The University of the State of New York

The State Education Department

State Review Officer

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No. 24-279

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

Appearances:

Brain Injury Rights Group, Ltd., attorneys for petitioner, by Richa Raghute, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Hanna Giuntini, 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 parent) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from the interim decision of an impartial hearing officer (IHO) determining her son's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) recommended educational program for the student for the 2023-24 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). 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[a]). 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

At this point in the administrative proceeding, minimal evidence has been admitted into the hearing record—that is, the parties' briefs and attached exhibits concerning pendency—but no witnesses have testified (see Tr. pp. 1-35; IHO Exs. I-IV). Accordingly, there is little information regarding the student's educational history and the primary focus is on the procedural history of

this matter leading up to this appeal. Briefly, however, on November 15, 2021, a CPSE convened and developed the November 2021 CPSE IEP for the student, who was then three years of age (see IHO Ex. I at p. 8). Finding the student eligible to receive special education as a preschool student with a disability, the November 2021 CPSE recommended 12-month programming consisting of a full day 12:1+3 special class placement, two 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual physical therapy (PT), and four 60-minute sessions per year of parent counseling and training services (id. at pp. 8, 22-23).

In a final notice of recommendation dated November 15, 2021, the district summarized the special education program recommended in the November 2021 CPSE IEP and identified a specific school location within which to implement the student's program (see IHO Ex. IV at p. 1). The parent executed the final notice of recommendation on November 15, 2021, thereby consenting to the provision of special education to the student (id.).

Evidence in the hearing record reveals that, approximately two years later, a CPSE convened on or about January 31, 2023 and developed a "Turning 5 IEP" for the student (see IHO Ex. II at p. 11).[1, 2] According to the parent, the January 2023 CPSE recommended a 12:1+3 special class placement for the student, together with three 30-minute sessions per week of OT, PT, and speech-language therapy services, and special transportation services (id.). The parent noted that she had expressed her disagreement with the district's proposed IEP at the meeting (id.).

Next, the evidence in the hearing record indicates that, in a prior written notice to the parent dated March 20, 2023, the district sought the parent's consent to reevaluate the student in preparation for his "transition to kindergarten" and "to determine the appropriate special education services [the student] w[ould] need in a school-age setting" (Dist. Prior Written Not. at p. 1). The prior written notice identified the student's "turning five" as the basis for the requested reevaluations and indicated that the parent would be invited to "attend an IEP meeting to discuss the reevaluation" and the student's IEP (id. at pp. 1-2). A consent for additional assessments, dated March 20, 2023, was sent to the parent to allow the district to proceed with the reevaluations (id. at p. 4). According to the consent form, if the parent did not execute and return the document by April 3, 2023, the district would "attempt to contact [her] by phone"; if the parent did not respond to these efforts, the district indicated that it would "conduct the necessary assessments without written consent" (id.). The parent's signature line on the consent form remains blank (id.).

Thereafter, in a prior written notice sent to the parent dated June 15, 2023, the district summarized the special education programming recommended by a CSE, which had found the student eligible to receive special education as a student with multiple disabilities and which had

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[1] This information was gleaned from the parent's due process complaint notice, dated March 28, 2024, which was attached to the parent's memorandum of law submitted to the IHO during the impartial hearing (see IHO Ex. II at pp. 8-15).

[2] To be clear, a CPSE has no authority to conduct a meeting to develop a school-age IEP for a student (see M.H. v. New York City Dep't of Educ., 685 F.3d 217, 233 [2d Cir. 2012]). In all likelihood, the January 2023 CPSE convened to develop the student's final CPSE IEP to continue special education programming through August 2023.

purportedly convened on May 17, 2023, to develop the student's IEP (see IHO Ex. I at pp. 66-67).[3] Based on the prior written notice, the May 2023 CSE recommended 12-month programming consisting of a 12:1+(3:1) special class placement and related services of individual OT, PT, and speech-language therapy, together with the services of an individual health paraprofessional and the services of an individual transportation paraprofessional (id.). In addition, the prior written notice identified the specific school location within which to implement the student's program (id. at p. 67).

The evidence in the hearing record reflects that, in a letter dated on or about March 20, 2024, the parent allegedly notified the district of her intention to unilaterally place the student at the International Academy for the Brain (iBrain) for the 2023-24 school year (see IHO Ex. II at p. 11).[4]

A. Due Process Complaint Notice

In a due process complaint notice dated March 28, 2024, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see IHO Ex. II at p. 8). According to the parent, the student began attending iBrain during the 2023-24 school year (id. at pp. 8, 10).[5] 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 and costs for related services at iBRAIN, along with transportation costs (id. at p. 9).

B. Impartial Hearing Officer Decision

On May 1, 2024, the parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Tr. pp. 1-35). On that date, the IHO conducted a prehearing conference (see Tr. pp. 1, 3). The parties indicated that pendency was at issue in this matter, and the parent's representative indicated that the parent was seeking pendency services from the start of the 2023-24 school year based on the student's "current operative placement at iBrain" (Tr. pp. 3-4). The district's attorney initially disagreed with the contention that the pendency services began at the start of the 2023-24 school year because the parent had not filed the due process complaint notice until "March 29, 2024," and legally, the student's pendency services must start as of the filing date of the due process complaint notice (Tr. p. 4). In addition, the district's attorney stated that the student's November 2021 CPSE IEP, which provided for 12-month programming, formed the basis of the student's pendency services (id.). At that point, the IHO directed the parties to submit their respective positions about the student's pendency services in writing (see Tr. pp. 5-6). Thereafter, the IHO and the parties discussed the issues to be resolved

[3] In the parent's due process complaint notice, she acknowledged receipt of the June 15, 2023 prior written notice from the district (see IHO Ex. II at p. 11).

[4] The hearing record, as it currently stands, does not include a copy of the parent's alleged 10-day notice of unilateral placement dated March 20, 2024 (see generally Tr. pp. 1-35; IHO Exs. I-IV).

[5] At the impartial hearing, the parent's representative stated that the student began attending iBrain in July 2023 (see Tr. pp. 10-11).

at the impartial hearing, as well as the relief sought by the parent, and the IHO outlined the conduct of the impartial hearing (see Tr. pp. 7-34).[6]

Consistent with the IHO's directives, the parent submitted a memorandum of law in support of her application for an order directing that the district fund the student's placement at iBrain for the pendency of this proceeding (see IHO Ex. II at pp. 1-7). Initially, the parent asserted that, after receiving the June 15, 2023 prior written notice from the district, she "attempted to schedule a school visit, but was denied," and after "decid[ing] to enroll [the student] at iBrain[, s]he notified the [district] twice, via phone call, that she disagreed with its recommended placement for [the student] and that she was enrolling [her] in a private school" (id. at p. 3). Next, within the context of her pendency arguments, the parent acknowledged that a "student's right to pendency ar[ose] when the student's parent initiate[d] a due process complaint with a local school district," and in this instance, she telephoned the district two times to notify the district "of her rejection of the proposed placement, and her intent to place [the student] at a private school" (id. at p. 4). According to the parent, in the absence of a "written [10]-day notice, her verbal notice that she rejected the proposed placement was sufficient notice to inform the [district] that she disagreed with its recommendation" and she initiated administrative proceedings by due process complaint notice dated March 28, 2024 (id.).

Next, the parent recited the definitions typically used to describe a student's "'then-current educational placement'" for purposes of pendency (IHO Ex. II at p. 4, citing Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004]). While acknowledging the district's position asserted at the impartial hearing—to wit, that the student's November 2021 CPSE IEP formed the basis for the student's pendency placement as the last agreed-upon placement—the parent argued that the district's position ignored the fact that the November 2021 CPSE IEP designated a preschool placement for the student, the student was currently "past the age" of preschool, and "[a]s such, the last agreed-upon placement [wa]s no longer available" for the student (id. at pp. 4-5). In light of these facts, the parent asserted that the exception carved out by the Second Circuit's holding in Ventura de Paulino v. New York City Department of Education, 959 F.3d 519, 535 n.65 (2d Cir. 2020), applied to this matter (id. at p. 5). Generally, the parent argued that this exception described in footnote 65 in the Ventura de Paulino decision permitted the IHO to award the parent pendency at her preferred location, iBrain, because the student's last agreed-upon placement was no longer available to the student (id.). In addition, the parent argued that the IHO had the "authority, coextensive with a district court, to award equitable relief" and to issue injunctive relief to effectuate the student's pendency placement at iBrain (id. at pp. 5-6). More specifically, the parent asserted that since the district "only agreed to the [November] 2021 [CPSE] IEP as the basis for pendency, and that program [wa]s no longer available to [the student], the only remaining option for a pendency placement [wa]s [the student's] operative placement" at iBrain (id. at p. 6). The parent further asserted that she met all of the "traditional elements of a preliminary injunction" (id.). As relief, the parent requested an interim order directing the student's pendency placement at iBrain for the 2023-24 school year, effective as of "July 17, 2023," and ordering the district to fund the costs of the student's pendency placement at iBrain (tuition, related

[6] At the impartial hearing, the parent's representative raised the issue of possibly having to file an amended due process complaint notice (see Tr. p. 16). The parent attached a copy of the amended due process complaint notice, dated May 3, 2024, to her memorandum of law submitted in support of the student's pendency placement at iBrain (see IHO Ex. II at pp. 1, 16-24).

services, nursing, and special transportation) (id. at p. 7). Alternatively, the parent requested the student's pendency placement effective as of the date of the due process complaint notice, March 28, 2024 (id.).

The district also submitted a memorandum of law in support of its position on the student's pendency placement (see IHO Ex. I at pp. 1-7). The district opposed the parent's request for the district to fund the student's pendency placement at iBrain under an "operative placement theory," and argued that the November 2021 CPSE IEP constituted the last-agreed upon program for the student, and as such, formed the basis for his pendency placement during these administrative proceedings (id. at p. 2). Initially, the district asserts that the student's entitlement to pendency arose "when a due process complaint [wa]s filed" (id. [emphasis in original]). Pointing to the Second Circuit's decision in Ventura de Paulino, the district argued that the "'term "then-current educational placement" in the stay-put provision typically refer[red] to the students' last agreed-upon educational program before the parent requested a due process hearing to challenge the [student's] IEP'" (id. at pp. 2-3, citing Ventura de Paulino, 959 F.3d at 531). After reciting the various means for changing a student's pendency placement, the district contended that iBrain could not constitute the student's pendency placement because there had been "no final decision on the merits finding iBrain to be appropriate," and the parent could not assert the "operative placement theory" to determine that iBrain was the student's pendency placement because the "'parent c[ould] not 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'" (id. at p. 3, citing Araujo v. New York City Dep't of Educ., 2020 WL 5701828 [S.D.N.Y. Sept. 24, 2020], quoting Ventura de Paulino, 959 F.3d at 536).

With regard to the parent's "operative placement" theory, the district argued that, while under certain limited circumstances this theory may establish a student's pendency placement—notably, when a school district attempted to "change a student's program without the parent's consent, or where an IEP [wa]s created and there was no previously implemented IEP, so that the current public-school placement provided by the school district [wa]s considered to be the pendency placement"—these scenarios did not exist in this matter (IHO Ex. I at pp. 4-5). Moreover, the district pointed to a recent decision issued by the Federal Court of the Southern District, which rejected the operative placement argument and noted that the operative placement might apply in cases where a district attempted to move a student without the parent's consent or where there was no previously implemented IEP (id. at pp. 5-6, citing Scheff v. New York City Dep't of Educ., 680 F. Supp. 3d 354, 364 [S.D.N.Y. 2023]). Given that neither of these circumstances applied to this matter, the district asserted that the operative placement theory must be rejected (see IHO Ex. I at pp. 5-6).

Overall, the district asserted that iBrain did not constitute the student's pendency placement and that the district remained "willing to work with the parents to find a suitable placement and in fact, did offer a placement on June 15, [2023]" at a district public school, which the parent ultimately rejected in favor of unilaterally placing the student at iBrain (IHO Ex. I at p. 6).[7]

[7] Following the submission of the parties' pendency briefs, the district replied to the parent's arguments in an email to the IHO, dated May 7, 2024, and the parent responded in kind on the same day (see IHO Ex. III at pp. 1-4). In the interim decision on pendency, the IHO acknowledged receipt of the parties' additional arguments in the emails and at times, cited to the emails as an IHO exhibit (see Interim IHO Decision at p. 1).

In an interim decision on pendency dated May 23, 2024, the IHO found that, contrary to the parent's arguments, the student's pendency placement consisted of the special education program set forth in the student's November 2021 CPSE IEP and that the "effective date of any pendency order [wa]s the date of the filing" of the due process complaint notice (Interim IHO Decision at pp. 1, 8).[8] Additionally, the IHO found that, despite the parent's arguments, he did not have the authority to "issue a traditional injunction like a District Court" (id. at p. 5). With respect to the parties' arguments, the IHO found that the parent's argument in favor of iBrain as the student's operative placement as pendency had been rejected by the holding in the Scheff decision (id. at p. 6). The IHO also found that the "district's public placement offer was still available" for the 2023-24 school year, and there was nothing in the hearing record to suggest that the "school [wa]s unavailable and the district refused or failed to provide pendency services" (id. [emphasis in original], citing Ventura de Paulino, 959 F.3d at 533-34). As a result, the IHO ordered the district to provide the student with the following as his pendency placement, as of the date of the filing of the parent's due process complaint notice, March 29, 2024: a full day, 12:1+3 special class placement; two 30-minute sessions per week of individual speech-language therapy; three 30-minute sessions per week of individual OT services; two 30-minute sessions per week of individual PT services; and four 60-minute sessions per year of parent counseling and training services (see Interim IHO Decision at p. 8).

IV. Appeal for State-Level Review

The parent appeals from the IHO's interim decision, asserting overall that the IHO erred by finding that iBrain was not the student's pendency placement and relatedly, by failing to award funding for the student's placement at iBrain for the pendency of this proceeding. More specifically, the parent contends that the IHO erred by finding that she did not have equitable authority to issue a traditional injunction to order a change in the student's pendency placement. The parent argues that the IHO erred by finding that the November 2021 CPSE IEP formed the basis for the student's pendency placement notwithstanding evidence reflecting that the student has aged-out of his preschool program and thus, it is no longer available, which, according to the parent, was the district's burden to establish. The parent further argues that the IHO erred by finding that the student's entitlement to pendency was triggered by the filing of the due process complaint notice rather than triggered by the district unilaterally changing the student's placement without the parent's consent. In addition, the parent continues to argue on appeal that iBrain is the student's pendency placement because it was the student's operative placement at the time the due process complaint notice was filed. Additionally, the parent continues to argue that this matter falls within an exception explained in a footnote to the Ventura de Paulino decision, discussing what may potentially occur when a placement is no longer available and the district either refuses or fails to provide pendency services. The parent requests a finding that the student is entitled to pendency at iBrain for the remainder of this proceeding.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's interim decision on pendency. More specifically, the district asserts that the IHO correctly found that the November 2021 CPSE IEP was the student's last-agreed upon placement and constitutes the student's pendency placement. In addition, the district contends that the parent's

[8] The IHO's interim decision is 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 Interim IHO Decision at pp. 1-10).

argument that the November 2021 CPSE IEP cannot form the basis for pendency because it was a preschool program and the student is now school-aged has been summarily rejected by SROs and the Second Circuit in Ventura de Paulino. According to the district, the parent's actions in this matter—unilaterally placing the student at iBrain and then filing for due process—have been expressly forbidden under Ventura de Paulino. Moreover, the district argues that the parent's reliance on the fact that the student has aged-out of the preschool program as a basis for finding that it is no longer available is misplaced because the pendency provision does not require that a student remain in a particular site or location. The district further argues that, in a previous SRO decision, an SRO addressed, and rejected, the parent's arguments concerning the applicability of the exception described in footnote 65 in the Ventura de Paulino decision, as well as whether an IHO has the authority to issue traditional injunctive relief. As a final point, the district argues that the IHO properly found that the student's pendency rights begin when a due process complaint notice is filed.[9]

V. Applicable Standards—Pendency

The IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino, 959 F.3d at 531; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey, 386 F.3d at 163, 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]).[10] 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;

[9] The parent submitted a reply to the district's answer. However, State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the parent's reply merely reasserts many of the same allegations as raised in the request for review and does not appear to address any of the issues permitted in a reply; accordingly, the parent's reply will be disregarded.

[10] 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).

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, 455-56 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed];[11] 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 v. Arlington Central School District Board of Education, 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

Contrary to the parent's arguments, the IHO properly concluded that the November 2021 CPSE IEP formed the basis for the student's pendency placement and that pendency began at the time the due process complaint notice was filed. Moreover, and also contrary to the parent's arguments, 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

[11] The parent's argument that the IHO erred in holding that pendency arises at the time the due process complaint notice was filed is in contravention of the law of this Circuit and is meritless.

declining to apply "operative placement" as requested by the parents in Ventura de Paulino, the Second Circuit Court 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. Instead, the hearing record reflects that the student's November 2021 CPSE IEP was implemented, and the hearing record is devoid of evidence that the parent challenged the program recommended therein (see generally Tr. pp. 1-35; IHO Exs. I-IV). Therefore, based on the evidence presented, the November 2021 CPSE IEP constitutes the last agreed-upon program when the parent filed her due process complaint notice, dated March 28, 2024. 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]).

Turning to the parent's contention that the student's November 2021 CPSE IEP could not form the basis for the pendency placement because the student had aged-out of the preschool program, this contention mistakenly focuses 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). Thus, notwithstanding that the student "aged out" of the programs available at the preschool location, the November 2021 CPSE 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]).

Additionally, to the extent placement at a preschool program became "unavailable," contrary to the parent's argument, the current matter would not fall under the auspices of footnote 65 in the Second Circuit's decision in Ventura de Paulino. In that footnote, the Second Circuit noted:

> We do not consider here, much less resolve, any question presented where the school providing the child's pendency services is no longer available and the school district either refuses or fails to provide pendency services to the child. Those circumstances are not present here. We note, however, that at least one of our sister Circuits has acknowledged that, under certain extraordinary circumstances not presented here, a parent may seek injunctive relief to modify a student's placement pursuant to the equitable authority provided in 20 U.S.C. § 1415[i][2][B][iii]. See Wagner v. Bd. of Educ. of Montgomery Cty., 335 F.3d 297, 302–03 (4th Cir. 2003) [involving a situation in which the pendency placement was no longer available, and the school district had failed to propose an alternative, equivalent placement]

(Ventura de Paulino, 959 F.3d 519, 534 n.65). Here, the hearing record is devoid of evidence that the district has refused to provide pendency services to the student (see generally Tr. pp. 1-35; IHO Exs. I-IV). 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, as parent's counsel has been previously advised, 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. 21-234; 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 parent has not pointed to any cases in a district court achieving any success with this argument; in fact, at least one district court decision has advised counsel for the parent 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]).

Here, had the district been required to implement the pendency placement, it would have had to identify a comparable special education program. While the parties do not generally advance arguments on this point, it is instructive as it may arise in the pendency aspects of this proceeding: whether the district was required to locate a school to implement the pendency program after the parent 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.).

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,[12] and request to have the district implement the services described in the November 2021 CPSE 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 attempt to seek a preliminary injunction from a court of competent jurisdiction 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]).

VII. Conclusion

Having determined that the parent's request for funding for the student's placement at iBrain on a pendency basis is not permissible under the arguments presented by the parent, the necessary inquiry is at an end and the IHO's decision is upheld in its entirety.

I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 21, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[12] 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).