The University of the State of New York

The State Education Department
State Review Officer
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No. 24-466

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:
Liberty & Freedom Legal Group, Ltd., attorneys for petitioners, by Richa Raghute, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Hanna I. 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. Petitioners (the parents) appeal, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an impartial hearing officer's (IHO) refusal to determine their daughter's pendency placement during a due process proceeding challenging the appropriateness of respondent's (the district's) educational program recommended for the student for the 2024-25 school year. The appeal must be sustained in part.

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[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

Given the limited issues to be resolved, a full recitation of the student's educational history is unwarranted. Briefly, a CSE conducted an annual review for the student—who is eligible for special education as a student with a traumatic brain injury—in January 2024 and developed an IEP for the student for the 2024-25 school year (see Parent Ex. A at p. 5).[1] In a letter dated June 17, 2024, the parents notified the district of their disagreements with the student's January 2024 IEP, as well as their intentions to unilaterally place the student at the International Academy for the Brain (iBrain) for the 2024-25 school year (12-month program) and to seek public funding

[1] The student's eligibility for special education and related services as a student with a traumatic brain injury is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

from the district for the costs of the student's tuition (see generally Parent Ex. A-A).[2, 3] The parents also indicated within the June 2024 letter that they were seeking pendency services by the start of the 12-month, 2024-25 school year, and included a prepopulated, district "Pendency Form" with the letter (id. at p. 1; see generally Parent Ex. A-B).

The evidence in the hearing record indicates that, on June 20, 2024, the parent executed an "Annual Enrollment Contract" with iBrain for the student's attendance during the 2024-25 school year (July 2, 2024 through June 27, 2025) (Parent Ex. A-E at pp. 1, 6).[4] On the same date, June 20, 2024, the student's father executed a "Nursing Service Agreement" with "Park Avenue Home Care, LLC" (Park Avenue) to deliver nursing services to the student during the 2024-25 school year (July 2, 2024 through June 27, 2025) (Parent Ex. A-G at pp. 1, 7-8).

The hearing record further reflects that, on June 23, 2024, the parent executed a "School Transportation Annual Service Agreement" with "Sisters Travel and Transportation Services, LLC," (Sisters Travel) to provide round-trip transportation services for the student during the 2024-25 school year (July 2, 2024 through June 27, 2025) (Parent Ex. A-F at pp. 1, 6-7).

By due process complaint notice dated July 2, 2024, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 12-month, 2024-25 school year, and, as relevant to this appeal, requested pendency services based on an unappealed IHO decision, dated September 15, 2023 (September 2023 IHO decision) (see Parent Ex. A at p. 2; see also Parent Ex. A-C at pp. 1, 12). The parents attached a "Pendency Form," which "outline[d] the basis for pendency and the pendency program" (Parent Ex. A at p. 2; see also Parent Ex. A-B). According to the attached pendency form, the student's pendency services consisted of the following: district funding of iBrain's tuition costs pursuant to the "terms of the enrollment contract between iBrain and parent"; district funding of the costs of the student's transportation pursuant to the "terms of the transportation agreement" between Sisters Travel and the parent; and district funding of the costs of the student's nursing services pursuant to the "terms of the nursing agreement" between Park Avenue and the parent (Parent Exs. A-B; A-E—A-G).

On August 15, 2024, the parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Tr. p. 1). During the first three dates of the impartial hearing, the parties' and the IHO's discussions focused on the student's pendency services and the parents' federal complaint involving the same issue and the parties argued and briefed the IHO on the question of whether the IHO had concurrent jurisdiction with the federal court to issue an interim order on pendency (see Tr. pp. 1-90).

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[2] The parents' due process complaint notice included several attached exhibits, which were separately entered into the hearing record as evidence (see Tr. pp. 112, 134-35). For the purpose of clarity, citations to the exhibits attached to the due process complaint notice will be referred to as exhibit "A-A" or "A-B," as identified in the transcript (Tr. p. 112).

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

[4] Use of the term "parent" in the singular when used in this decision refers solely to the student's mother.

When the impartial hearing resumed September 12, 2024, the IHO asked the parties to provide an update with respect to the parents' complaint in district court (see Tr. pp. 91-101).[5] Having considered the parties' respective positions and noting that SRO decisions had been "split" on the issue of concurrent jurisdiction, the IHO declined to issue a ruling on pendency in this matter (Tr. pp. 102-03). The IHO noted that her decision made on the record was based, in part, on the fact that the district court had already heard the pendency issue, and the parties were ready to proceed with the merits of the instant impartial hearing within the week (see Tr. p. 103). The IHO further noted that she would not make a ruling with regard to whether increased costs constituted a change of the student's pendency placement (id.).

The impartial hearing proceeded on the merits through October 2, 2024 (see Tr. pp. 110-516). Based on the transcript, it appeared that the impartial hearing was scheduled to continue on October 16, 2024, with the parents presenting their final witness and for the parties to deliver closing statements (see Tr. pp. 514-15). The hearing record does not, however, include a transcript or other information indicating whether the October 16, 2024 date scheduled for the impartial hearing took place (see generally Tr. pp. 1-516; Parent Exs. A; A-A—A-G).

IV. Appeal for State-Level Review

The parents appeal the IHO's ruling made on the record, alleging that the IHO erred by refusing to issue an interim decision on pendency.[6] More specifically, the parents contend that the IHO erred by finding that she did not have jurisdiction to hear the issue of pendency. The parents assert that the district should not wait for an IHO decision before implementing a student's pendency services. The parents further assert that they may seek a pendency determination from either an administrative or a judicial forum, as stay-put (pendency) falls within the exceptions to the IDEA's exhaustion requirements. Next, the parents argue that they do not seek to alter the district court's pendency decision, but instead, seek an order directing the district to implement the student's pendency services. As final points, the parents contend that a determination with respect to pendency in this matter is not barred by collateral estoppel or mootness. On appeal, the parents seek an order on pendency retroactive to the date of the due process complaint notice, or, alternatively, an order remanding the matter to the IHO to issue a determination on pendency consisting of the educational program at iBrain, including the costs of tuition, related services, transportation, and nursing services.

In an answer, the district responds to the parents' allegations, arguing initially that, because the parents contested the IHO's failure to rule on pendency in district court, they have selected judicial review as their preferred method to challenge the IHO's failure to rule in this matter. As

[5] According to the parents' attorney, the district court had given the parents an opportunity until September 12, 2024 to amend their complaint, and the decision with respect to whether the parents would file an amended federal complaint rested on the IHO's decision in this matter, noting that it would be amended to seek to enforce implementation of the IHO's interim order on pendency (see Tr. p. 97). The parents' attorney also noted, however, that, if the IHO issued an interim order on pendency that was "unfavorable" to them, the parents would pursue the "regular channels" and appeal to the Office of State Review (Tr. p. 100).

[6] The hearing record does not include a written decision by the IHO denying the parents' request for an interim order on pendency. Similarly, the hearing record does not include an IHO decision on the merits of the parents' claims raised in the due process complaint notice.

a result, the district argues that the parents should be foreclosed from simultaneously pursuing pendency through the impartial hearing process. Alternatively, should an SRO consider the parents' pendency claim, the district contends that the substantial increase in costs of the student's program at iBrain has effectively changed the student's pendency services and the parents have not provided any justification for the increased costs, which the district calculates as an increase of $103,171.00 and which the district asserts is not reasonably attributable to inflation and cost of living increases, as asserted by the parents. As relief, the district seeks to dismiss the parents' appeal.[7]

In a reply, the parents respond to the district's arguments. Initially, the parents assert that the answer does not comply with practice regulations because it exceeds the 10-page limit. In addition, the parents argue that SROs have considered similar instances where parents have sought to enforce pendency simultaneously in administrative and judicial forums. Finally, the parents contend that the district's reliance on Ventura de Paulino v. New York City Department of Education, 959 F.3d 519 (2d Cir. 2020) to support its increased cost argument is misplaced because, unlike the facts in Ventura de Paulino, the parents in this case have not placed the student in a different nonpublic school seeking pendency.

V. Discussion

A. Preliminary Matters—Additional Documentary Evidence

With its answer, the district submits additional documentary evidence for consideration on appeal (see generally Answer Exs. 1-2). Answer exhibit 1 is a copy of the first federal complaint filed by the parents' attorney on or about July 9, 2024 in the United States District Court for the Southern District of New York, which includes allegations regarding the student's pendency placement (see Answer Ex. 1 ¶¶ 95-107). More specifically, the allegations note that an unappealed IHO decision forms the basis for the student's pendency services, which consists of continued funding of the costs of the student's tuition at iBrain, as well as the continued funding of the costs of special transportation and nursing services (id. ¶¶ 97-100, 102, 104, 106-07). According to the complaint, the parents seek an order, in part, directing the district to fund the student's pendency services (id. at p. 28). Answer exhibit 2 is a copy of the amended federal complaint filed by the parents' attorney on or about September 19, 2024, in the United States District Court for the Southern District of New York, which retains allegations regarding the student's pendency placement based on an unappealed IHO decision, but adds references to the then-presiding IHO's decision to not issue a ruling on pendency due to a lack of concurrent jurisdiction with the district court (see Answer Ex. 2 ¶¶ 111, 120-24, 127-40). According to the amended complaint, the parents continue to seek the same relief with respect to pendency as set forth in the first complaint (compare Answer Ex. 1 at p. 28, with Answer Ex. 2 at pp. 33-34). While Answer exhibit 1 and exhibit 2 are documents that are public records related to the procedural history of administrative proceedings involving this student, the existence of which may be available for consideration by the undersigned without admitting the documents as

[7] The district submits two documents as additional evidence for consideration on appeal (see generally Answer Exs. 1-2). The parents do not object to the district's proffered evidence in its reply (see generally Reply).

additional evidence, in this instance, for purposes of convenience, both documents will be accepted and referenced by citing to the exhibits as identified and submitted by the district.

B. Jurisdiction

While not directly asserting that an SRO lacks jurisdiction over the parents' appeal, the district argues that the parents—having filed an action in a federal district court seeking the same relief as they do in this appeal—should not be allowed to proceed in multiple forums for that relief. Thus, in order to avoid potentially conflicting rulings from an SRO and the district court, the district asserts that the parents' appeal must be dismissed and allowed to proceed in the federal district court.

In support of its assertions, the district cites, in part, to Application of the Department of Education, Appeal No. 19-107. However, the posture of Application of the Department of Education, Appeal No. 19-107 differs significantly from this appeal. In that matter, the IHO issued an interim decision on pendency, which the parents appealed to a federal district court and which the district subsequently appealed to the Second Circuit Court of Appeals (Application of the Dep't of Educ., Appeal No. 19-107). The appeal remained pending in the Second Circuit during the impartial hearing and the subsequent appeal to the Office of State Review (id.). In the appeal to the Office of State Review, the parents sought to reverse the IHO's interim decision on pendency and the district opposed such relief (id.). The SRO in that matter noted that a federal district court judge had already vacated the IHO's interim decision on pendency, and as the parents had elected to appeal the student's pendency services directly to the district court, there was no basis upon which for the SRO to act (id.). As a result, the SRO did not address the IHO's vacated decision on pendency (id., citing Application of a Student with a Disability, Appeal No. 19-089).

The district also points to Application of a Student with a Disability, Appeal No. 19-089 in support of its assertions. In Application of a Student with a Disability, Appeal No. 19-089, while the parents' district court action seeking enforcement of the administrative decisions was pending, the parents requested a second interim administrative decision from the IHO directing placement of the student at iBrain, which the IHO denied, and the appeal for State-level administrative review in Application of a Student with a Disability, Appeal No. 19-089 ensued. As the SRO in that matter explained, IHOs and SROs do not have authority (that is, jurisdiction) to enforce favorable administrative orders (i.e., the first interim decision in favor of the parents) and declined to address the IHO's decision not to issue a second interim decision, noting in addition that the parents had elected to pursue the enforcement issue in district court and finding that "it would not be prudent to permit the same appeal to go forward in two different forums" (Application of a Student with a Disability, Appeal No. 19-089). In stark contrast, the parents in this matter are not seeking to enforce a favorable administrative decision—instead, the parents are actually challenging the IHO's failure to issue an interim decision on pendency. Additionally, in Application of a Student with a Disability, Appeal No. 19-089, the parents presented the IHO's decision not to amend a pendency order to the district court and the district court "decided that it would not direct the IHO to revisit the decision regarding pendency while that decision was being challenged in Court." Further differentiating the two proceedings, in this matter, although the parents have raised a similar pendency issue in district court, there is no indication in the hearing record that the district court has taken any action.

In opposition to the district's arguments, the parents cite to Application of the Board of Education, Appeal No. 20-033 as authority to allow the pendency issue to proceed simultaneously in both administrative and judicial forums. The parents argue that, in Application of the Board of Education, Appeal No. 20-033, the SRO acknowledged that parents may bring an action for pendency without exhausting administrative remedies and reasoned that neither the IHO nor an SRO need abstain from issuing a final administrative decision while awaiting a pending enforcement action in district court.

However, with that said, having the proceeding pending simultaneously in two forums at the same time leaves the matter in an awkward posture. This posture comes about because, unlike most matters under the IDEA, some courts have indicated that a parent may bring an action for pendency without first exhausting administrative remedies (Ventura de Paulino, 959 F.3d at 531 [finding that "where 'an action alleg[es a] violation of the stay-put provision,' such action 'falls within one, if not more, of the enumerated exceptions' to the IDEA's exhaustion requirement"], quoting Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199 [2d Cir. 2002] [noting that the administrative process is inadequate given the time sensitive nature of stay-put rights]). I have considered whether or not it is appropriate to abstain from making a decision on the student's pendency placement, as the district court's decision on this issue will ultimately supersede this decision. Here, as distinguished from the facts in Application of a Student with a Disability, Appeal No. 20-164, the parents' amended complaint brought in district court specifically appeals the IHO's refusal to issue a pendency decision, which the parents have also appealed in this forum as well, and the district court has not yet taken any action on the amended complaint. The hearing record indicates, however, that the district court heard arguments concerning the merits of the pendency matter raised in the parents' initial complaint filed with the district court during the course of these administrative proceedings (see Tr. pp. 93-94, 98-103). Therefore, consistent with the rationale expressed in Application of the Bd. of Educ., Appeal No. 20-033, there does not appear to be any danger in issuing a pendency decision in this matter that may conflict with the district court's ultimate rulings, and very little, if any, prejudice to the parties if a pendency decision is issued because this administrative decision will remain subject to judicial review (see Application of the Bd. of Educ., Appeal No. 20-033).[8] Consequently, I have decided to proceed to the merits of the appeal, and the district's argument that the parents' appeal be dismissed to allow the matter to proceed at the federal district court is denied.

C. Pendency

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, the IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino, 959 F.3d at 531; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X

[8] It is, however, troubling that the parents failed to mention any information about their original federal complaint or the amended complaint filed during the instant administrative proceedings in the request for review or in the reply (see generally Req. for Rev.; Reply).

v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[9] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46,709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

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

[9] In Ventura de Paulino v. New York City Department of Education, 959 F.3d 519 (2d Cir. 2020), 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).

Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

To establish the student's pendency placement at the impartial hearing, the parents and the district initially agreed that the unappealed September 2023 IHO decision formed the basis for the student's pendency placement (see Tr. pp. 15-16; see generally Parent Ex. A-C). However, although the district's attorney did not contest that the September 2023 IHO decision was the last IHO decision in the hearing record—or the actual pendency services pursuant to that decision—he argued, and now continues to argue on appeal, that under Ventura de Paulino, "where the costs have increased substantially over that period [since] the last decision," justification existed to reject, in whole or in part, the parents' request for pendency at iBrain funded at the increased costs (Tr. pp. 15-17; see Answer ¶¶ 27-29).[10]

As noted above, pendency has the effect of an automatic injunction (Zvi D., 694 F.2d at 906). Accordingly, the district was obligated in this instance to take steps to arrange for the provision of the student's pendency services during the course of the proceeding and through the current appeal, unless the parties agreed otherwise. Having agreed that the unappealed, September 2023 IHO decision formed the basis for the student's pendency services, and having failed to take any steps during the process of the hearing to challenge the student's pendency placement or to develop the hearing record with regard to what costs should be borne by the district to fund the student's pendency services—including the costs of tuition and related services at iBrain, the costs of transportation services, and the costs of nursing services—the district is, under the law, responsible for the implementation of pendency. The district was required to implement pendency services from the date of the due process complaint notice, July 2, 2024, through the conclusion of the administrative proceedings and any further judicial review.

Additionally, while it is possible that a dramatically different cost or fee structure could weigh towards a finding that a nonpublic school is not providing a similar program to what had been previously provided such that it may constitute a change in the student's placement, that is not what is argued here as the district asserts that the cost itself is the only change. The district's argument that it should "be permitted cost-control measures so that pendency is not seen as a blank check opportunity" is not unreasonable. With respect to the same nonpublic school at issue here, at least one district court has remarked that "the [district] raises legitimate concerns about waste, fraud, and abuse if parents and providers believe ex ante that the [district] will pay no matter what" (Davis v. Banks, 2023 WL 5917659, at *5 [S.D.N.Y. Sept. 11, 2023]). However, given the underdeveloped state of the hearing record with regard to the district's argument as to the increased costs of the student's program at iBrain, there is no basis to address any potential allegation of waste, fraud, or abuse at this juncture.

[10] The parents' attorney candidly stated at the impartial hearing that the district had "not explicitly refused to implement pendency," but instead, was "fighting implementation of pendency in both the administrative level and the federal court level" (Tr. p. 96). The parents' attorney also made clear that the district was "arguing that they should not have to finance pendency" for the student at iBrain (Tr. pp. 96-97).

VII. Conclusion

Having reviewed the evidence in the hearing record, the IHO erred by refusing to determine the student's pendency services during the instant administrative proceedings. I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the district shall arrange for the provision of the student's pendency services as set forth in the unappealed September 2023 IHO decision, retroactive to the date of the due process complaint notice, July 2, 2024.

Dated: **Albany, New York**
December 20, 2024

STEVEN KROLAK
STATE REVIEW OFFICER