No. _____

In The
Supreme Court of the United States

DOROTHY NESKE, Individually and as Parent and Natural Guardian of G.S.,
CHRISTOPHER NESKE, 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 2nd day of October, two thousand twenty.

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

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. No. 19-4068-cv

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19-CV-2933 (VEC)
DATE FILED: 11/07/2019

DOROTHY NESKE and CHRISTOPHER NESKE, as Parents and Natural Guardians of A.N., and DOROTHY NESKE and CHRISTOPHER NESKE, Individually,
Plaintiffs,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,
Defendant.

ORDER

VALERIE CAPRONI, United States District Judge:

The parents and guardians of a minor, A.N., seek reconsideration of an order dismissing their action, which sought to compel the New York City Department of Education to fund A.N.'s attendance at the International Institute for the Brain ("iBrain"), a private school for children with special needs. Because Plaintiffs have not pointed to any controlling law or factual information that the Court has overlooked, Plaintiffs' motion is denied.

BACKGROUND

The relevant facts and procedural history are fully set forth in this Court's original decision. *See Neske v. New York City Dep't of Educ.*, No. 19-CV-2933, 2019 WL 3531959, at *1–2 (S.D.N.Y. Aug. 2, 2019). Within 14 days of that decision, Plaintiffs moved forreconsideration pursuant to Rule 59(e) of the Federal Rules of Civil Procedure and Rule 6.3 of the Local Civil Rules for the Southern District of New York. Pl. Br. (Dkt. 39) at 2.

DISCUSSION

"The standard for granting [] a motion [for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked."[1] *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *see also Sigmon v. Goldman Sachs Mortg. Co.*, 229 F. Supp. 3d 254, 257 (S.D.N.Y. 2017) ("[A] party moving for reconsideration must set forth 'the matters or controlling decisions which counsel believes the Court has overlooked.'" (quoting Local Civil Rule 6.3)). As such, "a motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." *Schrader*, 70 F.3d at 257. The movant also "may not advance new facts, issues, or arguments not previously presented to the Court." *Sigmon*, 229 F. Supp. 3d at 257 (citations omitted). A motion for

[1] The standard for reconsideration pursuant to Rule 59(e) is "identical" to that under Local Civil Rule 6.3 *Sigmon v. Goldman Sachs Mortg. Co.*, 229 F. Supp. 3d 254, 256 (S.D.N.Y. 2017) (collecting cases).

reconsideration may be granted if movant demonstrates "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (internal citations and quotation marks omitted).

In their brief supporting reconsideration, Plaintiffs argue that the Court misapplied *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412 (2d Cir. 2009), and *Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ.*, 629 F.2d 751 (2d Cir. 1980). Pl. Br. (Dkt. 39) at 3–4. In response to the Court's observation that Plaintiffs had taken *T.Y.*'s definition of "educational placement" "out of context," *Neske,* 2019 WL 3531959, at *6, Plaintiffs argue that context, in fact, does not matter. *See* Pl. Br. (Dkt. 39). at 4 ("Thus, regardless of the context, the *definition* of educational placement . . . is constant and does not change depending on whether it is being used by a school district or parent.") (emphasis in original). As the Court has previously explained, however, context is incredibly important because *T.Y.* stands for the proposition that "educational placement" must be defined in a manner that gives school districts, not parents, reasonable flexibility in choosing where educational services would be provided to students with disabilities. *See Neske*, 2019 WL 3531959, at *7. And, as the Court has also explained, a context-less definition would actually lead to instability of placement, which would undermine the very purpose of the pendency provision contained in the Individuals with Disabilities Education Act (IDEA).

See id. ("Otherwise, the two sides could engage in an endless tug-of-war, each seeking to countermand the other, causing the student to be repeatedly reassigned or transferred."). In other words, Plaintiffs are merely relitigating an issue that the Court has already decided, rather than pointing to any controlling law that the Court has overlooked.

Perhaps sensing that context actually does matter, Plaintiffs next attempt to distinguish *T.Y.* by contending that, in this case, DOE did not offer iHope as a pendency placement, whereas the school district in *T.Y.* offered the parents two choices. *See* Pl. Br. (Dkt. 39) at 4–5. The Court, however, sees nothing in the *T.Y.* decision that compels school districts to offer parents multiple options, and Plaintiffs have not pointed to any authority for the proposition that school districts must "offer" a pendency placement at all. Rather, as the language in the pendency provision indicates, the "pendency placement"[2] is generally not something to be offered but is instead the default placement that already exists, by virtue of an implemented IEP or another prior placement that was mutually agreed-upon.[3]

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[2] The term "pendency placement" is used interchangeably with the statutory term, "then-current educational placement." *See Arlington Cent. Sch. Dist. v. L.P.*, 421 F. Supp. 2d 692, 696–97 (S.D.N.Y. 2006).

[3] Because a "pendency placement" is the default placement, rather than something to be offered by the school district, Plaintiffs' argument that the Court based its decision on the "false premise" that the Defendant chose iHope as the pendency placement is misplaced. The Court never concluded that Defendant offered iHope as a pendency placement—that result was determined by the original Impartial Hearing Officer (IHO), who issued the Findings of Fact and Decision that agreed with *Plaintiffs'* original placement of A.N. at iHope

See 20 U.S.C. § 1415(j) ("[T]he child shall remain in the then-current educational placement."). Courts in this circuit have therefore ascertained the pendency placement by "look[ing] to: (1) 'the placement described in the child's most recently implemented IEP'; (2) 'the operative placement actually functioning at the time when the stay put provision of the IDEA was invoked'; or (3) 'the placement at the time of the previously implemented IEP.'"[4] *See Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 452 (2d Cir. 2015) (quoting *Mackey ex rel. Thomas M. v. Bd. of Educ. For Arlington Cent. Sch. Dist.*, 386 F.3d 158, 163 (2d Cir. 2004)). And as this Court noted in the original decision, when a child has an implemented IEP, there is no need to examine the "operative

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and setting forth A.N.'s program there. *See Neske*, 2019 WL 3531959, at *1. By virtue of the un-appealed decision of the IHO, theprogram at iHope became the last implemented and last agreed-upon placement. Far from mistakenly holding thatDefendant offered iHope as a placement, the Court specifically noted that Defendant had proposed a public-schoolplacement for 2018–19, and that Plaintiff could have enforced iHope as the "then-current educational placement"pursuant to the pendency provision, rather than unilaterally withdrawing A.N. from iHope and insisting that theywere entitled to pendency placement at iBrain. *See Neske*, 2019 WL 3531959, at *1 n.1.

[4] As they did in their original briefing, Plaintiffs make much hay of the idea that the lack of a "pendency placement" is an "impossible result," but that proposition, even if accepted, does nothing to advance Plaintiffs' case. Pl. Br. (Dkt. 39) at 9 (quoting *Gabel ex rel. L.G. v. Bd. of Educ. of Hyde Park Cent. Sch. Dist.*, 368 F. Supp. 2d 313, 325 (S.D.N.Y. 2005) (applying same test as set forth in *Doe* and *Mackey*)). A.N. does have a pendency placement—it is the program set forth in the FOFD rendered by IHO Sharyn Finkelstein, who approved Plaintiffs' choice of iHope.

placement."[5] *See Neske*, 2019 WL 3531959, at *5 n.3 (citing *Carrilo v. New York City Dep't of Educ.*, 384 F. Supp. 3d 441, 464 (S.D.N.Y. 2019) ("Courts tend to rely on the 'operative placement' factor in circumstances in which there was no prior-implemented IEP that might guide a determination of a 'current educational placement.'") (internal citation omitted)). In other words, while nothing forbids the school district and the parents from agreeing to a placement pending litigation, the school district is not required to propose an interim placement because, by default, courts will determine the "pendency placement" using the child's education history.

Next, Plaintiffs cite to the holding in *Carrilo*, which is not controlling, and which the Court declined to follow. *See* Pl. Br. (Dkt. 39) at 5. Plaintiffs also cite to *Soria v. New York City Dep't of Educ.*, 397 F. Supp. 3d 397 (S.D.N.Y. 2019), *see* Pl. Br. (Dkt. 39) at 6, another non-controlling decision, which agreed with *Carrilo* and was issued after this Court's decision. Because these cases are neither controlling nor overlooked, they cannot support a motion for reconsideration and instead simply reflect yet another attempt to relitigate what this Court has already decided.

Plaintiffs also make two other arguments that are far afield and non-dispositive. They take issue with the Court's characterization of Plaintiffs' argument, made in their opposition to Defendant's motion to dismiss, that the Court is required to accept as true their conclusory allegation that iHope

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[5] For that reason, Plaintiffs' argument that the Court failed to consider "operative placement" is meritless. *See* Pl. Br. (Dkt. 39) at 2-3, 8–9.

and iBrain are substantially similar. Pl. Br. (Dkt. 39) at 6. Nevertheless, that is exactly what they argued in their opposition memorandum. *See* Pl. Opp. to Mot. to Dismiss (Dkt. 24) at 4 ("Therefore, taking Plaintiffs' allegation concerning the substantial similarity of the two educational programs as true, as this Court must for purposes of DOE's motion . . . ."). Plaintiffs now contend that their allegations are far from conclusory because of testimony submitted in support of their motion for a preliminary injunction—but that is neither here nor there, as the Court resolved the case on Defendant's motion to dismiss Plaintiffs' complaint. Plaintiffs also take issue with the Court's recitation of the reality (a quotation of two other judges in this district) that, if Plaintiffs were to receive court-mandated funding, they would not be required to reimburse the school district if their action were ultimately meritless. *See* Pl. Br. (Dkt. 39) at 9–10. Plaintiffs do not dispute the accuracy of the Court's statement. And, in any event, the availability *vel non* of reimbursement provides context but it is not critical to the Court's conclusion, which hinges instead on the Second Circuit's decisions in *T.Y.* and *Concerned Parents*.

Finally, Plaintiffs make two related arguments—Defendant did not show that iHope was available as a placement for 2018–19,[6] and Defendant did not

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[6] The Court's original decision agreed with the Impartial Hearing Office that Plaintiffs may not invoke the "substantial similarity" standard unless the record shows that the prior placement, iHope, is unavailable. *See Neske*, 2019 WL 3531959, at *1, 7. The Impartial Hearing Officer was clear on this point, Plaintiffs did not challenge it in their original papers, and they cannot now raise a new issue on a motion for reconsideration, to flip both the standard and burden from proof of unavailability to proof of availability. In any event, the Court

make a *prima facie* showing that whatever pendency placement it offered was satisfactory. *See* Pl. Br. (Dkt. 39) at 6, 8–9. Aside from the fact that a "pendency placement" is generally pre-determined by the factual circumstances, rather than offered by the Defendant, as discussed above, Plaintiffs gravely misunderstand the compromise struck by the IDEA's pendency provision. Section 1415(j) "requires a school district to continue funding whatever educational placement was *last agreed upon* for the child until" the school district and the parents can resolve their disagreements. *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 171 (2d Cir. 2014) (emphasis added). The idea of the "last agreed upon" placement rests on the common-sense notion that a presumptively appropriate, interim placement

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has ruled on this issue, and Plaintiffs have not cited any controlling authority to the contrary.

Plaintiffs cite N.Y. Educ. Law § 4404(c) to support their argument that the burden is *always* on the school district, including during a pendency dispute, but that cannot be the case. *See* Pl. Br. (Dkt. 39) at 8. Even Plaintiffs acknowledge that they would bear the burden of proving "substantial similarity," if substantial similarity were relevant. *Id.* at 2 ("Plaintiffs were entitled to enroll A.N. at iBrain, so long as they . . . establish that the two programs are substantially similar."). Plaintiffs never alleged and nothing in the record suggests that iHope, the school the parents selected and as to which the IHO concurred was appropriate, was unavailable for the 2018–19 term. Even now, Plaintiffs do not even attempt to suggest otherwise. Because the "substantial similarity" standard is irrelevant on these facts, Plaintiffs' contention that the Court should have undertaken an independent assessment of the similarity between iHope and iBrain is without merit. *See Neske*, 2019 WL 3531959, at *6 n.4 (explaining that if the Court agreed that the substantial similarity standard were relevant, then the Court would have remanded to the agency for factfinding).

for all interested parties is one that was previously acceptable to the parents and to the school district and, at least at one point, provided the child with an appropriate education. There simply is nothing in the language of the pendency provision that requires the parents and the school district to undergo a separate exercise anew to ascertain the propriety of the last agreed upon placement before it can serve as a temporary placement.

In sum, Plaintiffs' motion for reconsideration is an effort to relitigate settled issues, without pointing to any controlling law or fact that the Court overlooked when issuing the original decision.

CONCLUSION

For the reasons discussed above, Plaintiffs' motion for reconsideration is DENIED. The Clerk of Court is respectfully directed to terminate docket entry 38.

SO ORDERED.

Date: November 7, 2019
New York, New York

/S/VALERIE CAPRONI
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19-CV-2933 (VEC)
DATE FILED: 08/02/2019

DOROTHY NESKE and CHRISTOPHER NESKE, as Parents and Natural Guardians of A.N., and DOROTHY NESKE and CHRISTOPHER NESKE, Individually,
Plaintiffs,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,
Defendant.

OPINION AND ORDER

VALERIE CAPRONI, United States District Judge:

The parents and guardians of a minor, A.N., seek an order compelling the New York City Department of Education ("the City") to fund A.N.'s attendance at the International Institute for the Brain ("iBrain"), a private school for children with special needs. Plaintiffs have moved for a preliminary injunction ordering the City to provide funding pursuant to 20 U.S.C. § 1415(j), the so-called "stay put" or "pendency" provision of the Individuals with Disabilities Education Act ("the IDEA"). The City has moved to dismiss Plaintiffs' complaint on procedural grounds and on the merits. For the

reasons discussed below, the City's motion to dismiss is GRANTED.

I. BACKGROUND

The pertinent facts are undisputed. A.N. is an eight-year-old boy who has learning disabilities caused by a brain injury. Compl. (Dkt. 1) ¶¶ 7–8. In 2017, Plaintiffs disagreed with A.N.'s Individualized Education Program ("IEP") for the 2017–18 school year and unilaterally enrolled him at the International Academy of Hope ("iHope"). Finkelstein Findings of Fact and Decision ("FOFD") (Dkt. 17-2) at 3. Plaintiffs then sought reimbursement from the City for A.N.'s tuition and other costs of attendance. *Id.*; Compl. ¶¶ 9–10. On March 6, 2018, an Impartial Hearing Officer (IHO), Sharyn Finkelstein, agreed with Plaintiffs that the City had not developed an appropriate IEP for the '17–18 term, determined that iHope provided an appropriate program for A.N., and ordered full reimbursement for the cost of his attendance. FOFD at 10; Compl. ¶ 10.

That resolution was short-lived. On June 21, 2018, Plaintiffs notified the City that it had not offered A.N. a program or placement that will address his educational needs and therefore they intended to move A.N. from iHope to iBrain, which appears to be a newly-opened offshoot or competitor of iHope. Rosken Decision (Dkt. 17-6) at 7; Compl. ¶ 12. A.N. has been attending iBrain since July 9, 2018, when the school first opened its doors. Rosken Hearing Tr. (Dkt. 17-5) at 46; Compl. ¶ 13. On the day that A.N. began attending iBrain, Plaintiffs filed a due process complaint against the City, alleging

that A.N. had not been offered a free and appropriate public education (FAPE) for the 2018–19 school year and requesting a so-called "stay-put" or pendency order for A.N. at iBrain. Compl. ¶ 14. A pendency order would require the City to fund A.N.'s tuition and related costs at iBrain while Plaintiffs' due process complaint was being resolved. *See* 20 U.S.C. § 1415(j); *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 452 (2d Cir. 2015).

At an evidentiary hearing on October 9, 2018, Plaintiffs argued to IHO Brad Rosken that they were legally entitled to transfer funding from iHope[1] to any other "substantially similar" program, such as iBrain. Compl. ¶ 16. IHO Rosken disagreed; he concluded that Plaintiffs may not port their funding to another school if the child's previously agreed-upon placement, here iHope, is still available. Rosken Decision at 7. Because iHope remained an available option, IHO Rosken concluded that the "substantially similar" principle was irrelevant and, accordingly, declined to determine whether the programs at iHope and iBrain were, in fact, "substantially similar." *Id.* at 7–8. On that basis, IHO Rosken denied Plaintiffs' request for interim funding of A.N.'s placement at iBrain, and instead directed the City to fund A.N.'s placement at iHope. *Id.* at 10; Compl. ¶ 17.

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[1] The City had proposed a public school placement for A.N. for the 2018–19 school year. Dkt. 17-4. There appears to be no dispute that the parents could have challenged the City's proposal to educate A.N. in a public school and would have obtained a stay put order that would have resulted in the City paying A.N.'s tuition at iHope while the parent's appeal was being processed.

On November 21, 2018, Plaintiffs appealed IHO Rosken's decision to the State Review Officer (SRO). Krolak Decision (Dkt. 27-2) at 7–8. On December 21, 2018, the SRO dismissed Plaintiffs' appeal as untimely because, absent a showing of good cause, an appeal from the IHO decision had to be taken within 40 days, which would have been November 19, 2018. *Id.* The SRO noted that Plaintiffs would have another opportunity to challenge the pendency decision, which had been issued on an interim basis, as part of their appeal of the IHO's final decision on A.N.'s due process complaint. *Id.* at 8.

More than four months later, Plaintiffs commenced this action, seeking vacatur of the IHO decision. Compl. at 5–6. The Complaint does not challenge the SRO decision directly. *See generally id.* On May 23, 2019, the City moved to dismiss. Dkt. 13. On May 29, 2019, nearly two months after commencing this action, Plaintiffs moved for a preliminary injunction directing the City to fund A.N.'s attendance at iBrain. Dkt. 16. Based on the Court's review of cases in this district, Plaintiffs are at least the seventh family to seek a pendency order after unilaterally moving their child from iHope to iBrain in the past year.

II. DISCUSSION

The Court addresses the City's motion to dismiss first because it is dispositive of Plaintiffs' motion for injunctive relief and Plaintiffs' overall case. The City argues that Plaintiffs' case should be dismissed because of (1) failure to exhaust administrative remedies, (2) lack of standing, (3) untimeliness, and (4) failure to state a claim. *See generally* Def. Br.

(Dkt. 14). The Court rejects the City's arguments as to exhaustion and standing and declines to rule on timeliness, but agrees that Plaintiffs have failed to state a claim upon which relief may be granted.

A. Administrative Exhaustion

Although the City claims that Plaintiffs failed to exhaust their administrative remedies by not taking a timely appeal of IHO Rosken's decision to the SRO, Plaintiffs' action is exempt from the exhaustion requirement. Ordinarily, a "plaintiff's failure to exhaust administrative remedies under the IDEA deprives a court of subject matter jurisdiction." *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 483 (2d Cir. 2002) (citing *Hope v. Cortines*, 69 F.3d 687, 688 (2d Cir. 1995)); *B.C. ex rel. B.M. v. Pine Plains Cent. Sch. Dist.*, 971 F.Supp. 2d 356, 365 (S.D.N.Y. 2013) ("Courts in this Circuit have held that—absent good causeshown—a party who fails to make a timely appeal to the SRO, or fails to timely serve the respondent, has failed to satisfy the exhaustion requirement." (collecting cases)). The exhaustion requirement, however, as Plaintiffs point out, does not apply to actions that seek a pendency or "stay-put" order, which the Second Circuit views to be a form of emergency relief. *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199 (2d Cir. 2002).

In *Murphy*, the Second Circuit held that "an action alleging violation of the stay-put provision falls within one, if not more, of the enumerated exceptions to" exhaustion. *Id.* ("Congress specified that exhaustion 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."). While the City attempts to distinguish *Murphy* on the merits as being a case that involved an actual risk of interruption of the child's education, whether Plaintiffs' claim is likely to succeed has nothing to do with the threshold jurisdictional question.[2] *See id.* ("The administrative process is inadequate to remedy violations of [20 U.S.C.] § 1415(j) because, given the time-sensitive nature of the IDEA's stay-put provision, an immediate appeal is necessary to give realistic protection to the claimed right." (citation omitted)). Indeed, pendency relief pursuant to § 1415(j) must be decided without regard to the traditional injunction factors, such as irreparable harm and likelihood of success on the merits. *Zvi D. by Shirley D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982). To require a showing that a child's education may be interrupted in order to trigger this Court's subject-matter jurisdiction would, therefore, be contrary to the purpose and design of § 1415(j). Accordingly, the Court concludes that Plaintiffs were not required to administratively exhaust their claims before pursuing this action.

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[2] Nor is this case only seeking reimbursement following the completion of all administrative proceedings. *Cf. M.M. ex rel. J.M. v. New York City Dep't of Educ.*, No. 09-CV-5236, 2010 WL 2985477, at *10 (S.D.N.Y. July 27, 2010) (holding that *Murphy* does not extend to § 1415(j) claims seeking reimbursement after conclusion of challenge to child's placement).

B. Standing

Although a close issue, the Court finds that Plaintiffs have standing to maintain this action. "[T]o satisfy the core requirements derived from Article III, a plaintiff must allege: (1) personal injury or threat of injury; (2) that the injury fairly can be traced to the action challenged; and (3) that the injury is likely to be redressed by the requested relief." *Heldman ex rel. T.H. v. Sobol*, 962 F.2d 148, 154 (2d Cir. 1992). The City argues that Plaintiffs lack standing because Plaintiffs have not alleged an injury and, to the extent that any injury exists, it was caused by Plaintiffs' unilateral decision to transfer A.N. to iBrain. As other courts have recognized under similar circumstances, however, a denial of "stay-put" creates an injury sufficient for Article III purposes.

In a non-binding, unpublished decision, the Second Circuit described the "stay-put" provision as creating a procedural right. *See A.S. ex rel. P.B.S. v. Bd. of Educ. for Town of W. Hartford*, 47 F. App'x 615, 616 n.2 (2d Cir. 2002); *Navarro Carrilo v. New York City Dep't of Educ.*, No. 19-CV-2944, 2019 WL 2511233, at *9 (S.D.N.Y. June 13, 2019). Even if the right to "stay put" is procedural, rather than substantive, Plaintiffs must still allege the existence of a concrete interest that has been or is likely to be harmed by the procedural violation. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 517–18 (2007) ("[A] litigant to whom Congress has accorded a procedural right to protect his concrete interests—here, the right to challenge agency action unlawfully withheld—can assert that right without meeting all the normal standards for redressability and

immediacy." (citations omitted)); *de Paulino v. New York City Dep't of Educ.*, No. 19-CV-222, 2019 WL 1448088, at *3 (S.D.N.Y. Mar. 20, 2019), *reconsideration denied sub nom. Ventura De Paulino v. New York City Dep't of Educ.*, No. 19-CV-222, 2019 WL 2498206 (S.D.N.Y. May 31, 2019) ("[T]he violation of a procedural right granted by statute can be sufficient . . . to constitute injury in fact, as long as the violation entails a degree of risk sufficient to indicate a resulting concrete harm." (quotation marks omitted) (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549–50 (2016))).

At least two concrete interests may be at stake in "stay-put" cases. The first is the risk of disruption of the child's educational program. *See Cohen v. New York City Dep't of Educ.*, No. 18-CV-11100, 2018 WL 6528241, at *1 (S.D.N.Y. Dec. 12, 2018). In this case, Plaintiffs do not allege that the denial of "stay put" has had or will have any impact on A.N.'s ongoing or future attendance at iBrain, nor do they make any such argument in their briefing. *See* Compl. ¶¶ 18–24; Pl. Opp. Br. (Dkt. 24) at 6. Because there is no apparent risk of any negative impact on A.N.'s education caused by the denial of a pendency order, Plaintiffs have not demonstrated aconcrete injury on this basis. *See Cohen*, 2018 WL 6528241, at *1 (finding lack of "actual or imminent" harm because no indication that child was at risk of expulsion from iBrain).

Alternatively, parents and guardians may have a concrete interest in avoiding out-of-pocket payments for their child's tuition and related costs. As other courts in this District have concluded, the likelihood that a parent or guardian will incur personal financial obligations, due to the lack of interim

funding from the school district, is sufficient to create an injury for standing purposes. *Cruz v. New York City Dep't of Educ.*, No. 18-CV-12140, 2019 WL 147500, at *6 (S.D.N.Y. Jan. 9, 2019) ("The Second Circuit has stated that a plaintiff's 'contractual obligation to pay private-school tuition . . . even if her IDEA claim against [DOE] fails to result in funding' is sufficient to establish an injury in fact for standing purposes." (quoting *E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 457, 459 (2d Cir. 2014))); *see also de Paulino*, 2019 WL 1448088, at *4 (same). Although Plaintiffs have not submitted a copy of A.N.'s enrollment contract, the Court draws, at this stage, an inference in their favor that A.N.'s contract is similar to those in other cases involving iHope-to-iBrain transferees. iBrain's enrollment contracts appear to defer any obligation to pay tuition until administrative proceedings have been resolved—and in the event of an unfavorable resolution, parents may withdraw their children from iBrain and enter into an individualized payment plan for fees incurred prior to such withdrawal. *See, e.g.*, *de Paulino*, 2019 WL 1448088, at *3–4; *Cruz*, 2019 WL 147500, at *6–7; *Cohen*, 2018 WL 6528241, at *2. Because the absence of a pendency order may result in Plaintiffs having to pay iBrain for at least some portion of A.N.'s tuition, the Court finds that Plaintiffs have demonstrated a concrete harm arising out of the City's refusal to provide pendency at iBrain.

That injury is also fairly traceable to the City. While the City claims that the injury is caused by Plaintiffs' unilateral decision to transfer A.N. to iBrain, the traceability analysis does not require a defendant's actions to be the exclusive or even

proximate cause of the alleged injury. *Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013). Here, Plaintiffs' alleged injury bears a causal nexus to the City's refusal to fund A.N.'s placement at iBrain. *See Navarro*, 2019 WL 2511233, at *11 (rejecting the City's argument that injury was not traceable to the City because of Plaintiffs' unilateral transfer to iBrain).

For those reasons, the Court finds that Plaintiffs have standing to seek a "stay-put" order.

C. Timeliness

Section 1415(i)(2)–(3) allows a civil action to be brought in federal court by "[a]ny party aggrieved by the findings and decision" of a state or local educational agency in connection with an impartial due process hearing. In New York, such actions are subject to a four-month statute of limitations. N.Y. Educ. Law § 4404(3)(a); *see also Adler by Adler v. Educ. Dep't of State of N.Y.*, 760 F.2d 454, 459–60 (2d Cir. 1985) (interpreting previous iteration of the IDEA and applying analogous statute of limitations applicable to Article 78 proceedings in state court); *Engwiller v. Pine Plains Cent. Sch. Dist.*, 110 F. Supp. 2d 236, 242 n.1 (S.D.N.Y. 2000). Any time-bar under the IDEA is not jurisdictional, however, because the IDEA lacks a clear statement to that effect. *See United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) ("[T]he Government must clear a high bar to establish that a statute of limitations is jurisdictional. In recent years, we have repeatedly held that procedural rules, including time bars, cabin a court's power only if Congress has clearly stated as much." (internal quotation marks and

citation omitted)); *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("A rule is jurisdictional [i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." (internal quotation marks and citation omitted)); *see also M.G. v. New York City Dep't of Educ.*, 15 F. Supp. 3d 296, 304 (S.D.N.Y. 2014) ("The IDEA's statute of limitations is an affirmative defense rather than a jurisdictional prerequisite.") (discussing IDEA's two-year limitation on commencing a due process complaint).

The City argues that Plaintiffs' attempt to seek judicial review is untimely because more than four months elapsed between IHO Rosken's initial decision and this lawsuit being filed. In contrast, Plaintiffs argue that, because a pendency decision is an interim order, it does not trigger the four-month statute of limitations until a final decision has been issued at the conclusion of the due process hearing. Plaintiffs are in the unusual position of arguing that pendency relief is so urgent that they must be allowed to seek immediate appeal without exhausting administrative avenues—yet they should nonetheless be allowed to dawdle for as long as they wish prior to seeking such relief. In the Court's view, the correct and most workable approach would be to calculate the statute of limitations from the agency's most recent decision on pendency relief, which, in this case, would be December 21, 2018, the date the SRO dismissed Plaintiffs' appeal. *See* Krolak Decision at 8.

In any event, the Court need not decide whether this action was timely filed because the IDEA's statute of limitations is not jurisdictional, and

Plaintiffs, for the reasons discussed below, lose on the merits.

D. Failure to State a Claim

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Hogan v. Fischer*, 738 F.3d 509, 514 (2d Cir. 2013) (citation omitted). When "ruling on a Rule 12(b)(6) motion, we accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir. 2002). Plaintiffs claim that § 1415(j), the "stay-put" or "pendency" provision of the IDEA, requires the City to fund A.N.'s tuition and expenses at whatever school A.N. happens to attend, as long as the chosen school offers a program "substantially similar" to iHope's. For the reasons discussed below, the Court agrees with the City that § 1415(j) does not require school districts to provide a portable voucher—at least not when, as here, the original placement remains an available option.

Section 1415(j) provides that, "during the pendency of any proceedings conducted pursuant to this section, 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." "To determine a child's 'then-current educational placement,' a court typically looks to: (1) 'the placement described in the child's most recently implemented IEP'; (2) 'the operative placement actually functioning at the time when the stay put provision of the IDEA was

invoked'; or (3) 'the placement at the time of the previously implemented IEP.'"[3] *E. Lyme Bd. of Educ.*, 790 F.3d at 452 (quoting *Mackey ex rel. Thomas M. v. Bd. of Educ. For Arlington Cent. Sch. Dist.,* 386 F.3d 158, 163 (2d Cir. 2004)). In this case, there is no question that the relevant "education placement" is the program set forth in IHO Finkelstein's Findings of Fact and Decision.

Although IHO Finkelstein's decision determined that iHope was an appropriate placement and ordered the City to fund A.N.'s attendance at iHope during the 2017–18 school year, FOFD at 11, Plaintiffs claim that the term "educational placement" is a functional definition. That is, "placement" refers to the features and services of the educational program that IHO Finkelstein set forth in her decision, which were available at iHope but could also be available at another school. Those features include, among others, a 6:1:1 class ratio, occupational therapy five times per week, physical therapy five times per week, and speech and language therapy four times per week. FOFD at 11. According to Plaintiffs, because the term "educational placement" is not tied to a particular physical location, Plaintiffs are entitled unilaterally to move A.N. to any other school offering, in their

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[3] The City argues that Plaintiffs have waived any alternative argument that iBrain should be considered the "operative placement" because that argument was not raised before the IHO. City Reply (Dkt. 29) at 7. Regardless of any waiver, the "operative placement" factor is inapplicable to these facts. *See Navarro*, 2019 WL 2511233, at *19 ("Courts tend to rely on the 'operative placement' factor in circumstances in which there was no prior- implemented IEP that might guide a determination of a 'current educational placement.'" (citation omitted)).

opinion, "substantially similar" services without any interruption in funding.

Plaintiffs' position finds support in Second Circuit precedent only by taking language out of context. The Second Circuit has indeed stated that the term "'[e]ducational 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." *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009). And, on that theory, at least one family has successfully persuaded one judge in this district that a stay-put injunction is warranted based on the family's unilateral decision to move a student from one school to another. *See Navarro*, 2019 WL 2511233, at *3–4.

In this Court's view, however, Plaintiffs misinterpret the central principle behind the Second Circuit's decision. In *T.Y.*, although the Second Circuit did hold that "educational placement" refers to a student's general education program, the Court did so only to conclude that the IDEA does not require the school district to assign the student to any "specific school location," as long as the assigned school meets the student's needs. *See* 584 F.3d at 420 ("[B]ecause there is no requirement in the IDEA that the IEP name a specific school location, T.Y.'s IEP was not procedurally deficient for that reason. We emphasize that we are not holding that school districts have carte blanche to assign a child to a school that cannot satisfy the IEP's requirements. We simply hold that an IEP's failure to identify a specific school location will not constitute a *per se* procedural violation of the IDEA."). Indeed, the Second Circuit specifically explained that parents

may "participate" in the school-selection process; they may not, however, "veto" the school district's choice of location. *Id.* ("The parents' actions suggest that they seek a 'veto' over school choice, rather than 'input'—a power the IDEA clearly does not grant them.").

Plaintiffs now seek precisely that veto power. Under Plaintiffs' view of Section 1415(j), parents can unilaterally move the student to their preferred school, file a due process complaint against the district, and then seek automatic funding through a "stay-put" order. Moreover, Plaintiffs claim that this Court must simply accept as true their conclusory allegation that the new program is "substantially similar" to the previous one.[4] Pl. Opp. Br. at 4. If the

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[4] Even if the Court were to agree with Plaintiffs that they may port funding to any "substantially similar" program, the record is inadequate for the Court to conclude that iBrain and iHope are "substantially similar." Courts should have the assistance of agency expertise when evaluating educational placements. *Abrams v. Carranza*, No. 19-CV-4175, 2019 WL 2385561, at *4 (S.D.N.Y. June 6, 2019) ("[A] federal court should not make substantialsimilarity determinations in the first instance when the Independent Hearing Officer or State Review Officer did notdo so."); *Cruz*, 2019 WL 147500, at *10 (remanding for factfinding on similarity of iHope and iBrain). Thus,Plaintiffs' conclusory allegations would not justify the injunctive relief they seek, and at minimum, the case wouldneed to be remanded for further fact development as to the "substantial similarity" between the programs at iHopeand iBrain. If the other iHope-to-iBrain cases in this district are any indication, reasonable minds can differ onwhether the programs are substantially similar. *Compare Navarro*, 2019 WL 2511233, at *17 (reversing agencydetermination that iBrain and iHope are not substantially similar) *with Angamarca, v. New York City Dep't of Educ.*,No. 19-CV-2930, 2019 WL 3034912, at *9 (S.D.N.Y. July 11, 2019) (affirming agency determination that iBrainand iHope are not substantially similar and denying

Court were to grant a "stay-put" order based on that bare allegation, Plaintiffs would not be required to reimburse the City if they do not ultimately prevail in the due process proceeding. *See Fiallos v. New York City Dep't of Educ.*, No. 19-CV-334, Dkt. 36, at 22 (S.D.N.Y. May 9, 2019) ("Plaintiffs offer no rational, non-conclusory argument for why they should receive money that they would not have to pay back and to which they may not have a right at all." (quoting *Cohen*, 2018 WL 6528241, at *3)). In effect, Plaintiffs hope to use § 1415(j), a provision designed to maintain continuity of a child's education, to convert an IEP into a transient school voucher to be exercised by the parents unilaterally.

Plaintiffs' voucher theory is not supported by circuit precedent. The Second Circuit has long held that school districts retain some discretion and flexibility to make practical adjustments to a student's "educational placement," which includes transferring students between comparable schools offering the same services. *See Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ.*, 629 F.2d 751, 753–55 (2d Cir. 1980) (holding that section 1415(b) would not be triggered by a decision to transfer the special education classes between two regular schools in the same district and noting that a contrary "interpretation of the [IDEA] would virtually cripple the Board's ability to implement even minor discretionary changes within the

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injunctive relief). Moreover, based on the limited evidence putbefore the IHO, at least at the time A.N. was first enrolled at iBrain, it appears it was not fully staffed and may havebeen incapable of delivering all of the services required by A.N.'s IEP. Rosken Hearing Tr. at 47–52.

educational programs provided for its students"). Here, issuing a "stay-put" order, immediately after Plaintiffs unilaterally decided to transfer A.N. to iBrain, when iHope (which Plaintiffs had unilaterally chosen the year before) remains an available option, would allow the parents effectively to dictate where an IEP is to be implemented. Such a scheme deprives school districts of the flexibility afforded to them under *Concerned Parents*.[5]

Plaintiffs' approach also risks undermining the very purpose of Section 1415(j), which is to ensure stability for the student. *See Murphy*, 297 F.3d at 199; *de Paulino*, 2019 WL 1448088, at *7. Common sense dictates that, to ensure some level of continuity of educational experience, the ultimate discretion to transfer a student's funding or placement cannot be wielded concurrently by the school district and the parents. Otherwise, the two sides could engage in an endless tug-of-war, each seeking to countermand the other, causing the

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[5] In this case, from a financial perspective, there may be little difference in the cost to the City of tuition reimbursement for iHope as opposed to iBrain, assuming iBrain is, in fact, an appropriate placement. But the legal proposition that Plaintiffs are advocating would not be so limited. If Plaintiffs were correct, parents could unilaterally move a child from a public school that is fully capable of providing a FAPE to a private school that they believe is also so capable and then demand payment of their private school tuition under the aegis of a stay-put order. That is contrary to a long line of IDEA precedent, which allows parents unilaterally to enroll a child in a private school and to obtain reimbursement of tuition only after they establish that the district's proposal did not provide a FAPE and that the school they selected did. *See*, *e.g.*, *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985), *Frank G. v. Bd. Of Educ. of Hyde Park*, 459 F.3d 356, 363 (2d Cir. 2006).

student to be repeatedly reassigned or transferred. Under *T.Y.* and *Concerned Parents*, parents or guardians have a right to voice their preference regarding school selection, but school choice ultimately lies with the state or local education agency—provided that the selected school can provide a FAPE. *See T.Y.*, 584 F.3d at 420; *Concerned Parents*, 629 F.2d at 753–55.

Because Plaintiffs misread *T.Y.* and *Concerned Parents*, this Court agrees with IHO Rosken that § 1415(j) does not require the City to fund a student's attendance at a preferred, "substantially similar" school, at least not when the existing school is concededly able to service the student's IEP. *See Ventura De Paulino v. New York City Dep't of Educ.*, No. 19-CV-222, 2019 WL 2498206, at *3 (S.D.N.Y. May 31, 2019) ("This Court finds no legal basis whatsoever in statute, regulation, or case law to support Plaintiff's 'substantial similarity' proposition.").[6] Absent the City's chosen school being somehow unavailable or inadequate, Plaintiffs'

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[6] Some state review officers, as a matter of practice, appear to have considered whether a unilateral placement by a parent is "substantially similar" to the previous program. *E.g.*, *Cruz*, 2019 WL 147500, at *3. The IDEA does not compel the review officers to do so. *Cruz* seemed to assume, without any analysis, the correctness of the state review officer's "substantial similarity" standard and remanded for factfinding on that issue. *See id.* at *10. Then, another district court, in *Navarro,* cited *Cruz*, again without further analysis, for the existence of the "substantial similarity" standard for determining when parents or guardians may transfer public funding. *See Navarro*, 2019 WL 2511233, at *4. This Court has not found any decision in this circuit that has actually interpreted §1415(j) or Second Circuit precedent to allow parents to unilaterally force reallocation of funding to any"substantially similar" school or program of their choice.

argument that funding is portable collapses under its own weight. In essence, Plaintiffs want to divorce the term "placement" from any particular brick-and-mortar school when they want to move A.N.— and then graft a school-specific requirement back onto the definition once A.N. has been enrolled in the school of their choice—so as to compel the City to pay for whatever new school they choose. If the term "educational placement" under § 1415(j) is purely a functional definition and does not require A.N. to be placed at iHope, then, by the same logic, Section 1415(j) does not require the City to fund A.N.'s placement at iBrain. Thus, even assuming the Plaintiffs correctly interpret the phrase "educational placement" to refer merely to the level of educational services that A.N. must receive, the Court simply sees nothing in § 1415(j) that requires the City to accede to Plaintiffs' preferred school.

In sum, Plaintiffs' legal theory depends on an inverted reading of the Second Circuit's decisions and has no basis in the pendency provision of the IDEA. Because the Court sees no reason to disturb IHO Rosken's decision under 20 U.S.C. § 1415(j), the City's motion to dismiss is GRANTED.[7]

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[7] Plaintiffs have asked the Court to decide their motion for a preliminary injunction before deciding the City's motion to dismiss. Dkt. 21. The order by which this Court decides the motions is immaterial to the outcome because, for the same reason that the Court is granting the City's motion to dismiss, Plaintiffs are not entitled to injunctive relief. As Judge Koeltl and Judge Furman have explained in their respective cases involving iBrain transferees, Section 1415(j) is inapplicable when, as here, there is no meaningful threat to the child's learning experience. *See Fiallos*, No. 19-CV-334, Dkt. 36 at 22; *Cohen*, 2018 WL 6528241, at *2. Absent an automatic injunction under § 1415(j), Plaintiffs are not entitled to a

III. CONCLUSION

For the reasons discussed, the City's motion to dismiss, Dkts. 12–15, is GRANTED pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Clerk of Court is respectfully directed to terminate all pending motions and deadlines and close the case.

SO ORDERED.

Date: August 2, 2019
New York, New York

/S/ VALERIE CAPRONI
United States District Judge

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preliminary injunction under this Circuit's normal preliminary injunction standard because Plaintiffs cannot show irreparable harm—A.N.'s education is not at risk of disruption, and the only dispute is determining who pays his tuition and when. *See Fiallos*, No. 19-CV-334, Dkt. 36 at 23–24 ("There is no conceivable irreparable injury to be prevented by a preliminary injunction.").

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.

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. No. 19-2540

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.

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

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 5th day of November, two thousand twenty.

Dorothy Neske, Individually and as Parent and Natural Guardian of A.N., Christopher Neske, Individually and as Parent and Natural Guardian of A.N.,
Plaintiffs - Appellants,
v.
New York City Department of Education,
Defendant - Appellee.

ORDER

Docket No: 19-4068

Appellants, Christopher Neske and Dorothy Neske, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk