The University of the State of New York

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

No. 20-011

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 Nathaniel Luken, Esq.

Thivierge & Rothberg, PC, 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 from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to fund the costs of the student's attendance at the Brookville Center for Children's Services, Inc. (Brookville Center) for the 2019-20 school year. 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) or a local Committee on Preschool Special Education that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 4402, 4410; 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

This student has been the subject of a prior administrative appeal of an interim decision rendered by an IHO regarding the student's pendency placement after the district's offer of a particular preschool location for the 2019-20 school year and the parent's rejection thereof (see Application of the Dep't of Educ., Appeal No. 19-125). This State-level appeal relates to the IHO's final decision on the issue of the district's offer of a free appropriate public education (FAPE) in the same proceeding.

Turning to the student's educational history, in spring 2018, the student began receiving special instruction and speech-language therapy through the Early Intervention Program (EIP) (Dist. Exs. 1 at p. 1; 2 at p. 1; 4 at p. 1).[1]

On September 20, 2018 the district issued a "Consent for Initial Evaluation" seeking the parents' consent to evaluate the student and determine his eligibility for special education and related services through the CPSE (Parent Ex. M).[2] The parent signed the consent on November 19, 2018 and selected Brookville Center to conduct the evaluations of the student (id.).[3]

On November 19, 2018 a psychologist from Brookville Center evaluated the student's cognitive, adaptive, and social/emotional functioning (Dist. Ex. 1 at p. 1). Administration of the Wechsler Preschool and Primary Scale of Intelligence – Fourth Edition (WPPSI-IV) yielded a full scale IQ of 80, which fell in the low average range (id. at pp. 2, 4). The psychologist noted that the student's index score for verbal comprehension fell in the low average range, while his scores for visual spatial abilities and working memory fell in the borderline range (id. at pp. 2, 4-5, 8). According to the psychologist, completion of the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3) by the parent yielded scores at a "moderately low" adaptive level for communication, daily living skills, socialization, and motor skills (id. at pp. 3, 6-7, 8). In addition, results of the Behavior Assessment System for Children, Third Edition (BASC-3) parent report form yielded scores in the average range and did not reveal any significant behavior problems (id. at pp. 3, 8). The psychologist described the student as "friendly and socially related" during testing (id. at p. 1). She noted that the student displayed intermittent eye contact, which he sometimes used "with social intention, and to regulate social interactions" (id.). Although initially compliant, the student "got up from his chair and walked away" from the table where the evaluation was being conducted and did not respond to verbal prompts, physical prompts, or candy reinforcers to return to testing (id.). The psychologist indicated that the student's expressive language "mostly consisted of jargon" (id. at p. 2). In terms of receptive language, the student was sometimes able to follow directions; however, other times he did not follow directions "because he did not prefer to engage in the given task" or did not appear to understand directions (id.). According to the psychologist, the parent reported that the student showed interest in children of the same age but he could also be "aggressive with other children including hitting" (id. at p. 6). Further, the parent reported that the student would tantrum, usually when "things d[id] not go his way," and that these tantrums occurred about twice a day lasting between fifteen minutes and an hour (id.).

A second psychologist from Brookville Center completed a social history/parent interview on November 19, 2018 (Dist. Ex. 2). The psychologist reported that the parent's primary concern

[1] As part of a November 2018 social history, the parent reported that the student was not receiving special instruction due to the lack of a provider (Dist. Ex. 2 at p. 1). The parent also reported that the EIP services were inconsistent (id.).

[2] The hearing record includes duplicative exhibits (compare Parent Exs. C; M, with Dist. Exs. 6; 9). For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit were identical.

[3] Both of the student's parents were listed on the due process compliant notices and the request for review; however, predominantly the student's mother exchanged correspondence with the district and testified as a part of the impartial hearing proceedings. For clarity, when the decision references the parent in the singular, it is in reference to the student's mother.

was the student's speech and language development (id. at p. 1). The parent informed the psychologist that the student was in good physical health, had no known allergies, and did not take "daily medication" (id. at p. 2). On November 28, 2018 an educational evaluator conducted an observation of the student at home during his EIP speech-language therapy session (Dist. Ex. 3). The educational evaluator indicated that during shape sorter and puzzle activities the student was "fidgety in his seat and redirection by the therapist was unsuccessful" (id.). However, the evaluator noted that the student completed a Lego building activity and cookie matching game (id.).

As part of the student's initial CPSE evaluation, Brookville Center also completed a speech-language evaluation on November 29, 2018 (Dist. Ex. 4). Administration of the Preschool Language Scale – Fifth Edition (PLS-5) and Receptive-Expressive Emergent Language Test – Third Edition (REEL-3) revealed receptive and expressive language delays (id. at pp. 1-4). With respect to receptive language, the evaluating speech-language pathologist indicated that the student responded to his name and simple directives, given verbal repetition, and was able to identify some body parts, clothing items, common objects, and simple actions (id. at p. 3). The student had difficulty comprehending pronouns and following commands (id.). With respect to expressive language, the student obtained a desired item by getting it himself or pointing to it (id.). According to the evaluator, the student had difficulty using more words than gestures to communicate and using words for a variety of pragmatic functions (id.). The student "was not observed to use more than 20 words or name objects by use" and he "used jargon along with occasional single words given verbal prompts (id.).

A November 29, 2018 occupational therapy (OT) evaluation report indicated that the student demonstrated fine motor delays, sensory processing difficulties, and required assistance to complete most-self-help tasks (Dist. Ex. 5 at pp. 1-4). Administration of the Peabody Developmental Motor Scales – Second Edition (PDMS-II) indicated that the student showed strengths in his ability to use a three-jaw chuck grasp, scribble on paper, and build a ten-cube tower (id. at p. 2). According to the evaluating occupational therapist, the student's greatest areas of need were related to improving his grasp on markers and scissors, imitating lines, and stringing beads (id.). Completion of the Toddler Sensory Profile 2 by the parent revealed difficulties in the student's general processing (the student would "'occasionally' take longer than same aged children to respond to questions or actions, would "withdraw[] from situations and misse[d] eye contact during everyday interactions") and visual processing abilities (the student "was observed to be easily distracted and required prompts to remain focused") (id. at pp. 2-3). In addition, the parent's responses indicated that the student had temper tantrums and was clingy, half the time staying calm only when being held (id. at p. 4). The parent's responses further indicated that the student was impulsive, had a low frustration tolerance, poor social interactions, a high activity level, and a short attention span (id.) The occupational therapist noted that during the evaluation the student was fidgety and ran around the room; he also threw items across the room when presented with a non-preferred task (id.).

Following the completion of the initial evaluation, the CPSE convened on January 9, 2019 (Tr. p. 66). At that time the CPSE administrator suggested the student was "borderline" and recommended that the committee reconvene after the student's third birthday (Tr. p. 67). The

parent requested to tour Brookville Center and the CPSE administrator did not object (id.).[4] The parent subsequently toured Brookville Center (Tr. pp. 57-58, 66-68).

The CPSE reconvened on June 5, 2019 and found the student eligible for special education services as a preschool student with a disability (Parent Ex. C at p. 1). The resultant IEP reflected the results of the evaluations conducted by Brookville Center (compare Parent Ex. C, with Dist. Exs. 1-5). The IEP stated that the student required "a language-based educational setting which adopt[ed] a multi-media and multi-sensory approach" (Parent Ex. C at p. 5). The IEP further stated that the student needed "consistent prompts, redirection, [and] consistent verbal models, as well as . . . repetition and clarification of verbal input" (id.). The CPSE created nine annual goals that focused on the student's weaknesses in fine motor development, visual motor development, sensory processing, attending, peer relations, expressive language, and following directions (id. at pp. 7-10). For the 2019-20 school year, the CPSE recommended that the student attend a full day (5 hours per day) special class in an integrated setting five times a week and receive two 30-minute sessions of individual speech-language therapy per week and two 30-minutes sessions of individual OT (id. at p. 11). The recommended IEP indicated that the student did not require special transportation and the placement recommendation was listed as "Approved Special Education Program" (id. at p. 14).

The parent reported that at the June 2019 CPSE meeting she asked the CPSE administrator if the student could attend Brookville Center and the CPSE administrator advised her that the student needed go to a screening in "his community" (Tr. p. 68; see Tr. pp. 50, 53). The CPSE administrator recommended the Apple Tree Preschool (Apple Tree) as a potential preschool location for the student (see Tr. pp. 68-69). The parent visited Apple Tree and, in an email dated June 20, 2019, advised the district that she did not believe the setting was suitable for the student (Parent Ex. L). The parent asserted that Apple Tree was not appropriate because it was too restrictive and the children enrolled in the school required "a support based program whereas" her child required "a peer module structure for his development" (id.). In an email response dated June 24, 2019, the district acknowledged the parent's disappointment with Apple Tree and indicated that it had secured a spot for the student at one of the district's public schools and also reached out to two other State-approved preschools (id.). The email noted that the administrators from the approved preschools would contact the parent directly (id.). The parent indicated that one of these schools was the Parsons Preschool (Parsons) (Tr. pp. 70-71).

In a "Preschool Acceptance Letter" addressed to the CPSE chairperson and dated July 15, 2019, Brookville Center indicated that it was able to provide the level of services mandated in the student's June 2019 IEP (Parent Ex. D). The letter stated that the student would be placed in a class with a maximum class size/staffing ratio of 15:1+2 and that the proposed class conformed with the requirements of the student's IEP (id.). The letter also noted that the student would be provided with the related services indicated on his IEP (id.). The assistant director for Brookville Center reported that the CPSE administrator would not approve the student for the school (Tr. pp. 50-51). According to the assistant director, the CPSE administrator suggested that Brookville

[4] The New York State Education Department approves preschool special education programs, including Brookville Center, 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).

Center should not have conducted a screening of the student and advised the parent that the school was appropriate without a referral from the district (Tr. p. 51).

In an email dated July 19, 2019, the district stated that the parent's visit at Parsons "was a success" and that the school had accepted the student to start in September (Parent Ex. K at p. 1). In a final notice of recommendation also dated July 19, 2019, the district assigned the student to attend Parsons for the 2019-20 school year (Dist. Ex. 8; see Dist. Ex. 7).

In an email dated July 23, 2019, the parent informed the CPSE that she was declining the placement at Parsons (Parent Ex. K at p. 1). The parent indicated that she had the opportunity to visit Parsons and tour the school (id.). The parent asserted that "during the tour, the school's representative was unable to provide adequate information pertaining to class setting, related services, classroom placement and structures, curricular resources or positive behavioral supports used to support children with special needs" (id.). The parent further noted that the location of the classrooms for students with disabilities was in the basement of the school, which raised safety concerns (id.). The parent asserted that she did not believe that the placement was able to provide adequate supports to meet the student's speech and language or socialization needs (id.).

The parents filed a due process complaint notice on August 7, 2019 (see Parent Ex. A). In a letter dated September 9, 2019, the student's physician indicated that the student had a diagnosis of asthma and used a nebulizer when needed (Parent Ex. G). The physician opined that it was necessary that the student "be in an environment which is free of dust and well aerated" (id.).

The parent testified that, after the resolution session, the district proposed another preschool location, this one within a district public elementary school (Tr. pp. 78-79). The parent testified that when she toured this preschool, she was informed it could not accommodate the student because the school didn't offer a preschool program for three-year-old students (id.).

A. Due Process Complaint Notice

In an amended due process complaint notice, dated September 9, 2019, the parents asserted that the district denied the student a FAPE for the 2019-20 school year by failing to offer "an appropriate preschool placement" (see Parent Ex. B). The parents contended that, "[t]o date, the [district] ha[d] failed to recommend a special education program for [the student] which could implement his IEP" (id. at p. 2). The parents asserted that they visited the proposed preschool locations identified by the district and found them all inappropriate for the student (id.). Specifically, regarding the district's recommendation that the student attend Parsons, the parents asserted that they rejected Parsons due to their concerns that the classroom to which the student would have been assigned was located in the basement of the school and that the student's asthma would have been exacerbated in that setting (id.). The parents contended that the student's pediatrician "agreed that the physical setting would not be appropriate" (id.). Further, the parents argued that the school staff "could not offer information about the curriculum and academics" (id.).[5]

[5] The parents also asserted that the district accused the parent "of disrespecting administrators and programs" after they rejected Parsons (Parent Ex. B at p. 2).

According to the parents, although Brookville Center (the parent's preferred State-approved preschool) accepted the student for the program beginning September 4, 2019 and would have been able to implement the student's IEP, the district refused to finalize the student's admission to Brookville Center (Parent Ex. B at pp. 2-3). According to the parents, a CPSE administrator "told the [student's] mother she w[ould] not send a child from Jamaica to Long Island" (id. at p. 3). According to the parents, the refusal to enroll the student at Brookville Center excluded the parents "from the IEP development process" and "cause[d] serious deprivation of educational benefits each day" (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 2019-2020 school year with roundtrip special education transportation" (Parent Ex. B at p. 3).[6]

B. Interim Impartial Hearing Officer Decision on Pendency

On October 8, 2019, the parties proceeded to an impartial hearing (Tr. pp. 1-8).[7] The IHO issued an interim decision on pendency on October 22, 2019 (IHO Interim Decision). The IHO noted that both parties agreed that the IEP "constitutes the student's initial and appropriate preschool program" but that the parents' challenged the district's refusal to implement the IEP in the preschool the parents selected for the 2019-20 school year (id. at p. 3). 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" (id.). The IHO then repeated two questions that he presented during the impartial hearing: "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 his first question, 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.). However, the IHO determined that, because the selection of a preschool for a student without a disability is based, not on the distance from a student's home,

[6] In an email to the district sent on September 16, 2019, the parent reiterated that she did not believe the recommended program at Parsons was appropriate for the student due to educational and medical reasons (Parent Ex. H). The parent requested that the CPSE send paperwork to Brookville Center, where the student had been accepted, to allow his placement there for the 2019-20 school year (id.). The parent indicated in her email that she had previously requested the district send paperwork to Brookville Center to allow the student's placement there for the 2019-20 school year (id.).

[7] On October 8, 2019, the parents requested mediation to resolve the issues raised in the present matter; however, the district did not agree to engage in mediation (Parent Ex. O at pp. 1-3).

but on the parents' preferences and school availability, a district "must replicate the school choice opportunity" for students with disabilities 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 parents 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 (id. at p. 6).

Based on the foregoing, the IHO ordered the district to place the student at the school identified by the parents as the pendency (stay put) placement (IHO Interim Decision at p. 6).

C. Impartial Hearing Officer Decision

The parties continued with and completed the impartial hearing on November 12, 2019 (Tr. pp. 9-85). The district served and filed an appeal of the IHO's interim decision on pendency with the Office of State Review pursuant to 8 NYCRR 279.10(d) (see Application of the Dep't of Educ., Appeal No. 19-125). On December 15, 2019, while the district's interlocutory appeal was pending, the IHO rendered a final decision on the merits of the claims raised in the parents' due process complaint notice (IHO Decision at p. 4).

Initially, the IHO characterized the issues presented as raising a legal issue (i.e., related to application of LRE principals) and a factual issue (i.e., whether the district's proposed preschool locations were appropriate or whether the parents had the right to pursue a different preschool "which offered an identical program" (IHO Decision at p. 2). With respect to the former issue, the IHO held that "[n]othing ha[d] changed [his] analysis of the law of LRE" as set forth in the interim decision (id.). The IHO reiterated his finding that "distance from home is not the basis for LRE in preschool under the federal interpretation of the term" and that State guidance referenced distance "only instrumentally" (id. at p. 3). Additionally, the IHO noted that his pendency order raised serious concerns about the district denying the parents the "right to preschool choice based on the student's disability," whereas nondisabled students "may attend any duly approved preschool program of their choice" (id.). For these reasons, the IHO "reiterate[d]" his "conclusion in [the] pendency order[] [that] the student ha[d] a legal right to attend the school the family ha[d] identified" (id.).

Turning to the factual issue, the IHO held that the parent's preferred school, Brookville Center, was able to provide the student's IEP mandated program and was an appropriate choice (IHO Decision at p. 3). Further, the IHO determined that the family cooperated with the district "throughout" and that the parents' rejection of the preschool location proposed by the district was "justified . . . even absent [the] district's full knowledge of the underlying medical reason" (id. at pp. 3-4). Specifically, the IHO found that "the family legitimately turned down two offered programs and, helpfully, offered a third that could plainly deliver the student's IEP" (id. at p. 4). "The district offered no further program alternatives and instead tried to thwart the family's

proffered program on grounds that do not challenge its academic propriety" (id.). Therefore, the IHO determined the district "failed to offer an appropriate program to the student" (id.). The IHO held that the parents "identified a fully appropriate State-approved program capable of delivering the IEP program" and that the parentally-selected preschool was the LRE for the student (id.). Finally, the IHO found that the district had "discriminated against [the student] on the basis of the student's disability . . . with respect to preschool choice" in violation of section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a) (id.).

For relief, the IHO directed "the district to place the student at the proffered parentally-selected preschool, and to provide transportation" to and from the school (IHO Decision at p. 4).

D. State-Level Administrative Review Decision on Pendency

In a decision dated January 3, 2020, an SRO reviewed the district's appeal of the IHO's October 22, 2019 interim decision on pendency (Application of the Dep't of Educ., Appeal No. 19-125). The SRO found that, as a matter of State law, pendency for a preschool student who had not previously received preschool services, such as the student in the present case, consists of services in the program designated by the board (id. at pp. 8, 10, 11, citing Educ. Law § 4410[7][c][ii]). Addressing the IHO's discussion of parental choice in the selection of preschool locations for students, the SRO contrasted the "non-evidence-based anecdotal information as to how the district determines admissions for its center-based preschool programs relied upon by the IHO" to the dictates of State law, which provides that "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" (Application of the Dep't of Educ., Appeal No. 19-125, at pp. 10-11, citing Educ. Law § 4410[2], [5][c], [e]). Therefore, the SRO found that the IHO erred in finding that the district had to implement the student's pendency program at the preschool preferred by the parents.

The SRO also touched on the IHO's findings in the interim decision related to LRE, first noting that it was not clear why the IHO focused his attention on LRE concerns and then noting that the Official Analysis of Comments to the revised IDEA regulations specifically spoke to a district's need to maintain flexibility in deciding how to implement a student's educational program (Application of the Dep't of Educ., Appeal No. 19-125, at p. 12, citing Placements 71 Fed. Reg. 46588 [August 14, 2006]). The SRO indicated that the district's decision in the present case was consistent with LRE considerations, which, contrary to the IHO's finding, apply in the preschool context as reflected in State preschool guidance (Application of the Dep't of Educ., Appeal No. 19-125, at p. 12, citing "Information for Parents of Preschool Students with Disabilities AGES 3-5," available at http://www.p12.nysed.gov/specialed/publications/preschool/ brochure.htm).

IV. Appeal for State-Level Review

The district appeals from the IHO's December 15, 2019 final decision, arguing that the IHO erred in finding that it failed to offer the student a FAPE for the 2019-20 school year. First, the district emphasizes that the parents did not challenge the IEP created by the CPSE but instead only dispute the particular preschool location to which the district assigned the student to attend. The district asserts that the IHO erred in finding that the parents were justified in rejecting the preschool locations proposed by the district and should have limited his review to whether the assigned

preschool location (Parsons) could have implemented the IEP. The district argues that "the parents do not have the right to dictate the school district's placement of their child" under the IDEA.

The district argues that it afforded the parents "input regarding placement" as required by the IDEA, noting that the district found three preschool locations for the parents to consider. As for the appropriateness of Parsons, the district argues that the hearing record shows that it could implement the student's IEP. The district asserts that the parents did not inform the district of the student's asthma prior to the district's proposal that the student attend Parsons on July 19, 2019 and that the letter from the student's physician is retrospective evidence that should not be considered. Moreover, the district contends that the parents failed "to establish that the Parsons classroom was an environment that would aggravate the Student's asthma."

Next, the district argues that the IHO erred in his analysis of LRE. The district contends that the issue of LRE was not raised in the due process complaint notice and that the issue is beyond the scope of review. Further, the district asserts that, since the IHO adopted his LRE findings from his interim decision on pendency, the SRO's reversal of the same in Application of the Department of Education, Appeal No. 19-025, should be deemed controlling.

The district also contends that the IHO erred in finding that Brookville Center was appropriate for the student. The district argues that the IHO should not have reached the second prong of the Burlington/Carter analysis regarding appropriateness of the unilateral placement because the district met its burden to show that it offered the student a FAPE. The district asserts the parents are not entitled to tuition funding for Brookville Center.

Finally, the district appeals the IHO's finding that the district violated section 504. The district acknowledges that an SRO does not have jurisdiction to review the IHO's findings related to section 504 but, nevertheless, argues that "the record is devoid of any indication that the [district] in any way discriminated against the Student on the basis of his disability."

In an answer, the parents generally admit or deny the district's allegations and argue that the IHO's decision should be upheld in its entirety. In addition, the parents argue the district failed to defend the appropriateness of the preschools proposed by the district other than Parsons: to wit, Apple Tree or the preschool located within a district public elementary school. Also, the parents assert that, by refusing to consider recommending Brookville Center, the district predetermined its recommendation for a particular preschool location and denied the parents the right to meaningfully participate in the development of the student's educational program. With respect to the appropriateness of Parsons, the parents contend that the CPSE was aware of the student's "medical and safety concerns" as the parents relayed those concerns to the CPSE after their visit. Moreover, the parents assert that the program was disorganized and lacked appropriate behavioral support. Finally, the parents contend that Brookville Center was an appropriate preschool and request that the district be required to fund the student's attendance there.

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 CPSE or 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]).[8] IEP recommendations for a preschool student with a disability must be developed in the same manner as an IEP for a school-age student (see 8 NYCRR 200.16[e][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 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. Scope of Review

With regard to the district's appeal of the IHO's determination that it violated section 504, an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations

[8] 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).

"relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]).

Accordingly, as the district acknowledged in its request for review, I have no jurisdiction to review the district's appeal of the IHO's determinations regarding section 504.

B. Parent Participation and LRE

The "legal issue" or issues addressed by the IHO in his final decision mirrored those he resolved in his interim decision on pendency (compare IHO Decision at pp. 2-3, with Interim IHO Decision at pp. 4-6). Indeed, the IHO acknowledged that nothing had changed his analysis of the law compared to his findings in the October 22, 2019 interim decision (IHO Decision at p. 2). The IHO did not have the benefit of the SRO's decision in Application of the Department of Education, Appeal No. 19-125, when he issued his final decision. However, subsequent to the IHO's issuance of his final decision, the district's appeal of the interim decision on pendency was sustained. The grounds on which the SRO reversed the IHO's interim decision on pendency now similarly warrant reversal of the IHO's final decision. Specifically, the IHO erred in his determinations relating to the degree to which the district must accommodate parental choice in selecting a particular preschool location for a preschool student to attend and the degree to which LRE considerations apply in the preschool context.

Generally, parents are entitled to participate in determining the educational placement of a student with a disability (see 20 U.S.C. §1415[b][1]); however, a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009] [holding that educational placement refers to the "general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school"]; 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]; White v. Ascension Parish Sch. Dist., 343 F.3d 373, 379-80 [5th Cir. 2003]; A.W. v. Fairfax County Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]).

As the SRO noted in Application of the Department of Education, Appeal No. 19-125, the same is true in the preschool context and State law is specific in providing 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]; see 8 NYCRR 200.16[f][1]). 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]; see 8 NYCRR 200.16[f][1]).

Based on the foregoing, the IHO erred in determining that the district was required to accede to the parents' choice of school for the purpose of implementing the student's preschool programming.

Turning to the IHO's findings related to LRE, the IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107; 300.114[a][2][i]; 300.116[a][2]; 300.117; 8 NYCRR 200.1[cc]; 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). State and federal regulations provide that a district must "ensure" that a student attend a placement "as close as possible to the [student's] home" and "in the school that he or she would attend if nondisabled," "[u]nless the IEP . . . requires some other arrangement" (34 CFR 300.116[b][3]; [c]; see 8 NYCRR 200.1[cc]; 200.4[d][4][ii]).

LRE requirements apply to preschool students in a similar way as they apply to school-aged students (see Participation With Nondisabled Children, 71 Fed. Reg. 46,666 [Aug. 14, 2006]; Dear Colleague Letter, 69 IDELR 106 [OSEP 2017]). In addition to the State guidance relating to LRE requirements cited by the IHO ("School Districts' Responsibilities to Provide Students with Disabilities with Specially-Designed Instruction and Related Services in the Least Restrictive Environment," Office of Special Educ. Mem [Dec. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationFieldAdvisoryMemoLRE.pdf; see IHO Decision at p. 3; Interim IHO Decision at p. 4), the State has more explicitly provided that a CPSE "must consider how to provide special education in the [LRE], where a preschool student with a disability can learn close to home with other children of the same age who do not have disabilities" ("Guide for Determining Eligibility and Special Education Programs and/or Services for Preschool Students with Disabilities" VESID Mem. [Jan. 2003] [emphasis added], available at http://www.p12.nysed.gov/specialed/publications/preschool/guide/; see also "Information for Parents of Preschool Students with Disabilities AGES 3-5," available at http://www.p12.nysed.gov/specialed/publications/preschool/brochure.htm).

In discounting the district's ability to consider a school's distance from a student's home as a part of the school selection process, and focusing on the other component of LRE, i.e. that "the student must be educated in the school he or she would have attended if not disabled," the IHO used the LRE provisions to remove the school selection process from the district. Notably, there is no indication in the hearing record that Brookville Center is the school which the student would

have attended if not disabled or that the parents could not have utilized the district's preschool selection process to identify the school the student would have attended if not disabled.[9] Additionally, as discussed above, the IHO erred in his determination that the district is required to accede to parental choice in this context. Instead, the district is permitted flexibility in identifying a preschool location and is permitted to consider, along with the parents' preference, the distance of the preschool location from the student's home. Therefore, for these reasons and for the reasons articulated in Application of the Department of Education, Appeal No. 19-125, the IHO erred in his application of LRE considerations in the preschool context.

C. Assigned School

Having determined that the district has flexibility in deciding how to implement a student's educational program, taking into account parental input and LRE considerations, the "factual issue" addressed by the IHO remains to be examined: to wit, whether the particular preschool location to which the district assigned the student to attend (Parsons) had the capacity to implement the student's IEP.[10]

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y., 584 F.3d at 419; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a

[9] The policies and procedures that the district 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 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).

[10] The parents allege that the district failed to defend the appropriateness of the preschools proposed by the district other than Parsons (i.e., Apple Tree or the preschool located within a district public elementary school); however, the district only identified these other preschools as possibilities for the parent to consider and did not officially recommend that the student attend them as it did Parsons (see Tr. pp. 68-69, Tr. pp. 78-79; Parent Ex. L; Dist. Ex. 8). Accordingly, the district did not need to defend the appropriateness of the other preschools.

particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O., 793 F.3d at 244; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Permissible prospective challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 222 F. Supp. 3d 326, 338 [S.D.N.Y. 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Reviewing the parents' amended due process complaint notice in light of the foregoing, the parents did not allege any prospective, non-speculative challenges to the district's capacity to implement the June 2019 IEP at Parsons (see Parent Ex. B). The amended due process complaint notice set forth the parents' concerns about Parsons because the classroom was "located in a basement without windows," which could exacerbate the student's asthma, and because the staff at Parsons "could not offer information about the curriculum and academics" (id. at p. 2).

1. Parent Participation—Information

To the extent the parents felt that they had insufficient information about the curriculum and academics at Parsons, as alleged in the amended due process complaint notice (Parent Ex. B at p. 2), the evidence in the hearing record reflects that the parents were provided an opportunity to tour Parsons and to obtain information relevant to a determination of whether the school could implement the student's IEP.

As discussed above, a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (see M.O., 793 F.3d at 244-45); however, there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant

information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

The evaluation coordinator/school psychologist (evaluation coordinator) for Parsons testified that the CPSE administrator reached out to Parsons to see if it had an "integrated class spot" for the student (Tr. p. 29). She indicated that it did and that she scheduled a screening and tour with the parent to take place in July (id.). The evaluation coordinator testified that, on a tour, she usually provided a parent with a walkthrough of the building (Tr. pp. 29-30). The evaluation coordinator testified that she showed the parent an integrated classroom and went "over the schedule" and "the daily activities" for the classroom with the parent (Tr. p. 30).[11] She indicated that, at the time of the tour, the parent did not express concerns about the ability of Parsons to address the student's needs (Tr. pp. 30-31). The coordinator could not "precisely remember" questions that the parent may have posed about Parsons (Tr. p. 34).

The parent reported that, following the visit, she relayed her concerns to a CPSE administrator via email dated July 23, 2018 (Tr. p. 74; see Parent Ex. K at p. 1). In particular, the parent stated in the email that "during the tour, the school's representative was unable to provide adequate information pertaining to class setting, related services, classroom placement and structures, curricular resources or positive behavioral supports used to support children with special needs" (Parent Ex. K at p. 1). The parent testified that she received a response from a second CPSE administrator who called on July 26th (Tr. p. 75). According to the parent, she informed the second CPSE administrator that she was rejecting Parsons but that she had identified Brookville Center as a school she would like the student to attend (id.). The Parsons evaluation coordinator testified that "a few days after" the parent toured Parsons she was informed by the second CPSE administrator that the parent felt she had not received adequate information about Parsons, including information about "the curriculum" or the "support systems" (Tr. p. 31). The coordinator testified that, in response, the principal of Parsons reached out to the parent and that, when the parent returned the principal's call, she "basically expressed that she was not comfortable with [the student] being placed in a basement" (Tr. p. 31). According to the parent, she subsequently spoke with the first CPSE administrator who told her "how dare you tell me that a

[11] The evaluation coordinator indicated that, from what she could remember from her notes, the student was able to separate from his mother and join the integrated classroom (Tr. p. 30). According to the evaluation coordinator, the student went into the classroom and sat with a group of other children (id.). She noted that the teacher was providing instruction and the student was attending (id.). The evaluation coordinator reported that the student seemed very related and showed interest in the other children and things around him (id.). He was also able to engage with the teacher (id.). In contrast to the evaluation coordinator's testimony, the parent reported that she had to beg the student to go inside the classroom (compare Tr. p. 71; with Tr. p. 30). She noted that there was an instructor at a table with two young boys and that the student sat with them for less than two minutes and then gravitated back to her (Tr. p. 72).

school does not have adequate information or curriculum. There's no way that I am sending [a] child from Jamaica to Long Island" (Tr. p. 76).

While the first CPSE administrator's reaction, as described by the parent, may not have been appropriate, the evidence in the hearing record does not reflect that the parents were denied the procedural right to obtain information about Parsons in order to make an informed decision about its ability to implement the student's IEP. Instead, the parent was provided an opportunity to tour the assigned preschool location and there is no indication that the parent pursued her questions about Parsons when either the principal of Parsons or the second CPSE administrator contacted her (see E.P. v. New York City Dep't of Educ., 2016 WL 3443647, at *11 [S.D.N.Y. June 10, 2016] [finding no violation of the parent's right to participate where the parent attended and participated in the CSE meeting, the district timely notified her of the assigned public school site, and the parent was provided a tour of the school, notwithstanding that the district failed to respond to the parent's letters and phone calls]). Further, with respect to the information sought about the curriculum and academics (see Parent Ex. B at p. 2), these areas of inquiry are too broad to tether them to the IEP such that it is unclear whether the information sought by the parents was even directly relevant to their ability to assess the proposed preschool location's capacity to implement the student's IEP (see E.P., 2016 WL 3443647, at *12 [distinguishing cases in which parents were unable to ascertain whether assigned schools "had certain IEP-mandated resources" from cases in which parents sought information about aspects of the school that revealed their concerns to be, in fact, substantive attacks on the students' IEPs]). Accordingly, the hearing record does not support a finding that the parents were denied the opportunity to obtain information about the proposed school site.

2. Location of Classroom

Turning to the crux of the dispute about Parsons, the parents expressed concerns related to the student's health and safety because the student's classroom and related service rooms were located in the school's basement, which the parents opined would exacerbate the student's asthma (see Parent Ex. B at p. 2).

With specific regard to the health or safety of a student with a disability, a school district denies the student the benefits guaranteed by the IDEA if it proposes a placement that threatens a student's health in a manner that undermines his or her ability to learn (A.S. v. Trumbull Bd. of Educ., 414 F. Supp. 2d 152, 178 [D. Conn. 2006]; citing Lillbask v. Conn. Dep't of Educ., 397 F.3d 77, 93 [2d Cir. 2005] [noting that Congress did not intend to exclude from consideration any subject matter, including safety concerns, that could interfere with a disabled student's right to receive a FAPE]; L.K. v. Dep't of Educ. of the City of New York, 2011 WL 127063, at *9 [E.D.N.Y. Jan. 13, 2011] [finding failure to identify a serious allergy to citrus fruits on a student's IEP did not constitute a denial of a FAPE]).

Initially, there was no provision in the IEP indicating that the student had asthma or required a particular environment (see Parent Ex. C). Moreover, as the district argues, at the time of the CPSE meeting on June 5, 2019, information that the student had a diagnosis of asthma was not made available to the CPSE as none of the evaluations, including the social history and the health examination form, indicated that the student suffered from asthma (see generally Dist. Exs.

1-6; Parent Ex. C). As such, the parent's challenge to the location of the classroom in the basement is not tethered to the IEP (see Y.F., 659 Fed. App'x at 5).[12]

Even assuming that the CPSE was aware of the student's asthma or a need for a dust free and/or aerated environment, the parents' allegation about the inappropriateness of the basement classroom at Parsons is speculative. The parent testified that the evaluation coordinator for Parsons showed her the classroom in which the student would be placed (Tr. p. 71). The parent indicated that she had concerns about the classroom and asked the evaluation coordinator if there was a possibility that the student could be placed in a classroom upstairs (id.). According to the parent, the evaluation coordinator responded "no" that the student would be downstairs in the basement (id.). The parent recalled that the tour continued, and the evaluation coordinator let her know where the student would receive his speech-language therapy and OT services (id.). The parent testified that she had medical concerns because the student was asthmatic and opined that it would not be appropriate for the student to be there (Tr. p. 72). According to the parent, the classroom was in a lower basement and she did not observe any windows (Tr. p. 73). She reported that the student had been getting treatments for his asthma since he was one-year old and she had concerns that the student would not be able to breathe appropriately in that setting (id.). The parent testified that she had additional concerns about the related services rooms which were also located in the basement where there were no windows (Tr. p. 74).

The letter from the student's physician, dated September 9, 2019 (after the parent's original due process complaint notice), states that it is "necessary that [the student] be in an environment which is free of dust and well aerated" (Parent Ex. G; see also Parent Ex. A at p. 1).[13] Although, the record demonstrates that the classroom at Parsons was located a basement, as was the related services room, it does not demonstrate that the student's asthma would have been affected by this location. The Parsons school psychologist testified that, to the best of her knowledge, the school had no violations when the Department of Health inspected the school within the past year (Tr. p. 32). Further, there is no indication in the hearing record that the classroom at Parsons was not free of dust or well aerated as required by the student's medical note or that the school could not make accommodations to make it so if the student attended. Accordingly, the evidence in the hearing record does not support the parent's claim that the district could not implement the student's IEP at Parsons because of the location of the classroom in the basement.

Notwithstanding that the parent's claim about the appropriateness of Parsons in the light of the student's asthma fails, if the parent remains concerned that the student requires a certain environment to accommodate the student's asthma, she should request that the CPSE reconvene and consider the same.

[12] The parents argue that they made the CPSE aware of the student's needs promptly after visiting Parsons (Parent Mem. of Law at p. 8). In support of this proposition, the parents cite their July 23, 2019 email to the district; however, in the email, the parent only states that she "was disheartened to find that classes for students with disabilities were located on the basement level of the school building. This raises safety concerns" (Ex. K at p. 1). The parent's email is not specific to the student and does not mention the student's asthma.

[13] The same physician completed a health examination form dated November 28, 2018, which was available to the CPSE, that did not reflect that the student suffered from asthma (compare Parent Ex. G, with Dist. Ex. 10).

3. Capacity to Implement the IEP

In addition to the foregoing, in their memorandum of law in support of their answer, the parents argue that the testimony of the evaluation coordinator failed to explain how Parsons would meet the student's "academic, social, and behavioral needs" or implement the student's annual goals, management needs, behavioral supports, or related services (Parent Mem. of Law at pp. 8, 9). However, the parents' allegations in their amended due process complaint notice about the location of the classroom in the basement and the lack of information communicated by Parsons staff during the tour (Parent Ex. B at p. 2) were insufficient to trigger the district's burden to present testimony about the capacity of Parsons to implement every aspect of the student's IEP (see J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [finding that a district did not have a burden to produce evidence demonstrating the adequacy of the assigned public school site absent non-speculative allegations about the school's ability to implement the IEP]; N.K., 2016 WL 590234, at *6 [noting that "[t]o be a cognizable claim, i.e., one that triggers the school district's burden of proof, the 'problem' with the placement cannot be a disguised attack on the IEP"]; see also M.B. v New York City Dep't of Educ., 2017 WL 384352, at *6 [S.D.N.Y. Jan. 25, 2017] [noting that the parent in that matter did "not allege that the placement school did not have the ability to satisfy the IEP" but instead sought "to require the District to prove in advance that it w[ould] properly implement the IEP," which "M.O. does not require"]).

The parent testified regarding her observations during her tour at Parsons (see Tr. pp. 71-74). Even assuming that the parents' concerns, as noted in the parent's testimony, had been sufficiently set forth in the parents' amended due process complaint notice to trigger the district's burden, they were not sufficiently tethered to the IEP (Y.F., 659 Fed. App'x at 5) and/or they were "instead, substantive attacks on [the student's] IEP . . . couched as challenges to the adequacy of [Parsons]" (M.O., 793 F.3d at 245). For example, the parent testified that, during the tour, staff did not facilitate the student's social interaction with the other students or use a lesson plan (Tr. p. 72). Further, the parent stated that she asked about behavioral supports at Parsons and she was told that the school did not utilize applied behavior analysis (ABA) or employ a Board Certified Behavior Analyst (BCBA) (Tr. p. 73). However, the student's IEP did not specify that the student required particular adult facilitation for social interactions, use of a lesson plan, or instruction using ABA (see generally Parent Ex. C).[14]

Based on all of the foregoing, there is nothing in the hearing record to indicate that Parsons did not have the capacity to implement the student's IEP. The district acted within its purview in

[14] The assistant director at Brookville Center testified that the student had behavioral needs, which they would have addressed using ABA methods and BCBA support (Tr. pp. 60-61). Specifically, she testified that although the classroom was not receiving ABA throughout the day, when a particular child would benefit from the method, the teachers, who are trained in the method, would implement it for that student (Tr. p. 61). These features of the Brookville Center program were not necessary to provide the student with a FAPE as they were not part of the student's IEP and the parties agree that the student's IEP was appropriate. The evidence regarding the student's behavioral needs and Brookville Center in the hearing record speaks to the parent's desire for the student to receive greater educational benefits through the provision ABA and BCBA services; however, a district is not obligated to provide services to maximize a student's educational opportunity (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Accordingly, to the extent that the behavioral supports sought in this proceeding are for the purposes of maximization of the student's potential, this is not a basis for finding that the recommended placement at Parsons was not appropriate.

recommending that the student attend Parsons and, as such, the district was not required to consider assigning the student to attend Brookville Center, the preschool preferred by the parents.

VII. Conclusion

In conclusion, it is noted that due to the parties' dispute in this matter, the student has not attended school or received related services through the course of the 2019-20 school year thus far (see Tr. p. 79). As a reminder to both parties, federal and State statutes and regulations concerning the education of students with disabilities provide for a collaborative process between parents and school districts in planning and providing appropriate special education services (see Schaffer v. Weast, 546 U.S. 49, 53 [2005] [noting that the "core of the statute" is the collaborative process between parents and schools, primarily through the IEP process]; Cerra, 427 F.3d at 192-93). I strongly encourage the parties to work collaboratively to ensure the student receives services going forward.

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2019-20 school year, the necessary inquiry is at an end. In light of this determination, I need not address the parties' remaining contentions.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated December 15, 2019 is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2019-20 school year and ordered the district to place the student at Brookville Center.

Dated: **Albany, New York**
February 14, 2020

STEVEN KROLAK
STATE REVIEW OFFICER