The University of the State of New York

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

No. 19-125

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Sadia Ahmed, Esq.

Thivierge & Rothberg, P.C., attorneys for respondents, by Katharine Giudice, 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 district) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from an interim decision of an impartial hearing officer (IHO) determining respondents' (the parents') son's pendency placement during a due process proceeding challenging the appropriateness of petitioner's recommended educational program for the student for the 2019-20 school year. The IHO found that the student's pendency placement was at the Brookville Center for Children Services (Brookville). The 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

Due to the procedural nature of this matter and the limited questions presented to the IHO, there are few, if any, facts established outside of the parties' pleadings and review of this matter must therefore begin with the parents' due process complaint notices.

A. Due Process Complaint Notice

By due process complaint notice dated August 7, 2019, the parents requested a hearing regarding the 2019-20 school year (August 7, 2019 Due Proc. Comp. Not.). The parents asserted that they were concerned with the district's "resistance for [the student's] admittance to Brookville Center which [they] believe[d] [wa]s best for his developmental and educational future" (id. at p. 1). According to the parents, they "looked at" two schools provided by the district and found they were not in the student's interests (id.). The parents then located Brookville, a State-approved nonpublic preschool, and obtained a letter of acceptance (id.). The parents asserted that Brookville has a contract with the district and accepted preschool children from the district (id.). According to the parents, the student's speech-language therapist supported the student's attendance at Brookville; however, the parents contended that during a telephone call the CPSE administrator/district representative stated she "[would] not send a child from Jamaica to Long Island," refused to listen to the parents' concerns, and disconnected the telephone call (id.at p. 2). The parents asserted that the CPSE administrator/district representative was unwilling to assist the student in attending Brookville and demanded "written rationale for why [the CPSE administrator/district representative] [wa]s resisting moving forward with a Department of Education approved school" (id.).[1]

On September 9, 2019, the parents amended their due process complaint notice, asserting that the district denied the student a FAPE for the 2019-20 school year by failing to offer an appropriate preschool placement (September 9, 2019 Amend. Due Proc. Comp. Not.). According to the amended due process complaint notice, a CPSE convened on June 5, 2019 and developed an IEP for the student recommending "a full day special class integrated setting in a preschool classroom with 2x30 minutes per week of 1:1 Speech and Language therapy and 2x30 minutes per week of 1:1 Occupational therapy," further indicating placement in an "'Approved Special Education Program'" (id. at p. 2). The parents alleged that they "requested a list of school options but the [district] refused to provide it" (id.).

According to the parents, the CPSE administrator/district representative suggested two preschools for the parents' consideration (September 9, 2019 Due Proc. Comp. Not. At p. 2). The parents visited the first one (APPLE Preschool) and determined the student would not have "appropriate and similar peers in that school" as many of the students in that school had physical disabilities and appeared to be much lower functioning than the student (id.). The parents visited the second (Parsons Preschool) and contended that they were concerned that due to the location of the classroom they saw being in the basement without windows, they believed it would exacerbate the student's asthma (id.). According to the parents, they were told that there was no space available on the upper floors of the building and the student's pediatrician confirmed with them that the basement setting would not be appropriate for the student (id.). The parents further alleged that the preschool could not provide information about the curriculum and academics (id.).

[1] The New York State Education Department approves preschool special education programs, including Brookville, which operates a program located in the district's geographical region (see "Approved Preschool Special Education Programs: New York City Region" available at http://www.p12.nysed.gov/specialed/preschool/program-list-nyc-region.html).

According to the parents, they informed the district that the preschools were not appropriate for the student and they did not receive any other proposed preschool sites from the district (id.).

The parents then located Brookville, toured the school, and found it to be appropriate (September 9, 2019 Due Proc. Comp. Not. at pp. 2-3). According to the parents, Brookville accepted the student for the program beginning September 4, 2019 and Brookville would have been able to implement the student's IEP; Brookville sent a letter informing the district of this in July 2019 (id.at p. 3). After the parents requested that the district finalize the student's admission to Brookville, the district refused and the CPSE administrator/district representative "told the [student's] mother she [would] not send a child from Jamaica to Long Island" (id.). According to the parents, the refusal to enroll the student at Brookville excluded the parents "from the IEP development process" and "cause[d] serious deprivation of educational benefits each day" (id.).

According to the parents, the district continued to suggest other preschool placements after the parents filed the initial due process complaint notice in August 2019, and that the district recommended a public preschool placement (September 9, 2019 Due Proc. Comp. Not. at p. 3). The parents asserted that they visited the public preschool and the school "could not confirm that it could implement [the student's] IEP" (id.). The parents alleged that the school filled related services mandates for students in kindergarten through fifth-grade prior to filling the related services mandates for preschool students, and "[t]here may not have been enough speech and occupational therapists to provide the weekly IEP mandates" (id.).

The parents contended that as of the date of the amended due process complaint notice, the district had not recommended an appropriate preschool for the student that could implement his IEP and requested that the district be ordered to "complete all necessary paperwork to place [the student] and fully fund his tuition at the Brookville Center for Children Services for the 2019-20 school year with roundtrip special education transportation" (September 9, 2019 Due Proc. Comp. Not. at p. 3).

B. Impartial Hearing Officer Decision

The parties appeared for an impartial hearing convened to determine the student's pendency placement on October 8, 2019 (Tr. pp. 1-8). During the impartial hearing, the IHO reiterated what he believed the parties positions to be, indicating that the district had recommended "a full-time preschool program in a center-based setting with . . . related services" and had "offered several of those to the family" (Tr. p. 3). According to the IHO, the parents rejected the offered preschools and identified a State-approved preschool they believed could implement the IEP (id.). The IHO then stated that the district did not "actually challenge any of that" and that the district challenged that Brookville was not the least restrictive setting (id.). After acknowledging that he had "very little confidence in [his] knowledge of the underlying law with respect to two threshold questions," the IHO identified those questions as how a least restrictive environment analysis would apply to preschool and whether the district can insist that the student attend the "bricks-and-mortar" preschool setting selected by the district (Tr. pp. 3-5). The IHO gave the parties the opportunity to submit briefs on these issues, but the parties declined, waiving the ability to submit briefs (Tr. pp. 5-6).

The IHO issued an interim decision on pendency on October 22, 2019 (IHO Interim Decision). The IHO indicated that this matter involves a student "recently turned three and newly eligible for preschool services in the current school year" (id. at p. 3). The IHO noted that both parties agreed that the IEP "constitutes the student's initial and appropriate preschool program" but the parents' challenged the district's refusal to implement the IEP in the preschool the parents selected for the 2019-20 school year (id.). The district proposed preschools to implement the IEP, but the parents rejected those preschools after visiting them (id.). The parents identified a State-approved preschool, applied to the school, and received an acceptance for the student to attend the preschool (id.).

According to the IHO, the district declined to effectuate placement in the preschool selected by the parents, "relying exclusively on the assertion that, because it is comparatively more distant from the student's home, it is not the Least Restrictive Environment" (IHO Interim Decision at p. 1). The IHO then repeated the two questions presented during the hearing, describing them as "How is LRE defined in the preschool setting?" and "Does the district have a monopoly on defining a preschool student's bricks-and-mortar placement as it does with school-aged students?" (id.).

In addressing the first question he presented, the IHO determined that "LRE in a preschool is neither legally nor logically connected to a school's distance from the student's home" (IHO Interim Decision at pp. 4-5). Initially, the IHO referred to guidance from the Office of Special Education and Rehabilitative Services indicting that LRE is applicable to preschool students in the same way it is applied to school-aged programs (id. at p. 4). The IHO then referenced State guidance indicating "'placement must be as close as possible to the student's home, and unless the student's IEP requires some other arrangement, the student must be educated in the school he or she would have attended if not disabled'" (id.). Finally, the IHO determined that because the selection of a preschool is not based on the distance from a student's home, but on the parents' preferences and school availability, a district "must replicate the school choice opportunity" by allowing parents to "apply to schools of their own choosing" (id. at p. 5).

With respect to his second question, the IHO determined that because the selection of a preschool operates differently from the selection of "a school-aged student's home-zoned school," and involves "a parental choice mechanism," the district may not prevent the parent from applying to the school of the parents' choice and obtaining admission at district expense, at least as long as it is an approved school (IHO Interim Decision at pp. 5-6). The IHO also noted a concern that the district retaining the ability to choose schools for preschool students with disabilities while allowing greater parental choice for non-disabled students, could factor into a non-IDEA discrimination-based complaint.

The IHO ordered the district to place the student at the school identified by the parents as the pendency placement (IHO Interim Decision at p. 6). The IHO further noted that he believed his decision resolved the only argument with respect to the substance of the due process complaint notice, but noted that if the parties wished to litigate anything further regarding this matter, "they must inform [the IHO] no later than October 30, 2019 of their wish to do so and summarize for [the IHO] the gravamen of what they seek to come to the table to prove" (id.).

IV. Appeal for State-Level Review

The district appeals from the IHO's interim decision and asserts that the IHO erred because there is no right to pendency in a unilateral placement when the parents rejected the district's attempts to provide the student with a placement. Thus, according to the district, Brookville cannot be the student's pendency placement because there has neither been an agreement to place the student at Brookville nor an administrative or judicial finding that Brookville is an appropriate placement for the student. The district asserts that compelling the district to fund the student's placement at Brookville under pendency "prematurely decide[d] [] the issue of tuition reimbursement in the Parent's favor." The district further argues that the school district maintains a "central role in arranging education placements and services for a student" that parents cannot "usurp." Finally, the district contends that the student's IEP involved his "initial admission to public school" and, therefore, the only possible pendency placement is a placement offered by the district. The district alleges that the parents cannot use pendency to dictate the student's placement.

The parents' answer the district's appeal and assert that the IHO properly found Brookville was the student's pendency placement as "Brookville could implement the agreed-upon IEP recommendations for [the student]." As a matter of procedure, the parents assert that the request for review should be dismissed for improper service. The parents also contend that the request for review is moot because the hearing on the merits concluded on November 12, 2019 and the matter is no longer "live." As a factual matter, the parents assert that they secured the student's acceptance to Brookville prior to the district securing an acceptance for the student at another school. The parents further contend that the district misconstrues this matter as one for tuition reimbursement, as the parents cannot unilaterally place the student at Brookville because Brookville is a State-approved nonpublic school. The parents further allege that the district has failed to find an appropriate placement for the student and has failed to implement the IHO's pendency decision. Finally, the parents submit, as additional evidence with their answer, a copy of the June 5, 2019 IEP, the acceptance letter to Brookville, and correspondence with the district regarding implementation of the IHO's pendency decision.

V. Discussion

A. Preliminary Matters

1. Service of the Request for Review

As a threshold matter, it must be determined whether or not the request for review should be dismissed for improper service.

An appeal from an IHO's decision to an SRO—whether the appeal is by a district or a parent—must be initiated by timely personal service of a verified request for review and other supporting documents, if any, upon respondent (8 NYCRR 279.4[b], [c]). If delivery of the request for review to the parent cannot be made after diligent attempts, the district may effectuate service by delivering and leaving the request for review at the parent's residence with some person of

suitable age and discretion; or if the district is unable to effectuate such service, service may be made as directed by a State Review Officer (8 NYCRR 279.4[c][1]-[2]).

After unsuccessfully attempting to effectuate service on the parents' attorney and after an unsuccessful attempt in the early afternoon of November 26, 2019 to personally serve the request for review upon the parent, the district sought permission from the Office of State Review to effectuate service through an alternate method (see 8 NYCRR 279.2[a], 279.4[c]). Prior to receiving a response from the Office of State Review, the district attempted to serve the parent in the morning of November 27, 2019 and sent a follow up letter to that effect to the Office of State Review. The Office of State Review granted the district's request and, after noting that the district had made one unsuccessful attempt at serving the parent, directed the district to effectuate service by making two additional attempts to effectuate personal service on the parents at different times of the day. The district sent a follow up letter further explaining that it had made two unsuccessful attempts at personal service on the parent and sought clarification of how many more attempts at personal service should be made. The Office of State Review responded indicating that the district should make one additional attempt at personal service, further directing that the district make that attempt "outside of normal working hours."

The parent contends that the district did not follow the directives from the Office of State Review, specifically that the district did not attempt service outside of normal working hours. According to the affidavit of service filed with the request for review, the process server attempted service at 1:00 p.m. on November 26, 2019, at 10:13 a.m. on November 27, 2019, and at 6:25 p.m. on December 2, 2019. The process server followed up his attempted service by mailing a copy of the request for review to the parents on December 3, 2019. Based on the information provided in the affidavit of service, the district complied with the directives from the Office of State Review. The parents generally assert that "a person of suitable age and discretion" was at their house on November 27 through December 2, 2019 during non-working hours and that the parent discovered the request for review taped to their door on the evening of December 2, 2019; however, without more specific details these allegations are not a sufficient challenge to the sworn and more detailed affidavit submitted with the request for review, especially when the respondent concedes having received the request for review through alternate service.[2]

2. Mootness

The parents assert that this appeal should be dismissed due to mootness; arguing that because the final day of hearing took place in this matter any dispute regarding pendency is no longer a "live" controversy. While the parents allege that the final day of hearing has taken place, there is no indication from either party that the district has agreed to pay for the student's placement at Brookville as the pendency placement or that the IHO has issued a final decision in this matter that otherwise resolves the pendency dispute (i.e. that the district is responsible to pay for Brookville due to the district's inability to implement the IEP at the preschool sites offered by the

[2] The parents and their attorney were copied on correspondence related to the district's request for alternate service.

district). Accordingly, the premise upon which the parents' argument rests has not yet occurred and the parents' argument is premature and need not be further discussed.

B. Pendency

In its appeal, the district challenges the IHO's determination that the student's pendency placement is Brookville. According to State law,

> During the pendency of an appeal [involving a preschool student with a disability], unless the board and the parent otherwise agree:
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> (i) a preschool child who has received services pursuant to subdivision five of this section, shall remain in the current educational placement; or
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> (ii) a preschool child not previously served pursuant to this section shall, if the parent agrees, receive services in the program designated by the board pursuant to such subdivision five, which designation resulted in such appeal.
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> A preschool child who is transitioning from part C of the individuals with disabilities education act and/or title two-A of article twenty-five of the public health law and is no longer eligible for services under part C and title two-A of article twenty-five of the public health law by reason of age, the school district or other public agency is not required to provide the services that the child had been receiving under part C and such title two-A. If the child is found eligible for special education programs and services pursuant to this section, and the parent or person in parental relation consents to the initial provision of services, then the school district or other public agency shall provide those special education programs and services that are not in dispute between the parent and the school district or other public agency.

(Educ. Law § 4410[7][c] [emphasis added]; see 34 CFR 300.518[c]). Thus, if a preschool student is already receiving preschool IEP services at the time that the parent requests an impartial hearing, the pendency services consist of those IDEA preschool services that were in effect at the time of the request (Educ. Law § 4410[7][a], [c]). However, if the student is initially found eligible for IDEA services for the first time, or if the dispute arises as the student is transitioning from early intervention services (part C), the student has been found eligible for services as preschool student (part B), and the dispute arises over the initial provision of preschool services, then pendency services consist of the preschool program designated by the board, that is, the proposed IEP services that are not in dispute provided that the parents are willing to provide consent (see Letter to Klebanoff, 28 IDELR 478 (OSEP 1997).[3]

[3] A Third Circuit opinion suggests the opposite result than the one urged by the United States Department of Education and the New York State Legislature, and this matter was raised before, but not squarely decided by a District Court in New York; however, in this case, the parents are not seeking the continuation of part C ISFP

The more general provisions under IDEA and the New York State Education Law provide 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 T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X 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]). An educational agency's obligation to maintain stay-put placement is triggered when an administrative due process proceeding is initiated (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 445, 452 [2d Cir. 2015]). 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 (T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS 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"]).

Stay-put "is often invoked by a child's parents in order to maintain a placement where the parents disagree with a change proposed by the school district; the provision is used to block school districts from effecting unilateral change in a child's educational program" (Susquenita, 96 F.3d at 83). "Where the parents seek a change in placement, however, and unilaterally move their child from an IEP-specified program to their desired alternative setting, the stay-put rule does not immediately come into play" (M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 [3d Cir. 2014]). "[A]n administrative ruling validating the parents' decision to move their child from an IEP-specified public school to a private school will, in essence, make the child's enrollment at the private school her 'then-current educational placement' for purposes of the stay-put rule. Having been endorsed by the State, the move to private school is no longer the parents' unilateral action, and the child is entitled to 'stay put' at the private school for the duration of the dispute resolution proceedings"

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services and, unlike the last time this issue arose, the State Legislature has had ample time to consider any court opinions on the topic, but have not seen fit to change the legislative policy with respect to part C to part B transitions (see R.C. v. Carmel Cent. Sch. Dist., 2007 WL 1732429 [S.D.N.Y. June 14, 2007], citing Pardini v. Intermediate Unit, 420 F.3d 181 [3d Cir.2005]). Thus, while recognizing that there are serious differences of opinion on how Congress intended pendency to work during the transition from part C into the initial provision of part B services, I continue to apply the State statute as the current, binding authority in this matter.

(M.R., 744 F.3d at 119; see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 484 [2d Cir. 2002]; see also Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 201 [2d Cir. 2002]).

Turning to the facts of this case, I first note that this matter involves the initial placement of the preschool student and is not one of the circumstances in which a prior educational placement has been established for the student that the school district authorities are trying to unilaterally change. Instead, it is the parents that are seeking to modify the student's placement to a different nonpublic (albeit State-approved) preschool site than the preschool sites offered by the district.[4] One point alluded to by the IHO, and with which I agree under State statute, is that implementation of pendency for a preschool student when first eligible (or transitioning from part C to part B) will necessarily relate back to the rights and obligations of the parties as to how a preschool IEP is supposed to be implemented (see Educ. Law § 4410[7][c][ii]).[5] The IHO had reasoned that because the selection of a preschool involved "a parental choice mechanism," the district could not prevent the parent from applying to the school of the parents' choice and obtaining admission at district expense (IHO Interim Decision at pp. 5-6). However, in determining the parties' rights and obligations with respect to implementation of preschool services, State law provides the basic framework on this issue, rather than the non-evidence-based anecdotal information as to how the district determines admissions for its center-based preschool programs relied on by the IHO.

State law dictates that "[t]he board of each school district shall be responsible for the provision of special education services and programs to preschool children . . ." (Educ. Law § 4410[2]). "After consideration of the recommendation of the committee and its statement of reasons, including any statement or statements of a parent setting forth an expressed preference, the board shall arrange for the provision of the recommended special services or programs from among the special services and programs approved for such purpose by the commissioner" (Educ. Law § 4410[5][c] [emphasis added]). Further, State law provides that "A preschool child shall receive the services of a program arranged for by the board commencing with the starting date for such program" (Educ. Law § 4410[5][e] [emphasis added]).[6] Based on State statute, although

[4] According to the allegations of the parents, they selected Brookville after the CSE process had concluded due to their dissatisfaction with the sites offered by the district for implementing the student's IEP; however, as noted above, a full evidentiary hearing has not been held in this matter.

[5] It is not clear from the limited facts if the student actually received early intervention services, or if the June 2019 CPSE meeting was the first time the student was considered for IDEA services, but under the Education Law, it would not affect the outcome of this case.

[6] The statute further provides guidance for how the municipality is involved with the provision of services and programming to preschool students having disabilities, stating that

> The board shall give written notice of the special services or programs arranged for to the appropriate municipality, and to the related service provider or the approved program selected to provide the services. The municipality shall contract with the approved program in a timely manner but in no event later than forty days from the receipt of written notice of the determination of the board.
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> * * *
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> The board shall determine the appropriate municipality based on the municipality within the school

there is room for input from parents in arranging for the provision of special services or programs to preschool students, the district is ultimately the party left with the obligation to arrange the student's programming in a center-based program in conformity with the written terms of the student's IEP. Accordingly, based on the framework provided under State law both with respect to Education Law § 4410[7][c][7][ii] which provides that a preschool student in these circumstances shall, under pendency, receive services in the program designated by the board, and under the more general provisions of Education Law § 4410[5][c] with respect to the party that initially designates the location of services, including the brick and mortar site for center-based services when recommended by the CPSE in the preschool student's IEP,[7] the IHO erred in finding that the district was required to accede to the parents' choice of school for the purpose of implementing the student's preschool programming pursuant to pendency.

It is not clear from the hearing record as to why so much of the IHO's decision is based on LRE considerations (IHO Interim Decision at pp. 3-6). While the IHO indicated that the district raised LRE as a reason for not wanting to place the student at the approved nonpublic school selected by the parents, the district did not make such an allegation on the record during the hearing.[8] The closest such allegation is actually contained in the parents' due process complaint notice and amended due process complaint notice both of which alleged that the CPSE administrator/district representative told the parents that she would not send a student "from Jamaica to Long Island" (August 7, 2019 Due Proc. Comp. Not. at p. 2; September 9, 2019 Amend. Due Proc. Comp. Not. at p. 3). It is possible that this allegation regarding the distance of the school from the student's home sparked the thought that LRE was an issue to be addressed in this matter. In this appeal, the district does not rely on LRE principles in its arguments.

As explained in the IHO's decision, LRE considerations do at times take the distance from a student's home to the location of the student's educational program into account (see IHO Interim Decision at p. 4). 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

district in which the preschool child resides at the time such board issues its written notice of determination

(Educ. Law § 4410[5][f], [g]).

[7] The IHO was correct to note, however, that because the student is not of compulsory school age, the district's decision to place a preschool student in a particular school or site does not have as much force as it would for a school age student whom parents are generally required to send to school. I can fully appreciate that is likely of little comfort to parents who believe the district should be providing an alternative arrangement.

[8] While the IHO framed the questions presented for the parties and appears to have offered the parties the opportunity to submit briefs, which they both declined, the IHO did not confirm the parties' positions on the record (Tr. pp. 3-6).

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 IHO tried to balance these two competing LRE concerns (proximity to the home and the school that the child would otherwise attend) as they apply to preschool students and reasoned that the selection of an assigned preschool within the district cannot be based on the proximity to the student's place of residence but instead must incorporate a parental choice mechanism. However, as further described in the Official Analysis of Comments to the revised IDEA regulations, the district must maintain some flexibility in deciding how to implement a student's educational program. In response to a comment requesting that an IEP be required to include an explanation as to why a child's educational needs cannot be met in the location requested by the parent, the United States Department of Education noted that "such a provision would be overly burdensome for school administrators and [would] diminish their flexibility to appropriately assign a child to a particular school or classroom, provided that the assignment is made consistent with the child's IEP" (Placements 71 Fed. Reg. 46588 [August 14, 2006]). The IHO overstepped that flexibility by discounting the district's decision to place the student closer to home, a decision that was consistent with the considerations expressed in the regulations governing LRE. Although citing State guidance for school aged students, the IHO discounted such guidance, indicating that the principles did not apply in the preschool context (IHO Interim Decision at pp. 4-5). However, the State's preschool guidance does not discount that aspect of federal law and states that "[t]he CPSE must consider how to provide the services in the Least Restrictive Environment (LRE), where your child can learn close to your home with other children of the same age who do not have disabilities. Services may be provided at an approved or licensed pre-kindergarten or Head Start program, the work-site of a provider, the student's home, a hospital, a State facility or a child care location" (see "Information for Parents of Preschool Students with Disabilities AGES 3-5" available at http://www.p12.nysed.gov/specialed/publications/preschool/brochure.htm). Additionally, the district's decision to keep the student closer to home may relate to the district's ability to effectively administer its educational programs, such as the provision of transportation. Accordingly, the IHO's reliance on LRE as a basis for finding that the district could not assign the student to a particular school was misplaced.[9, 10]

[9] The IHO also noted that the district's selection of a school site "raises a very serious Section 504 concern" in that parents of nondisabled preschool students may "avail themselves of preschool choice," while parents of disabled students cannot (IHO Interim Decision at p. 6). Although, review of this matter on appeal is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2]), it should be noted that there is no indication in the hearing record that the parents are seeking to avail themselves of the same process by which parents of nondisabled students apply to preschools for admission within the district.

[10] The policies and procedures that the district in this case uses to match preschool students (both disabled and nondisabled) with preschool sites and service providers was also not made part of the evidentiary record relied upon by the IHO. For example, State regulations explain that certain preschool programs must have random selection processes when the number of students who apply exceed the number of seats available (see 8 NYCRR 151-1.4). The State has recently initiated significant changes to foster a greater number of public and/or publicly funded preschool and early learning opportunities (see, e.g., Matter of DeVera, 32 N.Y.3d 423, 427-31 [2018] [detailing the history of the "legacy" universal prekindergarten statute (Education Law § 3602-e), the changes effectuated by the "statewide" universal prekindergarten legislation codified in Education Law § 3602-ee and the

Having overturned the IHO's finding on pendency, I will also address the parents' additional arguments related to pendency, as they were not submitted to the IHO and the parents' reasoning differs from the reasoning that the IHO used to support his decision. The crux of the parents' argument is that because they selected a State-approved school that is capable of implementing the student's preschool program, pendency must be provided at that particular preschool site. The parents assert that because the student's educational program refers only to the general type of educational program in which the child is placed, the parents are permitted to select a program that implements the student's educational program. The parents rely on a line of cases, which have found parents may move a student from a previously approved private facility to another private facility and receive funding under pendency as long as the new facility has the same general type of educational programming as the previously approved facility (see Answer ¶32-34). For the reasons described below, the parents' argument is misplaced in these circumstances.

Generally, the Second Circuit has held that the selection of a public school site to provide a student special education and related services is an administrative decision within the discretion of the school district (R.E. v. New York City Dep't of Educ., 694 F.3d 167, 191-92 [2d Cir. 2012]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that, while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). Similarly, in assessing whether a parent's selection of private service providers was reimbursable as part of the student's educational program under pendency, the Second Circuit noted that "[i]t is up to the school district to decide how to provide that educational program, at least as long as the decision is made in good faith" (T.M., 752 F.3d at 171).

However, the district's discretion to select a location at which to implement a student's pendency placement can, under certain circumstances, be forfeited (see Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook Cty., Ill. v. Illinois State Bd. of Educ., 103 F.3d 548, 549-50 [7th Cir. 1996] [in the case of a student who had been expelled from school, examining "the power of the court and the parents, rather than the power of the school district, to effect [the student's] placement" when the district forfeited that power by not producing any placement alternatives];[11]

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intervening addition of the Charter School Act]). It was recently reported to the New York State Board of Regents that there were seven separate early learning programs for three- and or four-year-olds with unique funding streams and requirements attendant to each program (see New York State Education Department; Proposal to Align Prekindergarten Programs in New York State (January 2017) available at https://www.regents.nysed.gov/common/regents/files/Proposal%20to%20Align%20Prekindergarten%20Programs%20in%20New%20York%20State.pdf), and many providers, both public and nonpublic, administer multiple programs alongside one another simultaneously, adding to the administrative complexity of placing students (see New York State Prekindergarten Program Directory, available at http://www.p12.nysed.gov/upk/documents/2018-2019NYSPre-KProgramDirectory.pdf).

[11] While Cook County arose in the disciplinary context, which is governed by a different set of rules under the IDEA (compare 34 CFR 300.518, with 34 CFR 300.533), the Seventh Circuit's description of the issue before it is similar, and the Court's observations are instructive to the present context.

Laster v. Dist. of Columbia, 439 F. Supp. 2d 93, 101-02 & n.10 [D.D.C. 2006] [noting that, "because the defendants failed to comply with IDEA provisions by not finding a substantially similar placement facility when the children's current facility became unavailable, the parents were entitled to act unilaterally"]).

In prior administrative proceedings, I have noted that in some circumstances parents can successfully secure stay-put protection if they obtain an administrative or judicial ruling that validates their decision to move a student from an IEP-specified public school setting to a private school that they selected without the district's input and this placement becomes the "then-current educational placement" for purposes of the stay-put rule, so long as a proceeding is pending (Schutz, 290 F.3d at 484). If "then-current educational placement" means only the general type of educational program in which the child is placed, then it appears that parents are not precluded from effecting alterations to a student's private programming without jeopardizing the district's obligation to fund the placement as stay put, so long as the alterations do not effect a change in educational placement (see Application of the Dep't of Educ., Appeal No. 19-039; Application of a Student with a Disability, Appeal No. 19-006;). Some district courts have adopted a similar approach finding that "Parents may unilaterally transfer their child from an established pendency placement to another educational setting so long as they comply with the ten-day notice requirement and establish that the two programs are substantially similar" (Soria v. New York City Dept. of Educ., 397 F. Supp. 3d 397, 402 [S.D.N.Y. 2019]; see Melendez v. New York City Dept. of Educ., 2019 WL 5212233, at *9 [S.D.N.Y. Oct. 16, 2019]; Navarro Carrilo v. New York City Dept. of Educ., 384 F. Supp. 3d 441, 464 [S.D.N.Y. 2019]; Abrams v. Carranza, 2019 WL 2385561, at *4 [S.D.N.Y. June 6, 2019]; Cruz v. New York City Dept. of Educ., 2019 WL 147500, at *10 [S.D.N.Y. Jan. 9, 2019]). However, some district courts have taken the opposite approach, finding that parents are not permitted to unilaterally move a student from one school to another and continue to receive the benefits of having the new placement paid for under pendency (see Hidalgo v. New York City Dept. of Educ., 2019 WL 5558333, at *8 [S.D.N.Y. Oct. 29, 2019]; Neske v. New York City Dept. of Educ., 2019 WL 3531959, at *7 [S.D.N.Y. Aug. 2, 2019], reconsideration denied, 2019 WL 5865245 [S.D.N.Y. Nov. 7, 2019]; De Paulino v. New York City Dept. of Education, 2019 WL 1448088, at *6, reconsideration denied 2019 WL 2498206 [S.D.N.Y. May 31, 2019]).

First, unlike this case, all of those cases involved situations where the student's placement at a parentally selected nonpublic school was already being funded by the district prior to the parent unilaterally selecting a second nonpublic school for the student because, generally, the parents in those matters had already prevailed in a due process proceeding and obtained an administrative or judicial ruling in their favor placing the student in a nonpublic school of the parent's choice. In this matter, the IEP at issue is the first IEP developed for the student under part B of the IDEA and the student has not yet attended either a public school or a nonpublic school. As described above, for a preschool student who has not yet received services under part B of the IDEA, for the purposes of stay-put, the student shall receive services in the program designated by the board, which designation resulted in such appeal (Educ. Law § 4410[7][c][ii]). In this instance, the parents alleged that the district suggested three preschools for the student (September 9, 2019 Due Proc. Comp. Not. At pp. 2, 3). While the parents object to the appropriateness of those schools

for the student (id.), the schools offered by the district are, in essence, the parents' options for the student's placement during the pendency of these proceedings.

VI. Conclusion

Based upon the evidence in the hearing record and for the reasons noted above, the student's school placement for the purposes of pendency is at the schools identified in the parents' amended due process complaint notice as having been recommended by the district and is not at Brookville.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's interim order on pendency dated October 22, 2019, is modified, by reversing that potion that determined that Brookville is the student's educational placement for the purposes of pendency.

Dated: **Albany, New York**
January 3, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER