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]), and explained that the district's and IHO's assertion that parents must dispute pendency in the very due process complaint notice that gives rise to the right to pendency was baseless (Doe v. E. Lyme Bd. of Educ., 962 F.3d 649, 659 [2d Cir. 2020] ["To that end, we again emphasize that once a party has filed an administrative due process complaint, the IDEA's stay-put provision provides that 'during the pendency of any proceedings conducted pursuant to [20 U.S.C. § 1415] ... the child shall remain in the then-current educational placement of the child.' 20 U.S.C. § 1415(j)] [emphasis added]).

Notwithstanding the prior IHO's incorrect interpretation of the IDEA's pendency provision, the undersigned determined that the error was harmless because, Zvi D. also explained long ago that "[t]he public agency, however, is not required to pay for the parent-initiated placement" (Zvi D., 694 F.2d 904, 907 [2d Cir. 1982]), which was essentially what the parents had done in this case. In Ventura de Paulino the Second Circuit further clarified this holding when discussing the parent-initiated placements at iBrain therein, explaining that the rule applied even in those cases in which the parents had already prevailed in prior tuition reimbursement cases against the district involving a similar private school. Thus, the Second Circuit held that "'[i]t is up to the school district,' not the parent, 'to decide how to provide that educational program [until the IEP dispute is resolved], so long as the decision is made in good faith'" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 534 [2d Cir. 2020]). I further explained that although the prior IHO incorrectly initially found that the parents were required to request pendency in a due process complaint notice, he nevertheless correctly determined on other grounds that the parents were not eligible to obtain public funding for iBrain as the student's pendency placement.

The substantive portion of the impartial hearing in IHO case number 193417 was conducted over five days between June 18, 2021 and August 9, 2021 (June 18, 2021 Tr. pp. 77-167; June 24, 2021 Tr. pp. 168-231; June 30, 2021 Tr. pp. 232-313; July 15, 2021 Tr. pp. 314-332; Aug. 9, 2021 Tr. pp. 333-420).

B. Due Process Complaint Notice and Subsequent Events

While the due process proceeding related to the 2019-20 and 2020-21 school years was pending, the parents filed another due process complaint notice dated July 6, 2021 and alleged that the district failed to offer the student a FAPE for the 2021-22 school year (IHO case number 210820) (July 2021 Due Process Compl. Notice).[5] The parents alleged that the district failed to conduct sufficient evaluations of the student and that the May 2021 IEP included inappropriate management needs, an inappropriate recommendation for a 12:1+(3:1) special class, and insufficient related services and supports (id. at pp. 3-5). In addition, the parents asserted that the particular public school to which the district assigned the student to attend would not have been able to implement the student's program and placement (id. at p. 5). For relief, the parents requested that the district be required to fund the costs of the student's attendance at iBrain for the 2021-22 school year, including related services and a 1:1 paraprofessional, as well as the costs of the student's special transportation (id. at p. 6). In addition, the parents requested that the district be required to provide the student with assistive technology devices and services and/or reimburse the parents for costs associated with the student's assistive technology device (id. at pp. 6-7). The parents also requested district funding of an independent educational evaluation (IEE) and a "transition evaluation" of the student (id. at p. 7).

An impartial hearing convened and on July 26, 2021, August 19, 2021, and September 23, 2021, the parties and the IHO discussed the history of prior due process proceedings involving the student and an appeal before the Commissioner of Education pursuant to section 310 of the Education Law, as well as preliminary matters relating to the impartial hearing process (July 26, 2021 Tr. pp. 1-28; Aug. 19, 2021 Tr. pp. 29-57; Sept. 23, 2021 Tr. pp. 58-70).

On September 13, 2021, the Commissioner of Education issued a decision finding that the parents' petition that challenged the district's residency determination was untimely (Appeal of R.A. and D.A., 61 Ed. Dep't Rep., Decision No. 18,047). The Commissioner further indicated that, "[w]hile petitioners have not submitted any evidence reflecting their physical presence within respondent's district, they retain the right to reapply for admission, on the student's behalf, if and when they submit sufficient proof thereof" (id.).

By a written motion to dismiss dated October 4, 2021, the district alleged that the parents and student were not residents of the district and, therefore, requested that the IHO dismiss the parents' July 2021 due process complaint notice (Oct. 4, 2021 Dist. Mot. to Dismiss). The parents submitted an opposition to the district's motion dated October 18, 2021 (Oct. 18, 2021 Parent Opp.

[5] No documentary evidence was admitted into the hearing record in IHO case number 210820 (Appeal No. 21-248), as the IHO granted the district's motion to dismiss on November 10, 2021 (see Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248). As a result, the hearing record does not include a copy of the July 6, 2021 due process complaint notice as an exhibit. However, a copy of the July 6, 2021 due process complaint notice was annexed to the IHO's April 20, 2022 order on consolidation issued after remand, which consolidated IHO case number 210820 into IHO case number 193417.

to Mot. to Dismiss). The parties reconvened for a status conference on October 25, 2021, wherein the parties argued their positions on the impact of the Commissioner's decision on the proceedings (Oct. 25, 2021 Tr. pp. 71-81). The district submitted a written reply to the parents' opposition to the district's motion to dismiss on October 27, 2021 (Oct. 27, 2021 Dist. Reply in Support of Mot. to Dismiss).

C. Impartial Hearing Officer and State Review Officer Decisions

By decision dated November 10, 2021, the IHO granted the district's motion to dismiss the parents' July 2021 due process complaint notice (Nov. 10, 2021 IHO Decision at p. 3).[6] First, the IHO noted that the parties were in agreement that an IHO did not have the authority to resolve a residency dispute (id. at p. 2). The IHO found that the September 2021 decision of the Commissioner of Education left the district's residency determination intact and was the "law of the case as it pertains to this student" (id.). The IHO then determined that statements by the parents' counsel during the impartial hearing amounted to an admission that the student had not reapplied for admission to the district for the 2021-22 school year (id.). Therefore, the IHO found that the district's residency determination stood and applied to the 2021-22 school year as well (id.). The IHO also opined that a decision to the contrary would offend the doctrine of res judicata (id. at pp. 2-3). Finally, the IHO rejected the parents' argument that the litigation concerning the student's residency was incomplete and, therefore, declined to hold the district's motion in abeyance (id. at p. 3).

The parents challenged the IHO's November 10, 2021 decision by appealing to the Office of State Review, arguing in a request for review that the IHO erred in finding that the student was not eligible to attend school in the district or receive special education from the district for the entirety of the 2020-21 and 2021-22 school years, due to her residency status. The parents contended that, because the parents had filed an application to reopen the Commissioner of Education's September 2021 decision, as well as a special proceeding pursuant to CPLR Article 78 (Article 78) in New York State Supreme Court challenging the Commissioner's decision, the district's residency determination was not final and could not be relied upon to find that the doctrines of law of the case or res judicata precluded the parents' claims.[7] Moreover, the parents asserted that the Commissioner's decision did not address the merits of the parents' appeal, instead finding that the petition was untimely. The parents also alleged that the stay issued by the Commissioner on May 10, 2021, afforded the student the status of a resident student from February 2020 through the date of the Commissioner's September 2021 decision and that their Article 78 proceeding requested reinstatement of the stay. Therefore, the parents argued that the IHO erred in relying on the Commissioner's decision to find that the student was not eligible for special education after March 25, 2020. The parents also asserted that the IHO erred by not addressing their claims relating to the 2021-22 school year and, in particular, alleged that the district failed to

[6] The IHO's November 10, 2021 decision was not paginated. For the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see Nov. 10, 2021 IHO Decision at pp. 1-3).

[7] On December 16, 2021, the Commissioner of Education denied the parents' application to reopen the September 2021 decision (see Application to reopen the Appeal of R.A. and D.A., 61 Ed. Dep't Rep., Decision No. 18,061 [2021], available at http://www.counsel.nysed.gov/Decisions/volume61/d18061).

evaluate the student in all areas of disability, the May 2021 CSE inappropriately recommended that the student attend a 12:1+4 special class, and that there was "no evidence" the assigned public school site could implement the student's IEP. Lastly, the parents requested findings that the district failed to offer the student a FAPE for the 2021-22 school year, that iBrain was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for district funding of the costs of the student's tuition.

In a combined decision dated February 28, 2022, an SRO reversed the IHO's dismissal of the parents' July 6, 2021 due process complaint notice based on the student's residency because the IHO had not addressed the effect of the Commissioner's stay upon the student's right to receive special education services while the stay was in effect (Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248). Additionally, the SRO noted that the IHO had dismissed the due process complaint notice before receiving evidence, and as a result, there was no hearing record on which to base a determination regarding the district's offer of a FAPE in a May 2021 IEP. Therefore, in light of the stay—which specifically provided that the district would be responsible to offer and provide the student a FAPE during the pendency of the residency appeal—the SRO found the IHO had erred in dismissing the parents' claims in their entirety. For those reasons, the SRO remanded the parents' claims relating to the May 2021 CSE and IEP, as set forth in their July 2021 due process complaint notice to the IHO to develop the hearing record and render a determination regarding that period of time from May 10, 2021 through the date of the Commissioner's decision, September 13, 2021.

D. Interim Impartial Hearing Officer Decisions After Remand and Subsequent Events

Upon remand from Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248, the parties reconvened for a status conference on March 28, 2022 (Mar. 28, 2022 Tr. pp. 82-109). By interim decision dated April 20, 2022, the IHO summarized the positions of the parties and determined that only the remanded cases should be consolidated (Order on Consolidation at pp. 2-3).[8] The parties reconvened again on May 13, 2022 for a status conference, wherein the parents' attorney requested an extension of the IHO's time to render a decision while the parents' Article 78 proceeding challenging the Commissioner's decision was pending (May 13, 2022 Tr. pp. 3-4). At a status conference held on June 8, 2022, the parents' attorney indicated that the Article 78 proceeding was still pending and requested an extension of the IHO's time to render a decision (June 8, 2022 Tr. pp. 15-17, 18-19).

By decision dated July 1, 2022, Supreme Court dismissed the parents' Article 78 petition for lack of personal jurisdiction over defendants as a result of improper service (see R.A. and D.A., No. 910331-21 at p. 6). The parties reconvened before the IHO and during a status conference held August 1, 2022, the parents' attorney indicated that a decision was rendered in the Article 78 proceeding and that the parents had made a motion to reargue and renew (Aug. 1, 2022 Tr. pp. 23-24). The parties jointly requested an extension of the IHO's time to render a decision (Aug. 1, 2022 Tr. p. 25). At a status conference held on September 20, 2022, the parents' attorney stated

[8] The IHO's April 20, 2022 order on consolidation was not paginated. For the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see Apr. 20, 2022 Order on Consolidation at pp. 1-18).

that the Article 78 proceeding was still pending (Sept. 20, 2022 Tr. pp. 32-34). In a discussion with the IHO, the parents' attorney stated that the Article 78 concerned the student's residency status and was "not directly related to the due process complaint with the issues" (Sept. 20, 2022 Tr. p. 33). The district's attorney asked whether or not the parents had returned to New York (Sept. 20, 2022 Tr. p. 34). The parents' attorney responded that he did not know if the parents had returned, and that the student was receiving services remotely (id.). The impartial hearing was scheduled to begin on November 9, 2022, however due to illness the parents' attorney requested an adjournment (Nov. 9, 2022 Tr. p. 46). On November 9, 2022, the parties scheduled an additional status conference for December 14, 2022 and an impartial hearing date was set for January 10, 2023 (Nov. 9, 2022 Tr. pp. 46-47, 50-51). During the December 14, 2022 status conference, the parents' attorney indicated that the parents had appealed Supreme Court's Article 78 decision to the Appellate Division Third Department and that the matter was still pending (Dec. 14, 2022 Tr. pp. 56-57). The parents' attorney requested that the scheduled impartial hearing date of January 10, 2023 be changed to a status conference (Dec. 14, 2022 Tr. pp. 57-58).

At a status conference held January 10, 2023, the IHO stated that she had received an email from the parents "indicating that they were seeking pendency on this student" (Jan. 10, 2023 Tr. p. 64). The IHO further stated that she had requested that the parties brief the issue and that both parties had submitted briefs to her (Jan. 10, 2023 Tr. pp. 64-65).

In an interim decision on pendency dated February 1, 2023, the IHO denied the parents' request for pendency (Interim IHO Decision at p. 7).[9] Citing to the decision of the District Court in Araujo, the IHO found that the parents' request was barred by the doctrines of res judicata and collateral estoppel and further that the District Court's decision was the law of the case (Interim IHO Decision at pp. 3-6; see 2020 WL 5701828 *3-*4). The IHO also found that the parents had never received an unappealed favorable determination on the merits at the State or federal level and that no changes had occurred since the Araujo decision that would warrant revisiting the issue of pendency (Interim IHO Decision at pp. 3-4).

IV. Appeal for State-Level Review

The parents appeal and seek review of the IHO's interim decision dated April 20, 2022 and assert that the IHO failed to make any finding identifying the student's pendency placement. As relief, the parents request that the IHO's interim order on pendency be reversed and that an order issue finding the student's pendency placement to be iBrain, because the district has never offered the student a pendency placement and there is no last agreed upon placement. The parents note that a prior IHO assigned to this matter prior to its consolidation denied pendency in an interim decision dated November 9, 2020, which was affirmed by the undersigned in Application of a Student with a Disability, Appeal No. 20-199, however they assert that the prior "pendency determination was based on facts that are now stale and more than two (2) years old" (Req. for Rev. ¶15). The parents allege that the IHO's determinations that the doctrines of res judicata and collateral estoppel precluded the parents' request for pendency were wrong as a matter of law and

[9] The IHO's February 1, 2023 interim order on pendency was not paginated. For the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see Feb. 1, 2023 Interim Order on Pendency at pp. 1-8). A status conference was held on February 2, 2023 to schedule the impartial hearing (Feb. 2, 2023 Tr. pp. 79-90).

fact. The parents argue that because the district has failed to provide the student with a FAPE beginning with the 2019-20 school year, due to its repeated failure to offer an educational program and placement uniquely tailored to meet the student's needs, the student's pendency placement is therefore her current educational program and placement at iBrain. The parents argue that "[t]his conclusion is based on the first [IHO decision] issued in consolidated IHO Case No. 193417, and the fact that iBRAIN is [the student]'s operative placement and is consistent with the equitable authority granted to impartial hearing officers" (Req. for Rev. ¶27).[10]

In an answer, the district denies the parents' material allegations and requests that the IHO's interim decision on pendency be affirmed. The district asserts that the parents' appeal should be dismissed for failure to timely serve a notice of intention to seek review. In addition, the district argues that the District Court's determination in the Araujo decision was binding authority over the matter and further argues that the parents should be precluded from repeatedly asserting the same pendency claim in multiple forums. The district further contends that the IHO correctly found that the parents' request for pendency was barred by the doctrines of collateral estoppel.[11] Next, the district alleges that iBrain was not the student's pendency placement because the student was offered a public school placement when the student first relocated to the district on or about January 3, 2020. The district argues that the parents rejected the public school placement and did so at their own risk.[12]

In a reply, the parents argue that the notice of intention to seek review was "minimally untimely" and did not prejudice the district.[13] The parents further refute the district's arguments.

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[10] "[T]he first FOFD issued in consolidated IHO Case No. 193417" identified by the parents was an IHO decision dated November 5, 2021, which awarded the parents tuition reimbursement at iBrain from February 25, 2020 through March 25, 2020. The November 5, 2021 decision awarding the parents tuition reimbursement was reversed by the SRO in Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248.

[11] The district's answer does not address the IHO's determination that the parents' request for pendency was barred by the doctrine of res judicata.

[12] The district also contends in its answer that the parents' request for review includes a claim that the student's then-current educational placement is unavailable because the school is closed for in-person instruction due to COVID-19 and that the claim is unsupported by any evidence in the hearing record. In their reply, the parents allege that they did not assert such a claim. Review of the parents' request for review supports the parents' position in this particular appeal. However, the parents have previously asserted the claim noted by the district in their appeal of the November 9, 2020 interim decision on pendency (see Application of a Student with a Disability, Appeal No. 20-199).

[13] State regulation requires that any party "who intends to seek review by a State Review Officer of the decision of an impartial hearing officer shall personally serve upon the opposing party,… a notice of intention to seek review" in the form described therein (8 NYCRR 279.2[a]). The notice of intention to seek review must be personally served upon the opposing party no later than 25 days after the date of the decision of the impartial hearing officer sought to be reviewed (see 8 NYCRR 279.2[b]). Among other things, [t]he service of a notice of intention to seek review upon a school district serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review (see Application of a Student with a Disability, Appeal No. 21-054; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student Suspected of Having a Disability, Appeal No. 12-014). The district must file the completed and certified record with the Office of State Review within 10 days after service of the notice of intention to seek review (see 8 NYCRR 279.9[b]).

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).

In the instant matter, the parents had until February 26, 2023 to timely serve the notice of intention to seek review on the district; however, according to the district's answer, the parents' notice of intention to seek review was served upon the district on March 6, 2023. The parents did not file a copy of the notice of intention to seek review with the Office of State Review. An SRO "may, in his or her discretion . . . review the determination of an impartial hearing officer notwithstanding a party's failure to timely serve a notice of intention to seek review" (8 NCYRR 279.2[f]). Although there was a noncompliance with State regulation as identified by the district, the attorneys for the parents do not have a history of noncompliance with this aspect of State regulation and the district has not identified any prejudice in responding to the parents' request for review. Accordingly, I decline to exercise my discretion to reject the parents' request for review in this instance. However, this is also not the first instance of untimeliness on this point (see Application of a Student with a Disability, Appeal No. 21-140) and the attorneys for the parents are cautioned that repeated failures to conform to the practice regulations with regard to the filing of a notice of intention to seek review can result in dismissal of an appeal by a State Review Officer.

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

In their request for review, the parents assert that the IHO erred by failing to identify the student's pendency placement and request that an SRO order that the student's pendency placement is iBrain because the district has never offered the student a pendency placement and there is no last agreed upon placement. The parents further argue that the IHO erred in determining that the parents' claim for pendency was barred by the doctrines of res judicata and collateral estoppel. The parents next allege that because the district has failed to provide a FAPE to the student since the 2019-20 school year "by its repeated failure to offer an educational program and placement uniquely tailored to meet [the student]'s needs, then [the student]'s pendency placement is her current educational program and placement" at iBrain. The parents contend that this "conclusion is based on the first [final November 5, 2021 IHO decision] issued in consolidated IHO Case No. 193417, and the fact that iBrain is [the student]'s operative placement and is consistent with the equitable authority granted to [IHO]s" (Req. for Rev. ¶27). In addition, the parents claim that the November 9, 2020 interim order on pendency "was based on facts that are now stale and more than two (2) years old" (Req. for Rev. ¶15).

The parents have asserted in their request for review that the IHO's rulings with regard to the doctrines of res judicata and collateral estoppel were "incorrect as a matter of law and fact" and "wrong as a matter of law and fact" but do not set forth with any specificity how the IHO erred in making those determinations (Req. for Rev. ¶¶22, 23). In their memorandum of law, the parents argue that res judicata does not apply to pendency determinations because it is not a ruling on the

merits (Parent Mem. of Law at pp. 12-13). Further, while the parents assert that the facts which formed the basis of the November 9, 2020 interim order on pendency are stale and more than two years old, the parents have not articulated any change in facts or circumstances that would implicate pendency rights or effectuate an agreed upon change in placement in either the request for review or memorandum of law.

In its answer, the district argues that the District Court's pendency determination in Araujo, specifically rejected the parents' claim that the district failed to offer a pendency placement for the 2020-21 school year and rejected the parents' request that iBrain be found to be the student's operative pendency placement. The district contends that the District Court's "findings constrain the SRO from reaching a contrary conclusion and on this basis alone the SRO should dismiss the appeal" because the parent chose to appeal the issue directly to District Court (Answer ¶21). The district further asserts that the IHO correctly found that the parents' request for pendency was barred by the doctrine of collateral estoppel. Specifically, the district contends that the parents' claim for pendency at iBrain is precluded by the decision of the District Court in Araujo. The district further argues that the parents' claim for pendency was also denied by a prior IHO and SRO in State-level administrative proceedings in Application of a Student with a Disability, Appeal No. 20-199. Lastly, the district argues that iBrain is not the student's pendency placement because it does not meet any definition of then-current placement.

In her February 1, 2023 interim order on pendency, the IHO determined that no change had occurred since the decision of the District Court in Araujo denying the parents' claim for pendency that would warrant revisiting the issue of pendency (Feb. 1, 2023 Interim IHO Decision at p. 4). The IHO further noted that the parents had attempted to revisit the issue with the prior IHO, who denied their request on collateral estoppel grounds in his November 9, 2020 interim order on pendency, which was affirmed by the undersigned in Application of a Student with a Disability, Appeal No. 20-199. The IHO determined that the District Court's decision in Araujo was the law of the case and that both the doctrines of res judicata and collateral estoppel precluded the parents from relitigating the issue. The IHO acknowledged that the parents argued that the facts were stale, however she correctly found that there was no evidence or indication that the facts had changed in such a way that would warrant revisiting the decision of the District Court (Feb. 1, 2023 Interim IHO Decision at p. 4).

Review of the hearing record in this matter supports the IHO's determinations. It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of res judicata "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012

WL 234392, at *4; Grenon, 2006 WL 3751450, at *6).[14] Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013]).[15]

It is undisputed that the prior pendency proceedings and the present matter involve the same parties and that the prior pendency dispute was resolved in an adjudication on the merits of the parents' allegations set forth therein (see Application of a Student with a Disability, Appeal No. 20-199). Notwithstanding a prior State-level administrative proceeding on the issue of pendency which rejected the parents' claim that pendency for the student was at iBrain on the same facts presented herein, the parents have raised once again on appeal the same claims and arguments already rejected by the District Court in Araujo. Accordingly those claims are precluded by the doctrines of collateral estoppel and res judicata. The IHO correctly ascertained that while the parents alleged that the November 9, 2020 interim decision on pendency was more than two years old, the parents failed to set forth a single change in fact or circumstance that would implicate the student's right to pendency or render the application of the doctrines of res judicata or collateral estoppel to the parents' current claims inappropriate. Rather, the instant appeal represents yet one more attempt by the parents to assert the same "nucleus of operative facts" in an attempt to get a favorable ruling despite prior adjudications that rejected identical arguments.

Turning to the parents' specific arguments, their assertion that the doctrines of res judicata and collateral estoppel do not apply to pendency decisions is without merit (Application of a Student with a Disability, Appeal No. 22-147 [holding the doctrine of res judicata applies to the pendency proceeding at issue as the prior pendency proceeding between the same parties resulted in a decision based on the merits, and the claims alleged in the current matter arose from the same nucleus of operative facts]).

The parents' claims that the district has not offered a pendency placement to the student and that the student is entitled to pendency at iBrain as the operative placement were fully addressed in the Araujo decision and reiterated by the undersigned in Application of a Student with a Disability, Appeal No. 20-199, who stated that the District Court had already ruled that

[14] While the IDEA allows a parent to file "a separate due process complaint on an issue separate from a due process complaint already filed" (20 U.S.C. § 1415[o]; 34 CFR 300.513[c]), "consolidation of multiple issues into a single complaint where such issues are known at the time of the filing of the initial complaint" are encouraged (Due Process Procedures for Parents and Children, 70 Fed. Reg. 35782 [June 21, 2005]). It has been noted in IDEA jurisprudence that "[a]lthough courts were initially hesitant to use res judicata in the administrative setting, the doctrine has consistently been applied to administrative hearings that reach a final judgment on the merits" (Theodore v. Dist. of Columbia, 772 F. Supp. 2d 287, 293 [D.D.C. 2011]).

[15] The related doctrine of collateral estoppel "precludes parties from litigating a legal or factual issue already decided in an earlier proceeding" (Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]). To establish that a claim is collaterally estopped, a party must show that: (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits (Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]; see Perez, 347 F.3d at 426; Boguslavsky v. Kaplan, 159 F.3d 715, 720 [2d Cir. 1998]).

> 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.
>
> 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).

As SROs have explained, there may be instances when a parent asserts pendency arguments 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),[16]

[16] 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.,

but once a court has issued a determination resolving pendency, administrative hearing officers do not have the power to alter a court's pendency decision. The District Court's decision with respect to this student cannot be collaterally attacked in an IDEA administrative due process proceeding. The parents' assertion that the student should receive a publicly funded pendency placement at iBrain because there is no last agreed upon placement is just rehashing the operative placement argument that was already rejected by the District Court (see Araujo, 2020 WL 5701828 at *4), and by the undersigned SRO (Application of a Student with a Disability, Appeal No. 20-199).

As was the case in Application of a Student with a Disability, Appeal No. 20-199, there is no evidence that there has been a change in circumstances since the parties were before the District Court, such as, 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. To the contrary, in prior State-level administrative proceedings, the district has been found to have offered the student a FAPE from December 2019 through March 25, 2020; and it was determined that the student was not eligible for a FAPE from March 26, 2020 through May 9, 2021 (Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248). On September 13, 2021, the Commissioner of Education issued a decision finding that the parents' petition that challenged the district's residency determination was untimely (Appeal of R.A. and D.A., 61 Ed. Dep't Rep., Decision No. 18,047). The Commissioner further indicated that, "[w]hile petitioners have not submitted any evidence reflecting their physical presence within respondent's district, they retain the right to reapply for admission, on the student's behalf, if and when they submit sufficient proof thereof" (id.). In addition, an SRO determined that a February 11, 2022 IEP offered the student a FAPE from February 11, 2022 (a date requested by the parents) through the 2022-23 school year (Application of a Student with a Disability, Appeal No. 22-136).

Lastly, the parents once again cite to footnote 65 in Ventura de Paulino for the proposition that the situation—neither considered, nor resolved by the Second Circuit—in actuality, applies to this student (Parent Mem. of Law at p. 10; see Ventura de Paulino, 959 F.3d at 534 n.65). The Second Circuit declined to address "any question presented where the school providing the child's pendency services is no longer available *and* the school district either refuses or fails to provide pendency services to the child" and noted that the Fourth Circuit had "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" to a State court of competent jurisdiction or in a District Court (id.; see 20 U.S.C. § 1415[i][2][C][iii]).[17] While I do not agree that the situation described by the Second Circuit applies to this student, I have previously stated in the prior pendency appeal that the parents should have pursued that argument in District Court which would have had the authority, at least, to issue extraordinary injunctive relief if it was indeed warranted. The section of the IDEA procedural safeguards relied on by the

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.

[17] In footnote 65, the Second Circuit incorrectly cited to 20 U.S.C. section 1415 subsection (i)(2)(B), which describes the limitations period for bringing a civil action and does not contain a subsection iii, or, for that matter any additional subsections. The correct cite for a court's authority to grant such relief as it determines is appropriate is 20 U.S.C. section 1415(i)(2)(C)(iii).

parents applies to a civil action brought in a State or federal court of competent jurisdiction and states that "[i]n any action brought under this paragraph, the court… shall grant such relief as the court determines is appropriate" (20 U.S.C. § 1415[1][2][C][iii]). However, unlike a State or federal court of competent jurisdiction, an administrative hearing officer does not have the authority to utilize injunctive relief to order a change in the student's pendency placement (Application of a Student with a Disability, Appeal No. 20-199). Here, the parents unilaterally placed the student at iBrain for the school years at issue and have, once again, sought public funding for that placement pursuant to the IDEA's pendency provision by putting forth the same set of facts adjudicated previously in this forum as well as federal court. Because the parents rely upon the same facts as presented previously for their arguments, the doctrines of collateral estoppel and res judicata bar any further consideration of the issues presented on this appeal or an order granting the pendency placement at iBrain sought by the parents. The fact that the parents have been litigating the claims since March 2020 and characterize the facts as stale does not alter that conclusion and does not require reversal of the IHO's April 2022 interim decision.

VII. Conclusion

The hearing record demonstrates that contrary to the parents' assertions there has been no change in circumstances since the District Court's determination in Araujo. The IHO correctly determined that 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 pendency purposes that would warrant funding at iBrain as a pendency placement. Further, the IHO did not err in finding that the parents' claims were barred by the doctrines of res judicata and collateral estoppel.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 1, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER