No. _____

In The
Supreme Court of the United States

CYNTHIA SORIA, Individually and as Parent and Natural Guardian of G.S.,
GIOVANNI SORIA, Individually and as Parent and Natural Guardian of G.S.,

Petitioners,

v.

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of October, two thousand twenty.

PRESENT: REENA RAGGI, RICHARD J. SULLIVAN, WILLIAM J. NARDINI, Circuit Judges.

No. 19-2540

CYNTHIA SORIA, Individually and as Parent and Natural Guardian of G.S., GIOVANNI SORIA, Individually and as Parent and Natural Guardian of G.S.,

Plaintiffs-Appellees,

v.

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant-Appellant.

For Plaintiffs-Appellees: PETER G. ALBERT, Brain Injury Rights Group, New York, NY.

For Defendant-Appellant: ERIC LEE (Richard Dearing, Scott Shorr, on the brief), for James E. Johnson, Corporation Counsel of the City of New York, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Analisa Torres, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the district court is **VACATED**, and the case is **REMANDED** with instructions to dismiss the complaint for failure to state a claim upon which relief can be granted. Defendant-Appellant New York City Department of Education (the "City") appeals from an order granting the motion of Plaintiffs-Appellees Cynthia and Giovanni Soria for a preliminary injunction. We assume the parties' familiarity with the underlying facts, procedural history of the case, and the issues on appeal.

The Sorias are the parents of G.S., a child with a disability. During the 2017–2018 school year, when G.S. was a student at the International Academy of Hope ("iHOPE"), the Sorias initiated an administrative proceeding alleging that the City failed to offer G.S. a free appropriate public education ("FAPE") for that school year, as required by the Individuals with Disabilities Education Act ("IDEA"). In June 2018, an impartial hearing officer agreed that the City had not offered G.S. a FAPE, found that iHOPE was an appropriate placement for G.S., and ordered the City to reimburse the Sorias in full for G.S.'s tuition at iHOPE for the 2017–2018 school year. The City did not appeal this decision.

Without the City's consent, the Sorias then unilaterally transferred G.S. to another private school called the International Institute for the Brain ("iBRAIN") for the 2018–2019 school year. Shortly thereafter, the Sorias initiated a second

administrative proceeding alleging that G.S.'s individualized educational program ("IEP") for the 2018–2019 school year failed to offer G.S. a FAPE. This time, however, in addition to seeking tuition reimbursement, the Sorias sought upfront public funding for G.S.'s tuition at iBRAIN during the pendency of their IEP challenge, pursuant to the IDEA's "stay-put" provision, 20 U.S.C. § 1415(j). After an impartial hearing officer denied the Sorias' request for pendency funding and a state review officer affirmed that denial, the Sorias filed a complaint against the City in the district court, seeking an order vacating the review officer's decision and directing the City to fund G.S.'s tuition at iBRAIN until final adjudication of the Sorias' IEP challenge.[1]

We have now twice confronted an identical set of material facts and legal issues: first in *Ventura de Paulino v. New York City Department of Education*, 959 F.3d 519 (2d Cir. 2020), and more recently in *Neske v. New York City Department of Education*,

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[1] On the eve of oral argument, the City submitted a letter informing the Court that in September 2019, pursuant to the district court's preliminary injunction order, the City paid iBRAIN and other providers for services rendered to G.S. in the 2018–2019 school year. *See* ECF Doc. No. 103 at 1–2. Shortly thereafter, the Sorias evidently moved to Long Island and enrolled G.S. in a new school there. *See id.* at 2. Although it is not clear why it took the City until the day before oral argument to learn these pertinent facts – most of which occurred over a year ago and long before the parties had submitted their briefs – we ultimately agree with the City that these facts, without more, do not necessarily render this appeal moot. Indeed, counsel for the Sorias agrees with the City that this appeal is not moot because the Sorias could attempt to rely on the district court's order to establish G.S.'s pendency status in future proceedings. *See* ECF Doc. No. 107 at 3.

No. 19-4068-cv, 2020 WL 5868279 (2d Cir. Oct. 2, 2020). In fact, all three cases arise from the same exodus of students from iHOPE to iBRAIN, and all of the plaintiffs are represented by the Brain Injury Rights Group ("BIRG"), whose founder Patrick Donohue also founded iBRAIN after leaving iHOPE. *See generally Ventura de Paulino*, 959 F. 3d at 528–29, 528 n.29.

In *Ventura de Paulino*, we held (and in *Neske*, we reiterated) that "[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." *Id.* at 536; *see also Neske*, 2020 WL 5868279, at *1. That conclusion decisively resolves this appeal. We invited the parties to submit supplemental briefing to address the applicability of *Ventura de Paulino* (and *Neske*) to this appeal because, although the Sorias filed their brief after we issued our decision in *Ventura de Paulino*, they did not address the merits of that decision. *See* Sorias' Br., ECF Doc. No. 70, at 34–36. In their supplemental briefing, the Sorias do not present any arguments that were not already addressed by either *Ventura de Paulino* or *Neske*.

First, the Sorias contend that this case is distinguishable from *Ventura de Paulino* because the City "never offered [G.S.] any pendency placement." Sorias' Supp. Br., ECF Doc. No. 95, at 3. But the same was true in *Ventura de Paulino*. Repeating what we made clear in *Neske*, "[i]n both *Ventura de Paulino* and this case, iHOPE became the students' pendency placement not at the City's instigation, but rather by operation of law after the City chose not to appeal the rulings of the impartial hearing officers holding that iHOPE was an appropriate placement

for these students." *Neske*, 2020 WL 5868279, at *1 (citing *Ventura de Paulino*, 959 F.3d at 532). Thus, "[j]ust as we deemed the City to have implicitly chosen iHOPE as the pendency placement for the students in *Ventura de Paulino*, the same applies here." *Id.*

Second, like the appellants in *Neske*, the Sorias argue that this case falls under footnote 65 of *Ventura de Paulino*, in which we reserved decision as to a situation "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." *Ventura de Paulino*, 959 F.3d at 534 n.65; *see* Sorias' Supp. Br. at 4. But again, "that situation is no more present here than it was in *Ventura de Paulino*" because "iHOPE continued to be available to [G.S.] and the City did not refuse or fail to provide pendency services at iHOPE; rather the plaintiffs unilaterally moved [G.S.] from [G.S.'s] pendency placement to a new private school." *Neske*, 2020 WL 5868279, at *2. Moreover, like the appellants in *Neske*, the Sorias never alleged in their complaint that iHOPE was effectively "unavailable" because it had changed so drastically, *see id.* at *2 n.2, and we decline to consider that argument for the first time on appeal, *see Mellon Bank, N.A. v. United Bank Corp. of N.Y.*, 31 F.3d 113, 116 (2d Cir. 1994) (declining to review an argument not raised before the district court when the party "clearly had the opportunity to raise" it below).[2]

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[2] BIRG submitted a letter to the Court after oral argument – purportedly "in response" to the letter filed by the City – arguing for the first time that iHOPE was "financially unavailable" to the Sorias due to "substantial changes to the

After *Neske* squarely and definitively rejected these attempts to distinguish *Ventura de Paulino*, we hoped (perhaps naively) that BIRG would not repeat them here. Simply put, this case is materially identical to *Ventura de Paulino*, and we reaffirm that binding precedent here.

* * *

Accordingly, we **VACATE** the district court's August 7, 2019 order and **REMAND** the case with instructions to dismiss the complaint for failure to state a claim upon which relief can be granted.

FOR THE COURT:
/s/ Catherine O'Hagan Wolfe, Clerk of Court

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iHOPE administration." *See* ECF Doc. No. 107 at 1–2. BIRG does not cite anything in the record to support these new contentions, and we refuse to consider them for the first time now. *See Mellon Bank*, 31 F.3d at 116.

DATE FILED: 10/29/20

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19 Civ. 2149 (AT)

CYNTHIA SORIA and GIOVANNI SORIA, as Parents and Natural Guardians of G.S., and CYNTHIA SORIA and GIOVANNI SORIA, Individually,

Plaintiffs,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

ORDER

ANALISA TORRES, District Judge:

Pursuant to the mandate of the United States Court of Appeals for the Second Circuit, ECF No. 50, this action is DISMISSED. Any pending motions are moot.

The Clerk of Court is directed to close the case.

SO ORDERED.

Dated: October 29, 2020
New York, New York

/s/ ANALISA TORRES, United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19 Civ. 2149 (AT)

CYNTHIA SORIA and GIOVANNI SORIA, as Parents and Natural Guardians of G.S., and CYNTHIA SORIA and GIOVANNI SORIA, Individually,

Plaintiffs,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

ORDER

ANALISA TORRES, District Judge:

Plaintiffs, Cynthia and Giovanni Soria, are the parents of G.S., a seven-year-old boy who suffers from a brain injury. Compl. ¶¶ 6-7, ECF No. 1. Plaintiffs move for a preliminary injunction (1) vacating a New York state administrative officer's decision denying the parents' request for an interim order for tuition reimbursement from Defendant, the New York City Department of Education (the "DOE"), for their son's non-public school placement at the International Institute for the Brain ("iBrain"), and (2) ordering the DOE to fund G.S. 's placement at iBrain for the 2018- 2019 school year until final adjudication of Plaintiffs' underlying

administrative proceedings. Pl. Mot., ECF No. 13. For the reasons stated below, Plaintiffs ' motion is GRANTED.

BACKGROUND

I. Framework of the Individuals with Disabilities Education Act

Pursuant to the Individuals with Disabilities Education Act (the "IDEA"), a student with a disability is entitled to a "free appropriate public education" ("FAPE"). 20 U.S. C. § 1400(d)(1)(A). An "individualized education program" or "IEP" for each child's FAPE is developed by her parents, at least one teacher, and a representative of the local educational agency. *Id.* § 1414(d)(1)(A)(i); *id.* § 1414(d)(1)(B).

However, a parent who believes that her child is not being provided with a FAPE may place her child in a private school, *see Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369–70 (1985), and "seek tuition reimbursement from the school district by filing what is known as a due process complaint," triggering "an administrative procedure by which the board of education appoints an Independent Hearing Officer ('IHO') who conducts a formal hearing and fact-finding," *M.O. v. N.Y. City Dep't of Educ.*, 793 F.3d 236, 239 (2d Cir. 2015) (internal quotation marks and citations omitted); 20 U.S.C. §§ 1412(a)(10)(C)(ii), 1415(b)(6); N.Y. Educ. Law § 4404(1). The IHO then renders a written decision on the parent's due process complaint by determining whether "(1) the proposed IEP failed to provide the

student with an appropriate public education; (2) the parent's private placement was appropriate to the child's needs; and (3) equitable considerations support the parent's claim." *Reyes ex rel. R.P. v. N.Y. City Dep't of Educ.*, 760 F.3d 211, 215 (2d Cir. 2014). The IHO's decision is binding upon both parties unless appealed to a State Review Officer ("SRO"). 20 U.S.C. § 1415(g); N.Y. Educ. Law § 4404(1), (2). An SRO's decision may be challenged by filing a civil action in a federal district court. 20 U.S.C. § 1415(i)(2)(A). That court, in turn, "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." *Id.* § 1415(i)(2)(C)(iii).

While the above-described administrative and judicial proceedings are ongoing, under the "pendency" or "stay-put" provisions of the IDEA and New York law, "unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child." *Id.* § 1415(j); *see also* N.Y. Educ. Law § 4404(4)(a). This allows the parties to preserve "the educational status quo while the parties' dispute is being resolved." *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 152 (2d Cir. 2014). An IHO then holds a hearing and issues an interim order on pendency ("IOP") that determines (1) the student's "pendency placement" and (2) whether the DOE must provide tuition reimbursement so the student may "stay put" in her then-current educational placement while the parent's due process complaint is being adjudicated. 20 U.S.C. § 1415(j); *see also S.G. v. Success Acad. Charter Schs., Inc.*, No. 18 Civ. 2484, 2019 WL 1284280, at *6 (S.D.N.Y. Mar. 20, 2019); *M.M. ex rel.*

J.M. v. N.Y. City Dep't of Educ., No. 09 Civ. 5236, 2010 WL 2985477, at *11 (S.D.N.Y. July 27, 2010). "If the student's 'current educational placement' is in private school, the responsibility for private school tuition 'stays put' as well. Thus, if the district has been paying for private school tuition, the district must continue to do so until the moment when the child's pendency changes." *M.M. ex rel. J.M.*, 2010 WL 2985477, at *2 (internal quotation marks and citation omitted). The parties may file an interlocutory appeal of an IHO's IOP decision to an SRO, N.Y. Comp. Codes R. & Regs. tit. 8, § 279.10(d), and then seek review of the SRO's decision before a federal district court, 20 U.S.C. § 1415(i)(2)(A). This is the procedural posture before the Court.

II. Factual Background

Plaintiffs are the parents of G.S., a seven-year-old boy who suffers from a brain injury. Compl. ¶¶ 6–7. The DOE has classified G.S. as a child with a disability. *Id.* ¶ 8. During the 2017–2018 school year, G.S. was a student at the International Academy of Hope, or "iHope." *Id.* ¶ 9. Plaintiffs filed a due process complaint pursuant to 20 U.S.C. § 1415(f)(1)(A) seeking tuition reimbursement at iHope for the 2017–2018 school year. *See id.* ¶ 10. On June 6, 2018, New York City IHO Suzanne M. Carter awarded full tuition and costs at iHope to Plaintiffs (the "IHO Carter Decision"). *Id.*; Ashanti Decl. Ex. A, ECF No. 15-1. The DOE did not appeal this decision. Compl. ¶ 11.

On June 22, 2018, Plaintiffs provided the required ten-day notice to the DOE indicating that

they were unilaterally moving G.S. from iHope to iBrain for the 2018–2019 school year, where G.S. remains a student. *Id.* ¶¶ 8, 12–13. Plaintiffs filed a second due process complaint, this time seeking tuition reimbursement for the 2018–2019 school year at iBrain and additionally, as relevant here, seeking an IOP directing the DOE to fund G.S.'s tuition at iBrain until the due process complaint is resolved, arguing that such funding was appropriate because G.S.'s placement at iBrain was "substantially similar" to his placement at iHope, which had been fully funded pursuant to the IHO Carter Decision. *Id.* ¶ 14; Ashanti Decl. Ex. D, ECF No. 15-4. On August 27, 2018, New York City IHO Mindy G. Wolman denied Plaintiffs' IOP request (the "IHO Wolman Decision"), Compl. ¶ 17; IHO Wolman Decision, Ashanti Decl. Ex. F, ECF No. 15-6, holding that G.S. was not entitled to pendency funding under Section 1415(j) at iBrain because (1) Plaintiffs unilaterally moved him there, and (2) the evidence submitted by Plaintiffs was insufficient to establish that G.S.'s program at iBrain was "substantially similar" to his program at iHope. IHO Wolman Decision at 4–6.

Plaintiffs appealed the IHO Wolman Decision to the New York State Review Office. Compl. ¶ 18. On November 9, 2018, SRO Steven Krolak issued a decision (the "SRO Decision") (1) that assumed without deciding that G.S. could be entitled to an IOP order despite being moved unilaterally by his parents, (2) but that affirmed IHO Wolman's denial of the IOP, stating that SRO Krolak lacked sufficient information to determine whether G.S.'s programs at iHope and iBrain were "substantially similar." SRO Decision at 11–14, Ashanti Decl. Ex. H, ECF No. 15-8.

On March 8, 2019, Plaintiffs filed a complaint against the DOE in this Court, seeking an order (1) vacating the SRO Decision and (2) directing the DOE to fund G.S.'s tuition at iBrain for the 2018–2019 school year. Compl. at 5–6. On May 3, 2019, Plaintiffs moved for a preliminary injunction seeking such relief. *See* Pl. Mot.

DISCUSSION

I. Standard of Review

A district court reviewing a state administrative decision under the IDEA "must engage in an independent review of the administrative record and make a determination based on a preponderance of the evidence." *M.H. v. N.Y. City Dep't of Educ.*, 685 F.3d 217, 240 (2d Cir. 2012) (internal quotation marks and citation omitted). "In deciding what weight is due to an IDEA administrative decision," the district court's analysis will often "'hinge on the kinds of considerations that normally determine whether any particular judgment is persuasive' . . . includ[ing] the quality and thoroughness of the reasoning, the type of determination under review, and whether the decision is based on the administrative body's familiarity with the evidence and the witness." *Reyes ex rel. R.P. v. N.Y. City Dep't of Educ.*, 760 F.3d 211, 218 (2d Cir. 2014) (quoting *M.H.*, 685 F.3d at 244). Although the "federal court is required to give due weight to the rulings of a local or state administrative hearing officer, . . . [j]udicial deference is particularly appropriate when the state hearing officers' review has been thorough and careful." *M.C. ex rel. Mrs. C. v. Voluntown Bd. of*

Educ., 226 F.3d 60, 66 (2d Cir. 2000) (internal quotation marks, citation, and alterations omitted). The standard of review "requires a more critical appraisal of the agency determination than clear-error review but nevertheless falls well short of complete de novo review." *G.B. v. N.Y. City Dep't of Educ.*, 145 F. Supp. 3d 230, 245 (S.D.N.Y. 2015) (quoting *M.H.*, 685 F.3d at 244). "When seeking to overturn an SRO's decision, the [p]arents bear the burden of demonstrating that the decision was insufficiently reasoned or supported." *N.B. v. N.Y. City Dep't of Educ.*, 711 F. App'x 29, 32 (2d Cir. 2017) (summary order).

II. Analysis

Plaintiffs seek a preliminary injunction pursuant to 20 U.S.C. § 1415(j) that (1) overturns the SRO Decision and (2) orders the DOE to fund G.S.'s placement at iBrain for the 2018–2019 school year until the underlying administrative proceedings are resolved. *See* Pl. Mot.

A. Plaintiffs' Unilateral Decision to Transfer G.S. to iBrain

The parties agree that G.S.'s educational placement for the purposes of pendency is based on the unappealed IHO Carter Decision, which held that iHope was an appropriate placement for G.S. for the 2017–2018 school year.[1] Def. Mem. at 7–8, ECF

[1] Pendency can be based on "an unappealed administrative decision." *Student X. v. N.Y. City Dep't of Educ.*, No. 07 Civ. 2316, 2008 WL 4890440, at *20 (E.D.N.Y. Oct. 30, 2008). The "pendency" or "stay-put" provision of 20 U.S.C. § 1415(j)

No. 21; Compl. ¶ 15; SRO Decision at 9. Defendant asserts, however, that G.S.'s pendency established by that decision fails to establish pendency for iBrain because Plaintiffs moved him from iHope to iBrain. Def. Mem. at 7–8, 15.

Parents may unilaterally transfer their child from an established pendency placement to another educational setting so long as they comply with the ten-day notice requirement and establish that the two programs are substantially similar. *See Navarro Carrilo v. N.Y. City Dep't of Educ.*, No. 19 Civ. 2944, 2019 WL 2511233, at *2–4 (S.D.N.Y. June 13, 2019), *appeal filed*, No. 19-1813 (2d Cir. June 19, 2019) ("[P]arents may move their child from a previously approved private facility to another private facility and still receive 'stay put funding' as long as the new facility has the same 'general type of educational programming' as the approved facility." (citations omitted)); *Abrams v. Carranza*, No. 19 Civ. 4175, 2019 WL 2385561, at *4 (S.D.N.Y. June 6, 2019) (holding that parents are entitled to pendency tuition funding after unilaterally moving their child so long as parents demonstrate substantial similarity of programs); *cf. Honig v. Doe*, 484 U.S. 305, 323 (1988) (noting that, with the pendency provision, Congress sought to "strip schools of the *unilateral* authority they had traditionally employed

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"establishes a student's right to a stable learning environment during what may be a lengthy administrative and judicial review." *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199 (2d Cir. 2002). It "represents Congress' policy choice that all handicapped children, regardless of *whether their case is meritorious or not*, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved." *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 453 (2d Cir. 2015).

to exclude disabled students . . . from school"). *But see De Paulino v. N.Y. City Dep't of Educ.*, No. 19 Civ. 222, 2019 WL 1448088, at *6 (S.D.N.Y. Mar. 20, 2019), *appeal filed*, No. 19-1662 (2d Cir. June 3, 2019). The Court rejects, therefore, Defendant's argument that by shifting G.S. from one non-public school to another Plaintiffs gave up their right to invoke Section 1415(j)'s stay-put protections.

B. Substantial Similarity of iHope and iBrain Programs

The Court now turns to the parties' second disagreement, namely, whether the iHope and iBrain programs are "substantially similar." When determining whether two programs are "substantially similar," "a slate of factors" is considered, including "whether the educational program in the student's IEP has been revised; whether the student will be educated with nondisabled peers to the same extent; and whether the student will have the same opportunities to participate in nonacademic and extracurricular services." *Navarro Carrilo*, 2019 WL 2511233, at *4; *see also T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 171 (2d Cir. 2014) ("[T]he pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers," and instead "guarantees only the same general level and type of services that the disabled child was receiving."); *T.Y. v. N.Y. City Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) ("'Educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a

child will receive—rather than the 'bricks and mortar' of the specific school." (citation omitted)); *Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS 79) v. N.Y. City Bd. of Educ.*, 629 F.2d 751, 753–54 (2d Cir. 1980) (noting that "the term 'educational placement' refers only to the general educational program in which the handicapped child is placed," not a specific school).

Here, the SRO Decision incorrectly concluded that "there is insufficient information about some important details with respect to the program provided to the student at iHope during the 2017–18 school year to make a reasonable determination as to whether the transfer of the student to iBrain constituted a change in educational placement or is a substantially similar placement." SRO Decision at 13. This is because SRO Krolak failed to conduct a thorough inquiry and analysis. As SRO Krolak noted at the beginning of his opinion, he was "required to examine the entire hearing record . . . [and] seek additional evidence if necessary." SRO Decision at 2; *see also* 34 C.F.R. § 300.514(b)(2)(iii) ("The official conducting the review must . . . [s]eek additional evidence if necessary."). But, despite SRO Krolak's repeated complaint that he lacked evidence, he did not search for supplementation. For example, the iHope IEP that SRO Krolak deemed missing from the record was relied upon by the IHO Carter Decision awarding full tuition and costs at iHope for the 2017–2018 year. *Compare* SRO Decision at 12–13, *with* Ashanti Decl. ¶ 6 & Ex. A, ECF No. 15-1. Additionally, although SRO Krolak primarily focused on the absence of evidence with respect to G.S.'s program at iHope, he also noted that the record did not include information about certain

services at iBrain, including "hearing education services." SRO Decision at 13. G.S., however, does not receive hearing education services at iBrain. Ashanti Decl. Ex. I, ECF Nos. 15-9, 15-10. These deficiencies in the SRO Decision illustrate an abject lack of thoroughness and sound analysis.

Moreover, on January 3, 2019, Plaintiffs submitted a motion to IHO Wolman seeking leave to introduce additional evidence in support of their application for pendency. Ashanti Decl. ¶ 18, ECF No. 15. The evidence consists of an affidavit of Nia Mensah, Doctor of Physical Therapy, who is the Clinical Director at iBrain and former Director of Physical Therapy at iHope. Mensah Decl. ¶¶ 1–2, Ashanti Decl. Ex. I, ECF No. 15-9 at 6–7. Curiously, IHO Wolman recused herself before ruling on the motion, as did a series of other IHOs before the action was eventually assigned to IHO Edgar De Leon, who has not yet ruled on it. Ashanti Decl. ¶¶ 19–41.

The Court shall consider Dr. Mensah's affidavit. *See* 20 U.S.C. § 1415(i)(2)(C)(ii) ("[T]he court . . . shall hear additional evidence at the request of a party."). Dr. Mensah identifies the many similarities between G.S.'s programs at iHope and iBrain. At iBrain—like at iHope—G.S. (1) is in a 6:1+1[2] special class; (2) has a full-time paraprofessional and school nursing services available to him as needed throughout the day; (3) receives the following one-on-one sixty-minute sessions: physical therapy five times a week, occupational therapy five times a

[2] "6:1+1" refers to "a special education class with six students, one special education teacher, and one paraprofessional." *See S.Y. v. N.Y. City Dep't of Educ.*, 210 F. Supp. 3d 556, 564 (S.D.N.Y. 2016).

week, and vision education services three times a week; (4) has a parent counseling and training mandate once per month for sixty minutes; and (5) has special transportation accommodations, which include a travel paraprofessional, limited travel time, air conditioning, and a wheelchair-accessible vehicle. Mensah Decl. ¶¶ 7–8. At iHope, G.S. received one-on-one speech-language therapy four times weekly and once weekly in a group setting, whereas at iBrain he receives it one-on-one five times weekly. *Id.* At iBrain, G.S. has one weekly sixty-minute assistive technology services session; such services were also available at iHope. *Id.* ¶¶ 6–7. Dr. Mensah notes that iBrain has many of the same students and staff as iHope, because "some of iHope's paraprofessionals, teachers and related services providers as well as most of its students, moved to iBrain upon iBrain's inception in 2018." *Id.* ¶ 9. Although a few services were not offered in September 2018, as iBrain was starting up, Dr. Mensah states that these deficiencies were short-lived and that any missed sessions will be made up, including the single missed parent counseling and training session that has already been made up. *Id.* ¶ 7(A)–(B); *see also Navarro Carrilo*, 2019 WL 2511233, at *17 ("I cannot find . . . that the failure to have a vision specialist on staff during the first two and a half months of the school year is an 'elimination' of vision support services, such that iBrain was not 'substantially similar' to iHope.").

"Substantially similar," by its own terms, does not require sameness.[3] The record demonstrates,

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[3] As the Second Circuit has observed, an interpretation of change in "educational placement" that would include any

therefore, by a preponderance of the evidence that G.S.'s program at iBrain for the 2018–2019 school year is substantially similar to his program at iHope for the 2017–2018 school year. Accordingly, G.S. is entitled to pendency at iBrain for the 2018–2019 school year.[4]

C. Preliminary Injunction

Defendant's remaining argument is that an injunction under Section 1415(j) is not "automatic"—that is, Plaintiffs must still meet the traditional requirements to obtain a preliminary injunction. Def. Mem. at 8–10 (citing Pl. Mem. at 8, ECF No. 14). Specifically, Defendant argues that Plaintiffs are not entitled to an injunction because "there is no threat to the stability of G.S.'s learning experience" and "no evidence he will be expelled from iBrain" absent an injunction. *Id.* at 9. The Court disagrees.

Defendant contends that Section 1415(j) is motivated in part by a student's interest in maintaining a stable learning environment. *Id.* (citing *Cohen v. N.Y. City Dep't of Educ.*, No. 18 Civ. 11100, 2018 WL 6528241, at *2 (S.D.N.Y. Dec. 12, 2018) (noting that the Second Circuit's "automatic preliminary injunction" directive "has less purchase

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program changes would significantly hamper the ability of the DOE to implement even minor discretionary changes for its students. *Concerned Parents*, 629 F.2d at 755. Where, as here, parents transfer their child from one private school to another, there is no need to more strictly interpret changes in educational placement.

[4] Because the Court deems the programs at iHope and iBrain substantially similar, it does not address Plaintiffs' alternative arguments concerning a theory of operative placement. Pl. Mem. at 20–23.

. . . in a case where there is no meaningful threat that a student will be removed from his pendency placement"); *Cronin v. Bd. of Educ. of E. Ramapo Cent. Sch. Dist.*, 689 F. Supp. 197, 202 (S.D.N.Y. 1988) ("The touchstone in interpreting section 1415 has to be whether the decision is likely to affect in some significant way the child's learning experience." (internal quotation marks and citation omitted))).

However, the Second Circuit has described Section 1415(j) as "an automatic preliminary injunction," and noted that it "substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships." *Zvi D. by Shirley D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982). Another court in this District recently considered and rejected Defendant's argument that there must be a threat to a child's learning experience for Section 1415(j) to apply. *Abrams*, 2019 WL 2385561, at *5. That court noted that, "[w]hile a few district courts have made the commonsense observation that plaintiffs might not be entitled to such an injunction if they have not shown any true danger exists, they have not relied on that observation to decline to grant a preliminary injunction or otherwise disturbed the well settled law that irreparable harm need not be shown to obtain injunctive relief regarding pendency." *Id.* (internal quotation marks and citations omitted); *see also Cruz v. N.Y. City Dep't of Educ.*, No. 18 Civ. 12140, 2019 WL 147500, at *9 (S.D.N.Y. Jan. 9, 2019) ("[T]his Court does not read *Cohen* as seeking to overturn well settled law

that irreparable harm need not be shown to obtain injunctive relief regarding pendency."). The Court agrees with *Abrams* and holds that Plaintiffs need not demonstrate irreparable harm in order to prove their entitlement to injunctive relief with respect to pendency.[5]

In actions brought under Section 1415, a court has the discretion to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). Here, the prerequisites for a preliminary injunction under Section 1415(j) have been met.

CONCLUSION

For the reasons stated above, Plaintiffs' motion for a preliminary injunction (1) vacating SRO Decision 18-113 dated November 9, 2018 and (2) ordering the DOE to fund G.S.'s pendency placement at iBrain for the 2018–2019 school year until a final adjudication on the due process complaint is complete is GRANTED.

The Clerk of Court is directed to terminate the motion at ECF No. 13. Plaintiffs' counsel shall submit a motion for attorney's fees by **September 6, 2019**. If agreement on attorney's fees can be reached,

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[5] Defendant cites to two opinions from this District which held that absent imminent threat of expulsion the parents' requests for preliminary injunctions to find pendency were to be denied. Def. Mem. at 9 (citing *Cohen*, 2018 WL 6528241, at *3; *Fiallos v. N.Y. City Dep't of Educ.*, No. 19 Civ. 334 (S.D.N.Y. Apr. 5, 2019), ECF No. 36). The Court declines to follow these decisions and instead joins those cases which held that (1) injury existed to establish jurisdiction and (2) the prerequisites to preliminary injunctions were met absent a showing of irreparable harm. *See Navarro Carrilo*, 2019 WL 2511233; *Abrams*, 2019 WL 2385561.

the parties shall submit a consent judgment within the same.

SO ORDERED.

Dated: August 7, 2019
New York, New York

/S/ ANALISA TORRES
United States District Judge

In the
United States Court of Appeals
for the Second Circuit

AUGUST TERM 2019

No. 19-1662-cv

ROSA ELBA VENTURA DE PAULINO,
INDIVIDUALLY AND AS P/N/G OF R.P.,
Plaintiff-Appellant,

v.

NEW YORK CITY DEPARTMENT OF
EDUCATION AND NEW YORK STATE
EDUCATION DEPARTMENT
Defendants-Appellees,

ROBERT BRIGILIO,
Defendant.

On Appeal from the United States District Court
for the Southern District of New York

No. 19-1813-cv

MARIA NAVARRO CARRILLO, AS PARENT AND NATURAL GUARDIAN OF M.G. AND INDIVIDUALLY; JOSE GARZON, AS PARENT AND NATURAL GUARDIAN OF M.G. AND INDIVIDUALLY,
Plaintiffs-Appellees,

v.

NEW YORK CITY DEPARTMENT OF EDUCATION,
Defendant-Appellant.*

On Appeal from the United States District Court for the Southern District of New York

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ARGUED: JANUARY 28, 2020
DECIDED: MAY 18, 2020

Before: LEVAL, CABRANES, AND SACK, *Circuit Judges*.

The plaintiffs in these tandem cases, parents of students with disabilities ("Parents"), chose to withdraw their children ("Students") from one private school and to enroll them in a new private school. Shortly after, the Parents initiated administrative

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* The Clerk of Court is directed to amend the official caption as shown above.

proceedings to challenge the adequacy of the Students' individualized educational programs ("IEPs"), written statements developed by a local committee on special education that set out, among other things, the Students' educational needs and the services that must be provided to meet those needs. The Parents sued the New York City Department of Education ("City") under the Individuals with Disabilities Education Act to obtain public funding for the new school's tuition and services during the pendency of those proceedings.

In the first case, *Ventura de Paulino v. New York City Department of Education*, No. 19-1662-cv, Plaintiff-Appellant Rosa Elba Ventura de Paulino appeals from an order denying her application for a preliminary injunction and from a final judgment entered on May 31, 2019, in the United States District Court for the Southern District of New York (George B. Daniels, *Judge*), dismissing her lawsuit. In the second case, *Navarro Carrillo v. New York City Department of Education*, No. 19-1813-cv, the City appeals from an order entered on June 13, 2019, in the United States District Court for the Southern District of New York (Colleen McMahon, *Chief Judge*), granting an application by Plaintiffs-Appellees Maria Navarro Carrillo and Jose Garzon for a preliminary injunction directing the City to pay for the new school's tuition and educational services.

Although these tandem cases come to us in different procedural postures, the question presented on appeal is the same: whether parents who unilaterally enroll their child in a new private school and challenge the adequacy of the child's IEP are entitled to public funding for the new school during the pendency of the IEP dispute, on the basis that

the educational program being offered at the new school is substantially similar to the program that was last agreed upon by the parents and the school district and was offered at the previous school.

On *de novo* review, we conclude that such parents are not entitled to public funding because it is the school district, not the parents, who has the authority to decide how a child's last agreed-upon educational program is to be provided at public expense during the pendency of the child's IEP dispute.

Accordingly, the May 31, 2019 judgment in favor of the City in *Ventura de Paulino* is **AFFIRMED**. And the June 13, 2019 order granting the application for preliminary injunction against the City in *Navarro Carrillo* is **VACATED,** and the cause **REMANDED** with instructions to dismiss the complaint for failure to state a claim upon which relief can be granted.

KARL J. ASHANTI (Peter G. Albert, *on the brief*), Brain Injury Rights Group, Ltd., New York, NY, *for Plaintiff-Appellant* in *Ventura de Paulino*, and KARL J. ASHANTI (Peter G. Albert, *on the brief*), Brain Injury Rights Group, Ltd., New York, NY, *for Plaintiffs-Appellees* in *Navarro Carrillo*.

ERIC LEE, Assistant Corporation Counsel (Richard Dearing and Scott Shorr, *on the brief*), *for* James E. Johnson, Corporation Counsel of the City of New York, New York, NY, *for City Defendant-Appellee* in *Ventura de Paulino*, and ERIC LEE, Assistant Corporation Counsel (Richard Dearing and Scott

Shorr, *on the brief*), *for* James E. Johnson, Corporation Counsel of the City of New York, New York, NY, *for Defendant-Appellant* in *Navarro Carrillo*.

BLAIR J. GREENWALD, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, and Steven C. Wu, Deputy Solicitor General, *on the brief*), *for* Letitia James, Attorney General, State of New York, New York, NY, *for State Defendant-Appellee* in *Ventura de Paulino*.

JOSÉ A. CABRANES, *Circuit Judge*:

The plaintiffs in these tandem cases, parents of students with disabilities ("Parents"), chose to withdraw their children ("Students") from one private school and to enroll them in a new private school. Shortly after, the Parents initiated administrative proceedings to challenge the adequacy of the Students' individualized education programs ("IEPs"), written statements developed by a local committee on special education that set out, among other things, the Students' educational needs and the services that must be provided to meet those needs.[1] The Parents also sued the New York City

[1] More specifically, the IEP is "a written statement that sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives." *M.H. v. N.Y. City Dep't of Educ.*, 685 F.3d 217, 224 (2d Cir. 2012) (internal quotation marks and citation omitted). The State of New York "has assigned responsibility for developing appropriate IEPs to local Committees on Special

Department of Education ("City") under the Individuals with Disabilities Education Act ("IDEA")[2] to obtain public funding for the new school's tuition and services during the pendency of the Students' IEP disputes.

In the first case, *Ventura de Paulino v. New York City Department of Education*, No. 19-1662-cv, Plaintiff-Appellant Rosa Elba Ventura de Paulino ("Ventura de Paulino") appeals from an order denying her application for a preliminary injunction and from a final judgment entered on May 31, 2019, in the United States District Court for the Southern District of New York (George B. Daniels, *Judge*), dismissing her lawsuit. In the second case, *Navarro Carrillo v. New York City Department of Education*, No. 19-1813-cv, the City appeals from an order entered on June 13, 2019, in the United States District Court for the Southern District of New York (Colleen McMahon, *Chief Judge*), granting an application by Plaintiffs-Appellees Maria Navarro Carrillo ("Navarro Carrillo")[3] and Jose Garzon

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Education . . ., the members of which are appointed by school boards or the trustees of school districts." *Id.* (internal quotation marks and citation omitted); *see also* N.Y. Educ. Law § 4402(1)(b)(1).

[2] 20 U.S.C. §§ 1400–1482.

[3] The record reveals that the name of Plaintiff-Appellee is Maria Navarro Carrillo, not Maria Navarro Carrilo as referred to by counsel. We note that "Carrillo," unlike "Carrilo," is a common Hispanic surname. Indeed, the administrative proceedings and school enrollment documents correctly identify her surname as "Navarro Carrillo," *see, e.g.*, *Navarro Carrillo* Joint App'x at 80, 83, 89, 143. The name was changed to "Carrilo," a misspelling of her maternal surname, by her

("Garzon") for a preliminary injunction directing the City to pay for the new school's tuition and educational services.[4]

Although these tandem cases come to us in different procedural postures, they present the same material facts and legal issues. The Students' educational program that was last agreed upon by the City and the Parents in the end of the 2017-2018 school year listed the International Academy of Hope ("iHOPE"), a private school, as the Students' educational provider. Prior to the beginning of the 2018-2019 school year, the Parents unilaterally enrolled the Students in a new private school, the

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counsel when filing the complaint. The misspelled name was used throughout the litigation of her case.

[4] Because there appears to be some confusion in the briefs as to the correct surname of the Parents in these tandem cases, we take this opportunity to recall the proper usage of Hispanic names and surnames. As a general rule, according to Spanish naming conventions, Hispanics typically have two surnames. The first last name is the father's family name, and the second last name is the mother's paternal family name. A person may be "known by merely his father's name, as in English; still in all formal cases," or where the father's name is common, the mother's name is often used in addition to the father's name. MARATHON MONTROSE RAMSEY, A TEXTBOOK OF MODERN SPANISH, AS NOW WRITTEN AND SPOKEN IN CASTILE AND THE SPANISH AMERICAN REPUBLICS 678 (Rev. New York: H. Holt and Co. 1958) (Orig. Publ. 1894); *see also* Wendy Squires, *A Short Guide to Establishing a Multilingual Practice*, 50 No. 6 PRAC. LAW. 31, 33 (2004). Here, with respect to Ms. Maria Navarro Carrillo, we assume based on the record that her father's last name is "Navarro" and her mother's paternal family name is "Carrillo." Therefore, for purposes of her legal identification, the last name of Maria Navarro Carrillo is "Navarro Carrillo," or just "Navarro." Referring to her as "Carrillo," or to the family as the "Carrillos," is incorrect.

International Institute for the Brain ("iBRAIN"). On appeal, the Parents contend that the City is obligated to pay for the Students' tuition at iBRAIN because iBRAIN's educational program is substantially similar to the program that was offered at iHOPE, which the City consented to and paid for.

The question presented in these cases is one of first impression: whether under the "stay-put" provision of the IDEA parents who unilaterally enroll their child in a new private school and challenge the child's IEP are entitled to public funding for the new school during the pendency of the IEP dispute, on the basis that the educational program being offered at the new school is substantially similar to the program that was last agreed upon by the parents and the school district and was offered at the previous school. More fundamentally stated, we must determine whether the fact that the school district has authority to decide how the child's agreed-upon educational program is to be provided during the pendency of an IEP dispute means that the parents also have such authority.

In the circumstances presented, we conclude, on *de novo* review, that parents are not entitled to such public funding because it is generally up to the school district to determine how an agreed-upon program is to be provided during the pendency of the IEP dispute. Regardless of whether iBRAIN's educational program is substantially similar to that offered previously at iHOPE, the IDEA does not require the City to fund the Students' program at iBRAIN during the pendency of their IEP dispute; when the Parents unilaterally enrolled the Students

at iBRAIN, the Parents did so at their own financial risk.

Accordingly, in *Ventura de Paulino*, we **AFFIRM** the May 31, 2019 judgment of the District Court in favor of the defendant school system; in *Navarro Carrillo*, we **VACATE** the District Court's June 13, 2019 order granting the application for a preliminary injunction against the school system and **REMAND** the cause with instructions to dismiss the complaint for failure to state a claim upon which relief can be granted.[5]

I. BACKGROUND

A. The IDEA's Legal Framework

The IDEA authorizes the disbursement of federal funds to States[6] that develop appropriate plans to, among other things, provide a free and appropriate public education ("FAPE") to children with disabilities.[7] To provide a FAPE to each student

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[5] A third case presenting the same legal question, *see Mendez v. New York City Department of Education*, No. 19-1852-cv, was argued before this Court on the same day, January 28, 2020, along with these tandem cases. We have disposed of the appeal in *Mendez* by summary order filed simultaneously herewith, in which we dismiss the case for lack of appellate jurisdiction. Of course, upon the issuance of the mandate in *Ventura de Paulino* and *Navarro Carrillo*, our analysis in this opinion will bind the District Court in *Mendez*.

[6] "The term 'State' [in the IDEA] means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas." 20 U.S.C. § 1401(31).

[7] *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006); *see also* 20 U.S.C. § 1412(a)(1)(A).

with a disability, a school district must develop an IEP that is "reasonably calculated to enable the child to receive educational benefits."[8] The IEP must identify the student's "particular educational needs . . . and the services required to meet those needs."[9]

The IDEA also requires participating States to develop an administrative review process for parents who are dissatisfied with their child's education and wish to challenge the adequacy of the child's IEP.[10] To that effect, the State of New York "has implemented a 'two-tier system of administrative review.'"[11] In the first tier, a parent can file an administrative "due process complaint" challenging the IEP and requesting a hearing before an impartial hearing officer.[12] The party aggrieved by the hearing officer's decision may then "proceed to the second tier, 'an appeal before a state review officer.'"[13] Once the state review officer makes a final

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[8] *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 151 (2d Cir. 2014) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982)).

[9] *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998).

[10] 20 U.S.C. § 1415(b)(6)–(8).

[11] *Mackey ex rel. Thomas M. v. Bd. of Educ. for the Arlington Cent. Sch. Dist.*, 386 F.3d 158, 160 (2d Cir. 2004) (quoting *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 197 (2d Cir. 2002)).

[12] *Id.* (citing N.Y. Educ. Law § 4404(1); 20 U.S.C. § 1415(f)).

[13] *Id.* (quoting *Murphy*, 297 F.3d at 197) (citing N.Y. Educ. Law § 4404(2); 20 U.S.C. § 1415(g)).

decision, the aggrieved party may seek judicial review of that decision in a state or federal trial court.[14]

At the crux of these cases is a provision in the IDEA known as the "pendency" or "stay-put" provision.[15] It provides that, while the administrative and judicial proceedings are pending and "unless the school district and the parents agree otherwise," a child must remain, at public expense, "in his or her then-current educational placement."[16] The term "educational placement" refers "only to the general type of educational program in which the child is placed"[17]—*i.e.*, "the classes, individualized attention and additional services a child will receive."[18]

Parents who are dissatisfied with their child's education can "unilaterally change their child's placement during the pendency of review proceedings"[19] and can, for example, "pay for private

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[14] *See id.* (citing 20 U.S.C. § 1415(i)(2)).

[15] *See* 20 U.S.C. § 1415(j).

[16] *Mackey*, 386 F.3d at 160 (citing 20 U.S.C. § 1415(j)). The IDEA's implementing regulations under federal law, *see* 34 C.F.R. § 300.514(a) ("Child's status during proceedings"), and New York state law, *see* N.Y. Educ. L. § 4404(4)(a), impose the same requirement.

[17] *Concerned Parents v. N.Y. City Bd. of Educ.*, 629 F.2d 751, 753 (2d Cir. 1980).

[18] *T.Y. v. N.Y. City Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009).

[19] *Sch. Comm. of the Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 373–74 (1985) ("*Burlington*"); *see*

services, including private schooling."[20] They "do so," however, "at their own financial risk."[21] They can obtain retroactive reimbursement from the school district *after* the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the *Burlington-Carter* test.[22] A parent can obtain such reimbursement if: "(1) the school district's proposed placement violated the IDEA" by, for example, denying a FAPE to the student because the IEP was inadequate; (2)"the parents' alternative private placement was appropriate"; and (3) "equitable considerations favor reimbursement."[23]

B. The Parties' Relationship and Administrative Proceedings

Ventura de Paulino is the mother of R.P., and Navarro Carrillo and Garzon are the parents of M.G. Both Students, R.P. and M.G., are minors with disabilities stemming from acquired brain injuries, who are entitled to a FAPE under the IDEA. During the 2017-2018 academic year, the Students were unilaterally enrolled by the Parents at iHOPE, a

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also Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993) ("*Carter*").

[20] *T.M.*, 752 F.3d at 152 (citations omitted); *see also R.E. v. N.Y. City Dep't of Educ.*, 694 F.3d 167, 175 (2d Cir. 2012).

[21] *Burlington*, 471 U.S. at 374.

[22] *E.M. v. N.Y. City Dep't of Educ.*, 758 F.3d 442, 451 (2d Cir. 2014).

[23] *T.M.*, 752 F.3d at 152 (citations omitted); *see also E.M.*, 758 F.3d at 451.

private school. The Parents filed due process complaints alleging that the Students' IEPs proposed by the local committee on special education for that school year was inadequate and that iHOPE's IEP was appropriate for the Students.

In both instances—in June 2018 in the case of R.P., and in April 2018 in the case of M.G.—impartial hearing officers determined that: (1) the City had failed to provide the Students with a FAPE in violation of the IDEA; (2) the Parents' alternative placement at iHOPE for the 2017-2018 school year was appropriate; and (3) equitable considerations favored reimbursement to the Parents. The impartial hearing officers ordered the City to reimburse the Parents for the expenses incurred at iHOPE during the 2017-2018 school year and ordered the local committee on special education to draft a new IEP that incorporates all the items of iHOPE's IEP. The City did not appeal.

Following the reimbursement orders, in or around June 2018, the Parents unilaterally enrolled the Students at iBRAIN, a newly created private school, for the 2018-2019 school year. On July 9, 2018, the Students' first day at iBRAIN, the Parents filed a due process complaint alleging that the City continued to fail to provide the Students with a FAPE for the new school year. In that complaint, the Parents asked for an order pursuant to the IDEA's stay-put provision directing the City to fund the Students' placement at iBRAIN during the pendency of the proceedings.

On November 22, 2018, the impartial hearing officer in R.P.'s proceeding denied the request for a pendency order and concluded that, consistent with the June 2018 administrative order that the City did

not appeal, iHOPE was R.P.'s pendency placement. Although Ventura de Paulino quickly appealed the interim decision to a state review officer, she did not wait for a final decision and filed a complaint in the district court.

On March 5, 2019, the impartial hearing officer in M.G.'s proceeding denied the request for a pendency order on the basis that iBRAIN and iHOPE were not substantially similar and that M.G.'s pendency placement remained at iHOPE. Navarro Carrillo and Garzon did not appeal the interim decision to a state review officer. Instead, they too filed their own complaint in the district court.

C. District Court Proceedings

On January 9, 2019, Ventura de Paulino filed her complaint seeking, among other things, a preliminary injunction requiring the City to pay for R.P.'s iBRAIN tuition and services. On March 20, 2019, the District Court rejected the City's argument that Ventura de Paulino was required to exhaust New York's two-tier review process, but denied her application for emergency relief.[24] On May 31, 2019, the District Court granted the City's motion to dismiss the complaint for failure to state a claim upon which relief can be granted, as well as the motion to dismiss by co-defendant State of New

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[24] *See Ventura de Paulino v. N.Y. City Dep't* of Educ., No. 19-cv-222 (GBD), 2019 WL 1448088, at *1, 5–7 (S.D.N.Y. Mar. 20, 2019), *reconsideration denied sub nom. Ventura De Paulino v. N.Y. City Dep't of Educ.*, No. 19-cv-222 (GBD), 2019 WL 2498206 (S.D.N.Y. May 31, 2019).

York.[25] Final judgment dismissing the case was entered on the same day.[26]

On April 2, 2019, Navarro Carrillo and Garzon filed their complaint seeking the exact same remedy sought by Ventura de Paulino. On June 13, 2019, after concluding that iHOPE and iBRAIN were substantially similar, the District Court granted the requested preliminary injunction and vacated the March 2019 Interim Order by the impartial hearing officer in M.G.'s proceeding.[27] The District Court ordered the City to pay for M.G.'s education at iBRAIN during the pendency of M.G.'s FAPE proceeding.[28]

These appeals followed. In *Navarro Carrillo*, the District Court granted the City's motion to stay the order of preliminary injunction pending the City's interlocutory appeal.

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[25] *See Ventura De Paulino v. N.Y. City Dep't of Educ.*, No. 19-cv-222 (GBD), 2019 WL 2499204, at *1–3 (S.D.N.Y. May 31, 2019).

[26] On appeal, Ventura de Paulino's reply brief belatedly objects to the dismissal of the State of New York, but her failure to raise the objection in her opening brief waived any challenge to the District Court's dismissal. *See EDP Med. Computer Sys., Inc. v. United States*, 480 F.3d 621, 625 n.1 (2d Cir. 2007). In any event, any such challenge to the dismissal would be meritless, since Ventura de Paulino's complaint does not plausibly allege any claims against the State of New York, or even seek any relief from it.

[27] *Navarro Carrilo v. N.Y. City Dep't of Educ.*, 384 F. Supp. 3d 441, 459–65 (S.D.N.Y. 2019).

[28] *Id.* at 465.

D. Unfamiliar Litigation and a Curious Set of Facts

Before proceeding to analyze the Parents' claims, we would be remiss not to emphasize the somewhat unusual set of facts presented in these tandem cases, which in turn have given rise to an unfamiliar pattern of IDEA litigation. To our knowledge, these tandem cases are just two of approximately 23 cases presenting similar, if not virtually identical, legal questions in our Court and in the Southern District of New York. In these cases, the parents or natural guardians of the students with disabilities transferred their children from iHOPE to iBRAIN for the 2018-2019 school year without the City's consent and are now claiming that they are entitled to an order requiring the City to pay for the educational services at iBRAIN on a pendency basis. The vast majority, if not all, of these plaintiffs are represented by the Parents' counsel in these tandem cases.

The arguably unusual circumstances surrounding the mass exodus of students from iHOPE to iBRAIN were thoroughly described by Judge Jesse M. Furman of the Southern District of New York in one of the many iHOPE-to-iBRAIN-pendency cases.[29] It has been alleged that, during the summer of 2018, there was a "'split between the

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[29] While tangential to our disposition of the Parents' legal claims, we rely on Judge Furman's summary as an interesting backdrop for our analysis set forth below. *See Ferreira v. N.Y. City Dep't of Educ.*, No. 19-cv-2937 (JMF), 2020 WL 1158532, at *2 n.1 (S.D.N.Y. Mar. 6, 2020) (denying the parent's motion for summary judgment and application for preliminary injunction, and granting the City's cross-motion for summary judgment), *appeal filed* No. 20-908-cv (2d Cir. Mar. 13, 2020).

original founders and some of the [iHOPE] board' over whether [iHOPE] should admit students with disabilities besides traumatic brain injuries,"[30] and that "'the original founders and some of the administration w[ere] ousted' from [iHOPE]."[31] Donohue left iHOPE and became the founder and registered agent of iBRAIN.[32] Donohue also happens to be the founder of the Brain Injury Rights Group,[33] the law firm representing the Parents in these tandem cases and the other plaintiffs seeking public funding from the City for iBRAIN's tuition and related services.

II. DISCUSSION

A. Standard of Review

We review a district court's grant of a motion to dismiss a complaint *de novo*, "credit[ing] all non-conclusory factual allegations in the complaint and draw[ing] all reasonable inferences in [the plaintiffs']

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[30] *Id.* (quoting *Fiallos v. N.Y. City Dep't of Educ.*, No. 19-cv-334 (JGK) (S.D.N.Y. Sept. 16, 2019), ECF No. 59, at 6-7, *appeal filed* No. 19-1330-cv (2d Cir. May 3, 2019)).

[31] *Id.* (quoting *Mendez v. N.Y. City Dep't of Educ.*, No. 19-CV-2945 (DAB) (S.D.N.Y. Sept. 20, 2019), ECF No. 27, at 6-7, 17, *appeal filed* No. 19-1852-cv (2d Cir. June 24, 2019)).

[32] *Id.* (quoting *Navarro Carrilo*, 384 F. Supp. 3d at 447, 450 (alteration omitted)) (citing Docket No. 19-cv-2937, ECF No. 33, at 11 & n.9, 169).

[33] *Id.* (citing *Donohue v. N.Y. City Dep't of Educ.*, No. 18-CV-9364 (DAB) (S.D.N.Y. Oct. 18, 2018), ECF No. 7, ¶ 8; *id.* ECF No. 34, at 2).

favor,"[34] to determine "whether such allegations and inferences plausibly indicate [the plaintiffs'] entitlement to relief."[35] Similarly, "questions of law decided in connection with requests for preliminary injunctions . . . receive the same *de novo* review that is appropriate for issues of law generally."[36]

Ordinarily, to obtain a preliminary injunction, the movant has to "show (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief."[37] But where the IDEA's stay-put provision is implicated, the provision triggers the applicability of an automatic injunction designed to maintain the child's educational status quo while the parties' IEP dispute is being resolved.[38]

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[34] *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 171 (2d Cir. 2015) (citing *Nielsen v. Rabin,* 746 F.3d 58, 62 (2d Cir. 2014)).

[35] *Id.* (citing *Ashcroft v. Iqbal,* 556 U.S. 662, 678–80 (2009)).

[36] *Am. Express Fin. Advisors Inc. v. Thorley*, 147 F.3d 229, 231 (2d Cir. 1998).

[37] *Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010).

[38] *See Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982) (stating that the stay-put provision "is, in effect, an automatic preliminary injunction" that "substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships"); *see also Arlington Cent. Sch. Dist.*

Because we conclude on *de novo* review that the Parents' complaints fail to state a claim upon which relief can be granted, we need not decide what standard applies to the Parents' request for preliminary injunctive relief.[39]

B. Exhaustion of Administrative Remedies

The IDEA requires that any available administrative remedies be exhausted before a lawsuit is filed in federal court.[40] There are, however, some exceptions to the IDEA's exhaustion requirement.[41] We have stated in the past that,

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v. L.P., 421 F. Supp. 2d 692, 696 (S.D.N.Y. 2006) ("Pendency has the effect of an automatic injunction, which is imposed without regard to such factors as irreparable harm, likelihood of success on the merits, and a balancing of the hardships.").

[39] Our conclusion that the Parents' complaints fail to state a claim is based on our review of the final judgment in *Ventura de Paulino*. Because the Parents' complaints are virtually identical in all material respects, our affirmance of the dismissal of Ventura de Paulino's complaint necessarily means that Navarro Carrillo and Garzon cannot succeed on the merits of their pendency claim and that the District Court's order of preliminary injunction in their favor must be vacated.

[40] *See* 20 U.S.C. § 1415(i)(2)(A) (providing a cause of action in federal or state court to any party "aggrieved" by a "final" decision of either an impartial hearing officer, if the state does not have an appeals process, or the state review officer, if it does); *accord J.S. v. Attica Cent. Sch.,* 386 F.3d 107, 112 (2d Cir. 2004).

[41] "[E]xhaustion is not necessary if (1) it would be futile to resort to the IDEA's due process procedures; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; or (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies."

unless an exception applies, the exhaustion of administrative remedies under the IDEA is a "jurisdictional prerequisite"[42] of the statute and that a "plaintiff's failure to exhaust . . . deprives a court of subject matter jurisdiction" over any IDEA claims.[43] Although we have questioned more recently the supposed jurisdictional nature of the exhaustion requirement,[44] because we are arguably bound by those earlier statements and because, in all but the rarest of cases, we "must determine that [we] have jurisdiction before proceeding to the merits" of a claim,[45] we first consider the City's argument that

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Murphy, 297 F.3d at 199 (citing *Mrs. W. v. Tirozzi*, 832 F.2d 748, 756 (2d Cir. 1987)).

[42] *Id.*

[43] *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.,* 288 F.3d 478, 483 (2d Cir. 2002).

[44] In *Coleman v. Newburgh Enlarged City School District*, we noted that our precedent has not been entirely clear on whether the IDEA's exhaustion requirement is a jurisdictional prerequisite or a mandatory claim-processing rule. 503 F.3d 198, 203 (2d Cir. 2007); *accord Paese v. Hartford Life Accident Ins. Co.,* 449 F.3d 435, 444 n.2 (2d Cir. 2006). Unlike a jurisdictional prerequisite, the affirmative defense that a party has failed to satisfy a mandatory claim-processing rule is subject to the doctrines of waiver and forfeiture. *See Coleman*, 503 F.3d at 203. Like in *Coleman*, however, "we are not forced to decide whether our precedent [in *Polera* and *Murphy*], which labels the IDEA's exhaustion requirement as a rule affecting subject matter jurisdiction rather than an 'inflexible claim-processing' rule that may be waived or forfeited, remains good law . . . because there can be no claim of waiver or forfeiture here." *Id.* at 204.

[45] *Lance v. Coffman*, 549 U.S. 437, 439 (2007); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998);

dismissal is appropriate because the Parents failed to exhaust their administrative remedies.

The City contends that the Parents were required to wait for a ruling by a state review officer before filing their complaints in federal court. But that argument ignores the fact 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.[46] That is clearly the case here. The Parents' complaints allege that the City's failure to pay for the Students' services at iBRAIN violates the stay-put provision of the IDEA.

The City also contends that the Parents cannot rely on the stay-put provision to circumvent the IDEA's exhaustion requirement because the City has not violated the stay-put provision. That argument also fails, as it conflates the merits inquiry of whether the Parents have stated a claim upon which relief can be granted with the arguable threshold inquiry of whether the Parents needed to exhaust their administrative remedies. Because the Parents allege that the City's failure to pay for the Students'

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but see Ctr. for Reprod. Law and Policy v. Bush, 304 F.3d 183, 195 (2d Cir. 2002) (recognizing a discretionary exception to *Steel Co.* on the basis that a court, in very rare circumstances, "may dispose of the case on the merits without addressing a novel question of jurisdiction").

[46] *Murphy*, 297 F.3d at 199; *accord Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 455 (2d Cir. 2015). As we explained in *Murphy*, "given the time-sensitive nature of the IDEA's stay-put provision," and the amount of time it would take a plaintiff to exhaust the administrative process, "an immediate appeal is necessary to give realistic protection to the claimed right." 297 F.3d at 199 (citation and quotation marks omitted).

services at iBRAIN violates the stay-put provision of the IDEA, the Parents are not required to satisfy the IDEA's exhaustion requirement.

C. The IDEA's Stay-Put Provision

The IDEA's stay-put provision provides in relevant part that "during the pendency of any [administrative and judicial] proceedings conducted pursuant to this section, unless the [school district] . . . and the parents otherwise agree, the child shall remain in the then-current educational placement of the child."[47] We have interpreted this provision to require a school district "to continue funding whatever educational placement was last agreed upon for the child until the relevant administrative and judicial proceedings are complete."[48] To that effect, although we may not have previously stated the proposition clearly, the IDEA does not authorize a school district to recoup payments made for educational services pursuant to the stay-put provision (*i.e.*, pendency services).[49] As reflected in

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[47] 20 U.S.C. § 1415(j).

[48] *T.M.*, 752 F.3d at 171 (citing *Mackey*, 386 F.3d at 163).

[49] *See Mackey*, 386 F.3d at 160–61, 165–66 (explaining that school districts are required to pay for a child's pendency placement regardless of who prevails in the IEP dispute and authorizing an award for pendency services even after parents lost their IEP dispute for the relevant school year). District courts in this Circuit also have noted repeatedly that "a school district has no right under the [IDEA] to recoup pendency tuition payment from a parent." *N.Y. City Dep't of Educ. v. S.S.*, No. 09-cv-810 (CM), 2010 WL 983719, at *9 (S.D.N.Y. March 17, 2010); *see, e.g.*, *N.Y. City Dep't of Educ. v. V.S.*, No. 10-cv-05120 (JG)(JO), 2011 WL 3273922, at *9 (E.D.N.Y. July 29,

the text of the provision and our cases, Congress's policy choice was that a child is entitled to remain in his or her placement at public expense during the pendency of an IEP dispute, regardless of the merit of the child's IEP challenge or the outcome of the relevant proceedings.[50]

Where, as here, the stay-put provision is invoked, our inquiry generally focuses on identifying the child's "then-current educational placement," as it is the only educational program the school district is obligated to pay for during the pendency of an IEP dispute.[51] The term "*then-current* educational placement" in the stay-put provision typically refers to the child's last agreed-upon educational program before the parent requested a due process hearing to challenge the child's IEP.[52] Under the IDEA, an initial placement is made by the school district upon the consent of the parent.[53] A child's educational

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2011); *E. Z.-L. ex rel. R.L. v. N.Y. City Dep't of Educ.*, 763 F. Supp. 2d 584, 599 (S.D.N.Y. 2011); *C.G. ex rel. B.G. v. N.Y. City Dep't of Educ.*, 752 F. Supp. 2d 355, 361 (S.D.N.Y. 2010); *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.,* 86 F. Supp. 2d 354, 367 n.9 (S.D.N.Y. 2000).

[50] *See Mackey*, 386 F.3d at 160–61; *see also Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 83 (3d Cir. 1996), *cited with approval in Mackey*, 386 F.3d at 161.

[51] *See Mackey*, 386 F.3d at 163; *Zvi D.*, 694 F.2d at 906.

[52] *See, e.g.*, *T.M.*, 752 F.3d at 171; *Mackey*, 386 F.3d at 163; *Zvi D.*, 694 F.2d at 906.

[53] 20 U.S.C. § 1415(j) ("[I]f applying for initial admission to a public school, [the child] shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.").

placement (or program) may be changed if, for example, the school district and the parents agree on what the new placement should be. The placement can also be changed if an impartial hearing officer or state review officer finds the parents' new placement to be appropriate by adjudicating the IEP dispute in the parents' favor, and the school district chooses not to appeal the decision.[54] Accordingly, implicit in the concept of "educational placement" in the stay-put provision (*i.e.*, a pendency placement) is the idea that the parents and the school district must agree either expressly or as impliedly by law to a child's educational program.

When the impartial hearing officers in these tandem cases concluded that iHOPE was an appropriate placement for the Students and the City chose not to appeal the ruling to a state review officer, the City consented, by operation of law, to the Students' private placement at iHOPE. At that moment, the City assumed the legal responsibility to pay for iHOPE's educational services to the Students as the agreed-upon educational program that must be provided and funded during the pendency of any IEP dispute. What is in dispute here, however, is whether the stay-put provision requires the City to pay for the educational services being provided to the Students at the new school, iBRAIN.

The stay-put provision does not guarantee a child with a disability "the right to remain in the exact same school with the exact same service

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[54] *See Mackey*, 386 F.3d at 163; *see also Bd. of Educ. v. Schutz*, 290 F.3d 476, 484 (2d Cir. 2002) ("[O]nce the parents' challenge [to a proposed IEP] succeeds . . ., consent to the private placement is implied by law, and the requirements of § 1415(j) become the responsibility of the school district.").

providers while his administrative and judicial proceedings are pending. Instead, it guarantees only the same general level and type of services that the . . . child was receiving."[55]

With this in mind, the Parents first argue that, because the educational program offered at iBRAIN is arguably substantially similar to that offered at iHOPE, the decision of the Parents to move the Students to iBRAIN did not change the placement for which the City is required to pay. In the alternative, the Parents argue that the Students' operative placement is at iBRAIN, since that is where the Students were enrolled at the time that the Parents initiated the administrative proceedings challenging the Students' IEPs for the 2018-2019 school year.

The Parents' arguments focus on identifying the pendency placement that the Students are entitled to receive—the inquiry that, as stated above, typically underlies most pendency disputes. The parties' dispute requires us, however, to answer a different question: Does the fact that the City retains authority to determine how the Students' pendency services are to be provided mean that the Parents may also exercise that authority?

1. The Parents' Primary Argument

The Parents' argument that the Students' new enrollment at iBRAIN did not constitute a change in the Students' pendency placement is misplaced. In *Concerned Parents v. New York City Board of Education*, we concluded, albeit in a different

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[55] *T.M.*, 752 F.3d at 171 (citing *Concerned Parents*, 629 F.2d at 753, 756).

context, that the City's transfer of children with disabilities in special education classes at one school to substantially similar classes at other schools within the same school district did not result in a change to the students' educational placement.[56] That conclusion, however, offers no solace to the Parents' pendency claims here.

Underlying the Parents' primary argument is the assumption that because a school district can move a child to a new school that offers the same general level and type of services without violating the IDEA's stay-put provision, a parent is likewise authorized to invoke the stay-put provision to require the school district to pay for a new school identified by the parent so long as the new school offers substantially similar educational services. Not so.

For the reasons stated below, it is the City, not the Parents, that is authorized to decide how (and where) the Students' pendency services are to be provided.

a. First Reason: The IDEA's Text and Structure

We start by recognizing the well-settled principle that "[b]y and large, public education in our Nation is committed to the control of the state and local authorities."[57] By choosing to accept federal funds

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[56] *See Concerned Parents*, 629 F.2d at 756 (rejecting claim that there had been a change in the children's educational placement that triggered prior notice and hearing requirements).

[57] *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

under the IDEA, participating States do not relinquish their control over public education, including their authority to determine the educational programs of students.[58] Nor do States agree to the wholesale transfer of that authority to the parents of children with disabilities. Rather, by accepting federal funds, States primarily agree to establish procedures to ensure that a FAPE is provided to children with disabilities.[59] One of those "procedural safeguards"[60] is the right to pendency services under the stay-put provision.[61]

The stay-put provision therefore was enacted as a procedural safeguard in light of the school district's broad authority to determine the educational program of its students. The provision limits that authority by, among other things, preventing the school district from unilaterally modifying a student's educational program during the pendency

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[58] *See Tilton v. Jefferson Cty. Bd. of Educ.*, 705 F.2d 800, 804 (6th Cir. 1983) ("Congress did not compel, as the price for federal participation in the education for the handicapped, a wholesale transfer of authority over the allocation of educational resources from the duly elected or appointed state and local boards to the parents of individual handicapped children."), *cited with approval in Fallis v. Ambach*, 710 F.2d 49, 56 (2d Cir. 1983).

[59] 20 U.S.C. § 1415(a) ("Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.").

[60] *Id.* § 1415 (entitled, "Procedural Safeguards").

[61] *See id.* § 1415(j).

of an IEP dispute. It does not eliminate, however, the school district's preexisting and independent authority to determine *how* to provide the most-recently-agreed-upon educational program. As we have recognized, "[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."[62]

If a parent disagrees with a school district's decision on how to provide a child's educational program, the parent has at least three options under the IDEA: (1) The parent can argue that the school district's decision unilaterally modifies the student's pendency placement and the parent could invoke the stay-put provision to prevent the school district from doing so; (2) The parent can determine that the agreed-upon educational program would be better provided somewhere else and thus seek to persuade the school district to pay for the program's new services on a pendency basis; or (3) The parent can determine that the program would be better provided somewhere else, enroll the child in a new school, and then seek retroactive reimbursement from the school district after the IEP dispute is resolved.

That said, 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. To hold otherwise would turn the stay-put provision on its

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[62] *T.M.*, 752 F.3d at 171 (citing *Concerned Parents*, 629 F.2d at 756).

head, by effectively eliminating the school district's authority to determine how pendency services should be provided.

Here, the Parents' pendency claims seek to do exactly that. The Parents and the City had agreed that the Students' educational program would be provided at iHOPE. When apparently dissatisfied with unspecified changes to iHOPE's "management" and "philosophy," the Parents unilaterally decided that iBRAIN was a better school for the Students.[63] The Parents are certainly entitled to make that decision for the benefit of their children, but in claiming that the City must continue to pay for iBRAIN's services on a pendency basis, the Parents effectively "seek a 'veto' over school choice rather than 'input'—a power the IDEA clearly does not grant them."[64] Regardless of whether the educational program that the Students are receiving at iBRAIN is substantially similar to the one offered at iHOPE, when the Parents unilaterally enrolled the Students at iBRAIN for the 2018-2019 school year, they did so at their own financial risk.[65]

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[63] At oral argument, counsel for the Parents generally attributed the exodus of students from iHOPE to iBRAIN to "changes in the management" and "philosophy" of iHOPE.

[64] *T.Y.*, 584 F.3d at 420.

[65] 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

b. Second Reason: Cost of Pendency Services

As a practical matter, it makes sense that it is the party generally responsible for paying a student's agreed-upon educational program—here, the City—who determines how the pendency services are to be provided. That is so for two reasons: (i) public funding for pendency services can never be recouped; and (ii) the cost of educational services in schools can vary dramatically.

i. Recoupment versus reimbursement

One can imagine circumstances in which a school district pays on a pendency basis for the educational services of a private school selected unilaterally by the parents, after which a court decides in the school district's favor, by holding that the parents' unilateral transfer modified the child's pendency placement, or that the school district's proposed IEP would have afforded the child a FAPE.[66] In these circumstances, the school district

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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).

[66] *Cf. S.S.*, 2010 WL 983719, at *1 (rejecting claim by the City that it is entitled to be reimbursed for the payments made "to advance the child['s] . . . private school tuition during hearing and appeal process" pursuant to the stay-put provision in light of the state review officer's final decision that the IEP

would have no recourse under the IDEA to recoup the sums it expended on the child.[67] By contrast, if the school district were found to have unilaterally modified the child's placement, the parent could seek injunctive relief against the school district for violating the IDEA.[68]

ii. Difference in educational costs

Dramatically different costs may be presented when parents unilaterally choose to enroll their child in a new school. Indeed, the cost of providing pendency services in the new school may be substantially higher than the cost of providing those services at the previous school.[69] Nothing in the

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"proposed for the child would have afforded him a" FAPE for the relevant school year).

[67] *See ante*, note 49. This did not happen here *only* because the District Court in *Navarro Carrillo* granted the City's motion to stay the order granting the application for a preliminary injunction.

[68] *Cf. T.M.*, 752 F.3d at 172 (authorizing limited reimbursement to parents in light of, among other things, the fact that the school district refused to provide the child pendency services in the first instance); *Mackey*, 386 F.3d at 165–66 (authorizing reimbursement for pendency services even after parents lost their IEP dispute for the relevant school year).

[69] In these cases, neither the City nor the Parents presented any evidence in the record about the cost of iBRAIN's services and how they compare to the cost of similar services at iHOPE. At oral argument, however, counsel for the City informed us, without contradiction, that the cost of attending iBRAIN was significantly higher, and that the Parents had

statutory text or legislative history of the IDEA, however, "implies a legislative intent to permit" the parents of children with disabilities "to utilize the [stay-put provision's] automatic injunctive procedure . . . to frustrate the fiscal policies of participating states."[70]

c. Third Reason: Uncertainty of Litigation

The Parents' pendency claims seek to upend the educational status quo that the stay-put provision was enacted to protect. Under the Parents' theory, litigation at the outset of an IEP dispute seems inevitable. The parties will need to rush to court to obtain a ruling on an emergency basis on whether the new school selected by the parent offers a program that is substantially similar to the program offered at the prior agreed-upon school. A provision that guarantees the right of a child to *stay put* can hardly justify the uncertainty inherent in a race to the courthouse.

2. The Parents' Alternative Argument

The Parents also argue that the City must pay for iBRAIN's services on a pendency basis because it is the Students' "operative placement" at the time when the IEP proceedings were initiated. That argument fails for all of the reasons stated above. A parent cannot unilaterally transfer his or her child

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disavowed the City's transportation arrangement at iHOPE in favor of a private transportation service arranged by iBRAIN.

[70] *Fallis*, 710 F.2d at 56 (quoting *Tilton*, 705 F.2d at 804).

and subsequently initiate an IEP dispute to argue that the new school's services must be funded on a pendency basis. That argument 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.

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,[71] 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.[72] Neither circumstance is presented here.

* * *

Although the stay-put provision prevents a school district from modifying a student's pendency placement without the parents' consent, it does not prohibit the school district from determining how, and where, a student's pendency placement should be provided. The Parents and the City had agreed that the Students' pendency placement should be provided at iHOPE. When the Parents enrolled the Students at iBRAIN, they did so at their own financial risk; the Parents cannot determine unilaterally how the Students' educational program

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[71] *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 867 (3d Cir. 1996), *cited with approval in Mackey*, 386 F.3d at 163.

[72] *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625–26 (6th Cir. 1990).

is to be provided at the City's expense. The Parents having failed to plausibly allege a violation of the stay-put provision and an entitlement to a pendency order requiring the City to pay for iBRAIN's services, they may obtain retroactive reimbursement for their expenses at iBRAIN only if they are able to satisfy the three-factor *Burlington-Carter* test after their IEP disputes are resolved. That question, if ever presented, is one that we leave for another day.

III. CONCLUSION

To summarize, we conclude that:

(1) An action that alleges a violation of the stay-put provision falls within one or more of the exceptions to the exhaustion-of-administrative-remedies requirement of the Individuals with Disabilities Education Act ("IDEA").

(2) Because the Parents' complaints allege that the City's failure to pay for the Students' educational services at the International Institute for the Brain ("iBRAIN") violates the IDEA's stay-put provision, the Parents were not required to exhaust their administrative remedies.

(3) The stay-put provision of the IDEA, which was enacted to limit a school district's broad authority to determine or modify a child's educational program without the parent's consent, does not eliminate the school district's authority to determine how, and where, a student's agreed-upon educational program is to be provided at public expense during the pendency of a parental challenge to the student's individualized education program ("IEP") dispute.

(4) The fact that the City retains authority to determine how and where the Students' most-recently-agreed-upon educational program is to be provided during the pendency of the Students' IEP disputes does not mean that the Parents may exercise similar authority. The Parents are not entitled to receive public funding under the stay-put provision for a new school on the basis of its purported substantial similarity to the last agreed-upon placement.

(5) Accordingly, regardless of whether iBRAIN provided the Students' last agreed-upon educational program in a manner substantially similar to iHOPE, when the Parents unilaterally enrolled the Students at iBRAIN, the Parents did so at their own financial risk.

For the foregoing reasons, the District Court's May 31, 2019 judgment in *Ventura de Paulino* is **AFFIRMED**; the District Court's June 13, 2019 order granting the application for preliminary injunction in *Navarro Carrillo* is **VACATED** and the cause in *Navarro Carrillo* is **REMANDED** with instructions to dismiss the complaint for failure to state a claim upon which relief can be granted.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of October, two thousand twenty.

PRESENT: GUIDO CALABRESI, ROBERT A. KATZMANN, SUSAN L. CARNEY, Circuit Judges.

No. 19-4068-cv

DOROTHY NESKE, individually and as parent and natural guardian of A.N., and CHRISTOPHER NESKE, individually and as parent and natural guardian of A.N.,
Plaintiffs-Appellants,
v.

NEW YORK CITY DEPARTMENT OF EDUCATION,
Defendant-Appellee.

For Plaintiffs-Appellants: KARL ASHANTI (Peter G. Albert, on the brief), Brain Injury Rights Group, Ltd., New York, NY.

For Defendant-Appellee: ERIC LEE, Assistant Corporation Counsel (Richard Dearing, Scott Shorr, Assistant Corporation Counsel, on the brief), for James E. Johnson, Corporation Counsel of the City of New York, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Caproni, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the orders and judgment of the district court are **AFFIRMED**.

Plaintiffs-appellants Dorothy Neske and Christopher Neske appeal from the orders of the United States District Court for the Southern District of New York (Caproni, *J.*) denying their application for a preliminary injunction and their motion for reconsideration and from the judgment of the district court dismissing their lawsuit. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Without the consent of defendant-appellee New York City Department of Education ("City"), the Neskes unilaterally transferred their child with a disability, A.N., from a private school called the International Academy of Hope ("iHOPE") to another private school called the International Institute for the Brain ("iBRAIN") for the 2018-2019 school year. Shortly thereafter, they initiated an administrative proceeding to challenge the adequacy of A.N.'s individualized educational program ("IEP"), and sued the City under the stay-put provision of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(j), to seek public funding for the tuition at iBRAIN during the pendency of the IEP challenge.

We recently confronted an identical set of material facts and legal issues in *Ventura de Paulino v. New York City Department of Education*, 959 F.3d

519 (2d Cir. 2020).[1] There, we held that "[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." *Id.* at 536. That conclusion squarely applies to the instant appeal. Nevertheless, the Neskes put forth several arguments as to why *Ventura de Paulino* is not controlling, all of which we find meritless.

First, the Neskes implicitly suggest that we, in *Ventura de Paulino*, misinterpreted the stay-put provision by confusing a change in schools for a change in educational programs; that is, they argue that moving A.N. to iBRAIN did not constitute a change in "placement" for purposes of the stay-put provision. That argument is merely a backdoor attempt at relitigating the key issue that we decided in *Ventura de Paulino*, where we explicitly rejected the argument advanced by the plaintiffs in that case that a unilateral change in children's enrollment does not constitute a change in the students' pendency placement. *See id.* at 533–36.

Second, the Neskes contend that *Ventura de Paulino* is meaningfully distinguishable in that the City was deemed to have chosen a school for the students at issue for pendency purposes there, whereas here the City did not make such a choice for A.N. Not so. In both *Ventura de Paulino* and this case, iHOPE became the students' pendency placement not at the City's instigation, but rather by operation of law after the City chose not to appeal

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[1] In fact, the same attorneys represent the plaintiffs in both appeals, and the briefs filed here for the Neskes are largely carbon copies of the briefs filed for the plaintiff in *Ventura de Paulino*.

the rulings of impartial hearing officers holding that iHOPE was an appropriate placement for these students. *See id.* at 532. Just as we deemed the City to have implicitly chosen iHOPE as the pendency placement for the students in *Ventura de Paulino*, the same applies here.

Third, the Neskes contend that this case falls under footnote 65 of *Ventura de Paulino*, where we reserved decision as to a situation "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." *Id.* at 534 n.65 (emphasis added). But that situation is no more present here than it was in *Ventura de Paulino*. In both appeals, iHOPE continued to be available to the students at issue and the City did not refuse or fail to provide pendency services at iHOPE;[2] rather, the plaintiffs unilaterally moved their children from their pendency placement to a new private school. *See id.* at 527**.**

We have considered the Neskes' other arguments as to why *Ventura de Paulino* is not controlling and find them to be without merit. And the Neskes have

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[2] In their supplemental letter brief, the Neskes argue that "because iHOPE drastically changed after the 2017-2018 [school year], with respect to, *inter alia*, the delivery of related services and the composition of the student body, staff and administration, it was unavailable for A.N. to receive the same educational program he had previously received at iHOPE *for purposes of pendency*." Appellants' Letter Br., dated Aug. 7, 2020, at 5. However, this factual allegation is not in their complaint, nor have the Neskes sought leave to amend their complaint to add it, either in the district court or on appeal. We accordingly decline to consider whether the Neskes' appeal could be distinguished from *Ventura de Paulino* on that basis. *See Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71 (2d Cir. 1998).

raised no arguments on appeal that were not advanced by the plaintiffs in *Ventura de Paulino* and resolved by this Court. Accordingly, the orders and judgment of the district court are **AFFIRMED**.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe, Clerk