The University of the State of New York

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

No. 21-031

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

Appearances:
Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her requests for pendency and for the costs of the student's provider of special education teacher support services (SETSS) at an enhanced rate for the 2019-20 school year. The district cross-appeals from that portion of the IHO's decision which ordered it to fund the cost of the student's SETSS and related services. The appeal must be sustained in part. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The hearing record is sparse with respect to the student's educational history. At the time of the hearing, the student was five years old and attended a preschool classroom for four-year-olds (Parent Exs. F at pp. 1, 2; G at p. 1; see Tr. p. 1). The student was enrolled in an out-of-district nonpublic school at parental expense (Parent Exs. F at p. 1; I at p. 1). On April 10, 2019, an in-district CSE convened to develop an IEP for the student's transition from preschool to kindergarten (Dist. Ex. 1 at p. 10). The April 2019 CSE found the student eligible for special education and related services as a student with a speech or language impairment and recommended 10-month services in a nonspecialized district school to be implemented on September 4, 2019 (id. at pp. 1, 7-8, 10, 11). Specifically, the April 2019 CSE recommended direct, group SETSS in English language arts (ELA) and math for five periods each per week,

delivered in a general education classroom, individual and group (2:1) occupational therapy (OT) one time each per week, for a 30-minute session in a separate location, individual physical therapy (PT) one time per week for a 30-minute session in a separate location, and individual and group (3:1) speech-language therapy one time each per week, for a 30-minute session in a separate location (id. at pp. 7-8, 11).

In July 2019, the parent's advocate contacted the New York State Education Department (NYSED) via telephone and email indicating that the parent planned to enroll the student in a "pre-kindergarten class in a private school" located in a district in which the student did not reside and seeking guidance regarding which school district was responsible for the student's "2019-2020 [s]pecial [e]ducation services" (Parent Ex. I at pp. 48, 49 [emphasis in original]). By email dated August 1, 2019, NYSED's Office of Special Education responded to the advocate's inquiry describing in detail the statutory provisions which applied to the student's unique status and further provided links to three State guidance documents in support of the written explanation (id. at p. 48). According to the response provided by NYSED's Office of Special Education, as the student no longer met the statutory definition of a preschool student–having reached school age–the student must transition to the CSE (id. at pp. 48, 49). As a student younger than the compulsory school age of seven, the student was not required to attend kindergarten and further, if the student was "not on a regular school attendance register for school-age children," the CSE of the student's district of residence was responsible for developing an IEP, offering special education services and determining the site where the services would be provided (id. at p. 48). Lastly, NYSED's Office of Special Education explained that if the parent enrolled the student in an out-of-district nonpublic school "pre-kindergarten class," the school district of location would not be responsible for developing an individualized education services program (IESP) for the student because the State's dual-enrollment statute only applied to parentally placed students in nonpublic elementary and secondary schools, not to a student who is less than compulsory school age continuing in a preschool program (id.).

According to a call log dated August 27, 2019, the parent contacted a list of 19 independent SETSS providers (Parent Ex. D at p. 1). The call log reflects that the parent contacted all 19 providers but was not able to find a provider (id.). The parent arranged for the student to receive SETSS through Special Edge, a private agency (Parent Ex. E at p. 1).

A. Due Process Complaint Notice

Notwithstanding the guidance provided by NYSED's Office of Special Education, in a due process complaint notice dated September 8, 2019, the parent asserted that the district had denied the student equitable services within the meaning of the dual enrollment statute and, within a request for pendency, the parent alleged that the April 2019 CSE had developed an IESP for the 2019-20 school year (Parent Ex. A at pp. 3, 4; see NY Educ. Law §3602-c). The parent did not challenge the appropriateness of the April 2019 CSE's recommendations, rather the parent alleged that the district did not offer a SETSS provider and the parent was unable to procure a provider for the 2019-20 school year at the district's regular published rates (id. at p. 3). The parent further asserted that the student would not have received the recommended services had she not procured a private provider at an enhanced rate (id.). As relief, the parent requested "market-rate funding" of the student's program of SETSS for the 2019-20 school year

(id.). The parent also requested pendency services based on the unchallenged and unimplemented April 2019 IEP, which the parent characterized as the "last agreed upon program… an IESP" (id. at p. 4).

B. Impartial Hearing Officer Decision

The parties proceeded to a one-day impartial hearing on February 25, 2020 (Tr. pp. 1-68). In a decision dated June 19, 2020, the IHO determined that pursuant to section 3602-c, the district–as the district of residence–was not obligated to develop an IESP for the student but was liable for the cost of the student's services (IHO Decision at pp. 7, 9, 11).[1] The IHO noted that the district "properly raised the issue of the extent of its obligation as the district of residence to provide the student with a FAPE for the 2019-2020 school year" (id. at p. 9 [emphasis in original]). After setting forth the applicable legal standard relative to pendency, the IHO stated, "[i]t seems like the [p]arent in this case wants it both ways, arguing that [s]ection 3602 [sic] does not apply, which would require the DOE to pay, but does not cite any authority requiring the DOE to pay, other than in general the IDEA, and a denial of FAPE" (id. at pp. 6-7). The IHO then noted that "if the IEP here is agreed to between the parties, and somebody is not following it… then the remedy is with the filing of a complaint in Albany with NYSED" (id. at p. 7). Pendency was not further addressed in the decision.

Next, the IHO found that the hearing record did not support the parent's assertion that she made efforts to obtain a district SETSS provider and that none were available (IHO Decision at p. 11). The IHO noted that the parent's call log indicated that all of the attempts were made over one day and further there was no evidence in the record that the parent had sought a provider from the "district of location" (id. [emphasis in original]). The IHO then determined that there was no evidence in the hearing record to establish that the parent had incurred any financial obligation to pay the difference between the enhanced rate and the district rate or any rate set by "the district of location" (id. at p. 12 [emphasis in original]). The IHO further found that the record did not indicate that the parent made a specific enforceable arrangement or contract with the provider "if the impartial hearing process did not result in an award of the enhanced rate" (id.). The IHO then determined that the evidence in the hearing record did not support a finding that the district failed to make available to the student special education programs and services on an equitable basis (id.).

In closing, the IHO found the district in default and ordered it to pay the cost of the student's SETSS and related services upon receipt of satisfactory proof that the services have been rendered and "invoiced" to the district "by the district of location" (IHO Decision at p. 12 [emphasis in original]). The IHO further ordered that the district should pay the cost of the student's SETSS and related services in the amount specified in the "IESP dated April 10, 2019," for the entirety of the student's 2019-20 school year, at a rate not to exceed the district's established rate for such services, unless the services were actually provided by "the district of location, which if provided by the district of location shall be paid by the [district] at the district

[1] The IHO decision has not been paginated. For the purposes of this decision, and consistent with the pleadings, the cover page is designated as page 1 with the remaining pages assigned page numbers 2-14.

of location established rate" (id. at pp. 12-13 [emphasis in original]). Next, the IHO ordered "the district of location" to conduct a reevaluation of the student in all areas of suspected disability not evaluated within the last two years and for "the district of location" to reconvene and "produce a new IEP" for the 2020-21 school year (id. at p. 13 [emphasis in original]).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by finding that the district of location was obligated to implement the student's IEP. The parent alleges that the IHO misunderstood the facts and improperly applied the dual enrollment statute to the facts. The parent also asserts that the IHO erred by failing to issue a pendency order and that pendency lies in the April 10, 2019 IEP. The parent further alleges that the IHO erred by denying her request for the costs of the SETSS delivered to the student at an enhanced rate. The parent contends that the district committed a gross violation of the IDEA and that the parent should be awarded the private services she obtained during the 2019-20 school year as compensatory educational services. As further relief, the parent requests a finding that the student was denied a FAPE for the 2019-20 school year, a finding that the district was responsible for the implementation of the April 2019 IEP, an order on pendency finding that the student is entitled to the services set forth in the April 2019 IEP as a pendency program, an order directing the district to fund the services obtained by the parent at the enhanced rate contracted or rate paid by the parent, and to remand the case for additional administrative proceedings for the IHO to rule on the facts and evidence of the case. The parent has included a copy of the agreement with the student's private SETSS provider as an exhibit to her request for review.[2]

In an answer with cross-appeal, the district argues that the IHO erred by directing the district to fund the SETSS and related services provided to the student for the 2019-20 school year. The district asserts that the IHO should have dismissed all of the parent's claims in the due process complaint notice. The district agrees that the IHO misunderstood the facts presented at the impartial hearing and erred by finding the district of location was responsible for implementing the student's IEP. The district faults the parent for the misinformation provided to the IHO beginning with the due process complaint notice mischaracterizing the student's recommended program as an IESP. The district asserts that all of the relief awarded by the IHO should be reversed. The district contends that the parent rejected the April 2019 IEP and was not entitled to relief after the parent unilaterally placed the student in a private program. Next, the district argues that the parent is not entitled to pendency or compensatory educational services

[2] With her request for review and with her answer to the district's cross-appeal, the parent submits as additional evidence documents identified as SRO exhibits A and B (see Req. for Rev. SRO Ex. A; Answer to Cross-Appeal SRO Ex. B). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Given the disposition of this matter, the contract between the parent and the SETSS provider and emails between the parties are not necessary to render a decision and, therefore, I decline to exercise my discretion to consider these exhibits as additional evidence.

because she rejected the April 2019 IEP and unilaterally enrolled the student in a private program without requesting an IESP. As relief, the district requests reversal of the IHO's order directing the district to fund the SETSS and related services the student received during the 2019-20 school year and requests that the IHO's decision dismissing the parent's other claims be affirmed and the appeal dismissed.

In an answer to the cross-appeal, the parent denies the district's claims and asserts that she should be awarded her requested relief.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[3]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court

[3] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Legal Framework

The IHO in this matter determined that the student was subject to the State's dual enrollment statute and as such, he found that the district wherein the student's nonpublic preschool was located was responsible for the development and implementation of an individualized education services program (IESP), and that the district of residence was responsible for the cost of the student's services (IHO Decision at pp. 10-11, 12-13). This was error.

State law defines a preschool student with a disability as a student who is eligible to receive preschool programs and services and "who will not have become five years of age on or before December first of the school year, or a later date if a board established such later date for eligibility to attend school" (Educ. Law § 4410[1][i]).[4] State regulation further describes a preschool student with a disability as a student who "is not entitled to attend the public schools of the school district of residence" due to being under the age of five (8 NYCRR 200.1[mm]; see Educ. Law § 3202[1]).

The State's dual enrollment statute provides that the district of location's CSE must review a parent's written request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law §§ 3602-c[2][a]; [2][b][1]).[5] A school district of location is defined as the school district in

[4] The district in this matter has established December 31st as its eligibility date (Tr. p. 19; see "A Family Guide to Preschool Special Education Services," at p. 7 [2019], available at https://www.schools.nyc.gov/special-education/preschool-to-age-21/moving-to-preschool).

[5] In such circumstances, the CSE must assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district. Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district for the purpose of receiving special education programming under Education Law § 3602-c, services for which a public school district may be held accountable through an impartial hearing.

which the nonpublic elementary or secondary school attended by the student is located (Educ. Law § 3602-c[1][f]). State guidance further explains that section 3602-c "pertains only to parental placements in nonpublic elementary and secondary schools. It does not apply to a child who is less than compulsory school age continuing in a preschool program, even if the preschool program is located in the same building as a kindergarten or other elementary grade classrooms. These students would continue to be the responsibility of the district of residence through the CSE" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 13, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf).

It is undisputed that the student in this matter turned five in 2019 (Tr. pp. 6, 19; Parent Exs. A at pp. 3, 4, 6; F at p. 1; I at pp. 1, 2; Dist. Ex. 1 at pp. 1, 10). The parent argued during the impartial hearing and on appeal that the student remains a preschool student based on the student's enrollment in a nonpublic, out-of-district preschool program for the 2019-20 school year (Tr. pp. 22, 40; Req. for Rev. at p. 4). However, the student does not meet the legal definition of a preschool student with a disability. The student in this matter is in precisely the situation described above, to wit: a school age student who is less than compulsory school age continuing in a preschool program. The fact that the preschool is located outside of the district of residence has no impact on the district's responsibility in this instance. The dual enrollment statute does not apply to students younger than the compulsory school attendance age who are enrolled in a preschool regardless of the location of the preschool.

The district was responsible for developing an IEP for this student for the 2019-20 school year and the hearing record reflects that a district CSE convened on April 10, 2019 to do so (Dist. Ex. 1). In her due process complaint notice, the parent asserted that the April 2019 CSE developed an IESP and indicated that the student was parentally placed in a non-public preschool program outside of the district (Parent Ex. A at pp. 3-4). In her closing brief and request for review, the parent argued that although the due process complaint notice "mistakenly terms the [s]tudent's special education program as an IESP program," the hearing record established that although the district developed an appropriate IEP for the student, it failed to implement its recommended program and placement (Parent Ex. I at pp. 1-3; Req. for Rev. at pp. 3, 4; see Tr. pp. 12, 20).

The IHO applied the incorrect legal standard in this matter. The district of residence was required to develop and implement an IEP for the 2019-20 school year pursuant to the IDEA. The district of location does not have an obligation to this student under the dual enrollment statute given his age at the time he was enrolled in the nonpublic preschool program. Accordingly, the IHO's orders directing the district to pay the cost of the student's SETSS and related services upon receipt of reasonably satisfactory proof of services having been rendered and "having been invoiced… by the district of location"; directing the district of location to conduct a reevaluation of the student in all areas of suspected disability not evaluated within the last two years; and directing the district of location to develop an IEP for the 2020-21 school year are reversed (see IHO Decision at pp. 12-13 [emphasis in original]).

B. Claims and Requested Relief

As described above, the IHO applied the incorrect legal standard. The IHO should have applied the three-pronged Burlington/Carter analysis to the parent's claims. Nevertheless, and for the reasons that follow, the parent has not raised any cognizable claims upon which relief can be granted in her due process complaint notice or request for review.

The hearing record reflects that the district convened a CSE on April 10, 2019, to develop an IEP for the student's transition to kindergarten to be implemented on September 4, 2019 (Dist. Ex. 1 at pp. 1, 7, 8, 10). The April 2019 CSE found the student eligible for special education and related services as a student with a speech or language impairment and recommended 10-month services in a nonspecialized district school consisting of five periods per week of direct ELA SETSS in a group to be delivered in a general education classroom, five periods per week of direct math SETSS in a group to be delivered in a general education classroom, individual OT once per week for 30 minutes, group (2:1) OT once per week for 30 minutes, individual PT once per week for 30 minutes, individual speech-language therapy once per week for 30 minutes, and group (3:1) speech-language therapy once per week for 30 minutes (id. at pp. 1, 7-8, 10, 11). All related services were to be provided in a separate location (id. at p. 8). On July 29, 2019, the parent's advocate requested guidance from NYSED via email stating that an IEP had been developed for the student "as a school aged student" and that the parents had decided to enroll the student in a private "pre-kindergarten class" (Parent Ex. I at pp. 48-49 [emphasis in original]). The parent's advocate asked, "which district would be responsible to offer equitable services to [the student]" as "the parents are anxiously awaiting guidance as to whether or not [the student] would be entitled to the 10 hours of SETSS and [r]elated services that the NYC Turning 5 team recommended" (id. at p. 49). In an email response dated August 1, 2019, NYSED's Office of Special Education outlined the student's status in a manner wholly consistent with the legal framework described above (id. at p. 48). Despite the guidance received from NYSED, the September 8, 2019 due process complaint notice asserted that the district denied equitable services to the student and requested funding for the parent's privately obtained SETSS at "market-rate" for the 2019-20 school year (Parent Ex. A at p. 3). The due process complaint notice does not allege that the district denied the student a FAPE for the 2019-20 school year. During the impartial hearing the parent's advocate agreed that the IEP developed for the student on April 10, 2019 IEP was appropriate (Tr. pp. 12, 20, 27). The hearing record does not indicate whether the parent sought to amend the due process complaint notice. In her closing brief, the parent's advocate asserted that the dual enrollment statute did not apply to this student, and she alleged for the first time at the impartial hearing that the district violated the IDEA by refusing to implement the April 10, 2019 IEP at the nonpublic, out-of-district preschool the student attended during the 2019-20 school year (Tr. p 20).

In the request for review, the parent's advocate inaccurately states that the September 8, 2020 [sic][6] due process complaint notice alleged a denial of a FAPE to the student for the 2019-20 school year (compare Req. for Rev. at p. 1; with Parent Ex. A at pp. 3-4). The request for review then correctly alleges that the IHO misunderstood the facts and the law as applied to the

[6] The due process complaint notice referred to is dated September 8, 2019.

student (Req. for Rev. at pp. 2-4). Next, the parent's advocate asserts that the parent is entitled to the April 10, 2019 IEP as pendency and to funding of the privately obtained SETSS services at an enhanced rate to be awarded as compensatory educational services (Req. for Rev. at pp. 4-10).

The hearing record reflects that the parent enrolled the student at her own expense at an out-of-district preschool and sought to have the recommended SETSS and related services set forth on the April 2019 IEP provided to the student at the nonpublic preschool at district expense (Parent Ex. I at pp. 2, 49). The parent contends that the district's refusal to provide the services offered on the April 2019 IEP at a location of her choosing constituted a failure to implement the April 2019 IEP. However, the April 2019 CSE recommended a program in a nonspecialized district public school placement (Dist. Ex. 1 at pp. 10, 11). The parent cannot mandate where the district implements the student's recommended program.

Federal and State regulations require that an educational program be provided "as close as possible to the child's home" and that "the child is educated in the school that he or she would attend if nondisabled," unless the student's IEP requires some other arrangement (34 CFR 200.115[b][3], [c]; 8 NYCRR 200.1[cc][3]; 200.4[d][4][ii][b]). However, it should be noted that according to the Official Analysis of Comments to the revised IDEA regulations the United States Department of Education removed the term "unless the parent agrees otherwise" from the proposed regulations in order to clarify that parents do not have a right to veto the school placement decision (Placements 71 Fed. Reg. 46587-88 [August 14, 2006]). The parent mistakenly argues in her answer to the cross-appeal that she did not reject the April 2019 IEP. The parent continues to conflate the district's obligations under the dual-enrollment statute with its obligations under the IDEA. The parent rejected the April 2019 IEP, which recommended placement in a nonspecialized district school, when she unilaterally enrolled the student in an out-of-district nonpublic preschool. The parent's agreement with the recommended special education and related services and rejection of a public school placement undermines any claim of failure to implement the April 2019 IEP. Once the parent rejected the recommended public school placement, she rejected the entire April 2019 IEP. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]). Further, when the parent obtained a SETSS provider to deliver services at the student's nonpublic preschool, she did so at her own financial risk. It is unfortunate that the due process complaint notice does not assert a denial of a FAPE if the parent actually sought to have her claims analyzed pursuant to a Burlington/Carter framework; however, even if it did, the parent essentially conceded that the district offered the student a FAPE by agreeing that the April 10, 2019 IEP was substantively appropriate and so would have been unable to prevail on Prong 1 of Burlington/Carter (Tr. pp. 12, 20, 27).[7] As such, I find that the district developed an

[7] The district's representative incorrectly stated that the due process complaint notice alleged a denial of a FAPE (Tr. p. 23). The district's representative also asserted that the district was "not presenting a case or calling any witness, because there is - - the [d]istrict doesn't have to. The [p]arent's complaint strictly was for… failure to implement the services" (Tr. p. 23).

appropriate IEP for the student for the 2019-20 school year and, as a result, the student was offered a FAPE for the 2019-20 school year.

In addition, the parent's claim for pendency must fail because the April 10, 2019 IEP was rejected. The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211

IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

Recently, the Second Circuit has further explained that a parent may not unilaterally move a student to a preferred nonpublic school and still receive pendency funding, since it is the district that is authorized to decide how (and where) a student's pendency services are to be provided as per the text and structure of the IDEA and given that the district is the party responsible for funding the pendency services (Ventura de Paulino, 959 F.3d at 532-35). The Court observed that:

> 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

(id. at 534). Therefore, the Court concluded that "[r]egardless of whether the educational program that the Students are receiving at [the new nonpublic school] is substantially similar to the one offered at [the prior nonpublic school], when the Parents unilaterally enrolled the Students at [the new nonpublic school] for the 2018-2019 school year, they did so at their own financial risk" (id.).

Here, the parent stated in her request for review that the student initially attended a State-approved preschool located in his district of residence in accordance with the student's Committee on Preschool Special Education (CPSE) IEP (Req. for Rev. at p. 2). After the April 2019 CSE meeting, the parent decided to enroll the student in a nonpublic, out-of-district preschool (Parent Ex. I at p. 49). The CPSE IEP referenced in the parent's request for review is not included in the hearing record and at the time of the impartial hearing was most likely the last agreed upon IEP. In any event, the April 2019 IEP was rejected by the parent, was never

implemented, and could not be considered the last agreed upon IEP as argued by the parent. The parties' representatives also engaged in a rather tortured discussion of "operative placement" during the impartial hearing (Tr. pp. 23, 25-30). As described above, a student's "then current placement" has been found to mean either the most recently implemented IEP, the operative placement, or the placement at the time of the previously implemented IEP (Dervishi, 653 Fed. App'x at 57-58), not some hybrid of these options. Moreover, courts have typically only relied on the "operative placement" to determine pendency when there is "no previously-implemented IEP," which is not the case here (see Melendez v. New York City Dep't of Educ., 420 F. Supp. 3d 107, 122-23 [S.D.N.Y. 2019]). In applying the rationale set forth in Ventura de Paulino, courts also have explicitly rejected reliance on the operative placement to find that a unilaterally chosen nonpublic school constitutes pendency absent an agreement between the parents and the district (Araujo v New York City Dep't of Educ., 2020 WL 5701828, at *3 [S.D.N.Y. Sept. 24, 2020], reconsideration denied, 2020 WL 6392818 [S.D.N.Y. Nov. 2, 2020], citing Ventura de Paulino, 959 F.35 at 536). Accordingly, I find no basis for disturbing the IHO's denial of the parent's request for a pendency order.

VII. Conclusion

Having found that the district offered the student a FAPE for the 2019-20 school year and the parent is not entitled to any of her requested relief, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated June 19, 2020 is modified by reversing those portions which found the student was subject to the State's dual enrollment statute and ordered the district to fund the student's SETSS and related services for the 2019-20 school year.

Dated: **Albany, New York**
April 26, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER