



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-027

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 suspected of having a disability

Appearances:

Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Daniel Levin, Esq.

Law Offices of Regina Skyer and Associates, LLP, attorneys for respondents, by Jesse Cole Cutler, Esq. and Linda A. Goldman, 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 a free appropriate public education to respondents' (the parents') daughter and ordered it to reimburse the parents for a portion of their daughter's tuition costs at the Shefa School (Shefa) for the 2018-19 school year. The parents cross-appeal from the IHO's decision to reduce the award of tuition reimbursement and from the IHO's determination that their daughter was not eligible for special education and supplemental services under the IDEA. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student attended a general education classroom in a dual-language charter school from first through fifth grades (see Parent Ex. D at p. 1; Dist. Ex. 12 at pp. 2-3). By parent report, the student began struggling with reading in first grade and received academic intervention services from the end of first grade until the end of second grade (id. at p. 3). In addition, the student received twice weekly tutoring sessions from second through fifth grades, paid for by her parents

(id.). In December 2017, when the student was in fifth grade, the parents obtained a private evaluation (educational update) due to their concerns that the student had shown a lack of educational progress in reading (Parent Ex. D at p. 1).¹ The hearing record indicates that the parents corresponded with the Shefa admissions team from December 5, 2017 through January 18, 2018, regarding participation in a prospective parent information session (Dist. Ex. 16 at pp. 1-3).² On March 10, 2018, the parents executed an enrollment agreement to place the student at Shefa for the 2018-19 school year (Parent Ex. K).

In a letter dated May 11, 2018, the parents shared the December 2017 educational update with the CSE and "request[ed] an IEP for the 2018-19 school year" (Parent Ex. A at p. 1).³ The district responded to the parents' letter in a prior written notice dated May 18, 2018 (Parent Ex. C). In the prior written notice, the district notified the parents that written consent for an initial evaluation of the student was required and listed the types of assessments to be conducted by the district (id. at pp. 1, 2). According to the district's Special Education Student Information System (SE SIS) events log, the parents were contacted on July 11, 2018 and July 18, 2018 to confirm the parents and student would appear for a psychoeducational evaluation and social history evaluation scheduled for July 19, 2018 (Dist. Ex. 15 at p. 7). The student's father provided written consent for the student to be evaluated on July 19, 2018 (Dist. Ex. 9). The psychoeducational evaluation and the social history evaluation also took place on July 19, 2018 with information provided by the student's parents (Dist. Exs. 10; 12).

The district sent the parents a notice, scheduling a CSE meeting for July 30, 2018 (Dist. Ex. 2). According to the district's SE SIS events log, the July 30, 2018 CSE meeting was postponed in order to have a speech-language evaluation conducted (Dist. Ex. 15 at p. 5). The speech-language evaluation was completed on August 8, 2018 (Dist. Ex. 14).

By letter dated August 20, 2018, the parents notified the district that the CSE had failed to convene to complete the initial evaluation process and provided 10-day notice of their intent to enroll the student in Shefa for the 2018-19 school year and seek tuition reimbursement (Parent Ex. E at pp. 1, 2). On September 12, 2018, the district sent the parents a notice, scheduling a CSE meeting for October 4, 2018 (Dist. Ex. 3). The October 2018 CSE meeting was rescheduled; the reason provided in the District's SE SIS log was that the student began attending Shefa which was located in a different region from her prior school (Dist. Ex. 15 at pp. 2-3). A notice of meeting was sent on November 21, 2018, scheduling a CSE meeting for December 11, 2018 (Dist. Ex. 4).

¹ The evaluation was conducted on three separate days in December 2017 and also included an observation of the student in her classroom at Shefa in April 2018 (Parent Ex. D at pp. 1-2). As the evaluation was primarily conducted in December 2017, and as it does not include a date for the report of the evaluation, it will be referred to herein as the December 2017 educational update (id.).

² The Commissioner of Education has not approved Shefa as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

³ In their letter to the CSE, the parents stated that the evaluation they obtained was a neuropsychological evaluation, however the evaluation is entitled "educational update" (compare Parent Ex. A at p. 1; with Parent Ex. D at p. 1).

A CSE convened on December 11, 2018 and found the student ineligible for special education services (Dist. Ex. 6). In a prior written notice dated January 18, 2019, the district reiterated the December 2018 CSE's determination that the student was not eligible for special education services, setting forth the evaluative information considered by the CSE and advising the parents of their due process rights (Dist. Exs. 8 at pp. 1-2; 15 at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated July 9, 2019, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2018-19 school year (Dist. Ex. 1 at p. 1). The parents alleged that the district failed to conduct all necessary evaluations and convene a CSE meeting in a timely manner (*id.* at p. 2). The parents also claimed that as a result of the CSE's failures to timely conduct an initial evaluation and convene a CSE meeting, the student was denied educational opportunity and a FAPE (*id.*). The parents argued that the CSE failed to develop or provide an IEP for the 2018-19 school year, failed to obtain and consider sufficient evaluative measures to determine the student's present levels of educational performance and areas of need, and "significantly impeded the ability of the [p]arents to participate in the development of the IEP" (*id.*).⁴ The parents further asserted that the CSE improperly found the student ineligible for special education due to academic testing that placed the student within the average range of functioning (*id.*). The parents rejected the CSE's determination and unilaterally enrolled the student in Shefa (*id.* at p. 3). The parents contended that Shefa was an appropriate placement for the 2018-19 school year; Shefa was able to address the student's academic and social/emotional needs, and Shefa was reasonably calculated to enable the student to receive an educational benefit (*id.*). The parents asserted that they had cooperated with the CSE review and placement process and as such, equitable considerations were in their favor (*id.*). As relief, the parents requested direct funding of the cost of the student's attendance at Shefa (*id.*).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 4, 2019, and concluded on November 22, 2019, after two days of proceedings (Tr. pp. 17-228).⁵ During the impartial hearing, the district conceded that there was a procedural defect in the CSE not convening until December 2018 (Tr. p. 225).

In a decision dated January 8, 2020, the IHO found that the district failed to offer the student a FAPE for the 2018-19 school year because the district "failed to comply with the procedural requirement that the student be evaluated and recommended for services within the required time frame" (IHO Decision at p. 15). Relying on Application of a Student Suspected of Having a Disability, Appeal No. 18-085, the IHO rejected the district's argument that the

⁴ The due process complaint notice appears to be a template which included errors, omissions, and allegations that are not related to this matter. For example, the date of the CSE meeting was incorrect, the body of the complaint alleged deficiencies in an IEP that was never developed, and in the proposed resolution section, the notice alleged that the parents "lack[ed] the financial resources to make tuition payments to Schoolname" (Dist. Ex. 1 at pp. 2-3).

⁵ A prehearing conference was held on September 18, 2019 (Tr. pp. 1-16).

procedural violation did not rise to the level of a denial of a FAPE because the student was not eligible for special education services under the IDEA (id.).

Next, the IHO found that Shefa was an appropriate unilateral placement for the student for the 2018-19 school year, and that equitable considerations weighed in favor of reimbursement (IHO Decision at pp. 16-19). The IHO ordered the district to provide reimbursement for the non-religious portion of tuition at Shefa for the 2018-19 school year (id. at p. 21).

Finally, in addressing the result of the December 2018 CSE meeting, the IHO found that the CSE correctly determined the student was ineligible for special education services under the IDEA, as the hearing record contained a "wealth of information and evaluations which support[ed] the CSE[']s determination" (IHO Decision at pp. 19-20).

IV. Appeal for State-Level Review

The district appeals, challenging the IHO's award of tuition reimbursement for a student determined to be ineligible for special education and related services under the IDEA. The district alleges that the IHO erred by finding the district failed to offer a FAPE to the student, arguing that a student who is not eligible for special education and related services under the IDEA is not entitled to a FAPE. The district asserts that its failure to comply with the timelines for initial review constituted a procedural violation that did not rise to the level of a denial of a FAPE and that the IHO erred by awarding tuition reimbursement for the 2018-19 school year to an ineligible student as a remedy for a procedural violation. The district further argues that the IHO misinterpreted the holding in Application of a Student Suspected of Having a Disability, Appeal No. 18-085, wherein the district in that matter had not appealed from the IHO's finding of a denial of a FAPE. The district asserts that the issue of finding a denial of a FAPE for an ineligible student was never reviewed in the matter relied on by the IHO. The district also argues that the IHO further erred by finding the parents' unilateral placement at Shefa appropriate as it provided special education to a student found not to be eligible for services and that the IHO further erred in awarding direct funding as the parents did not prove that they were unable to pay the cost of the student's attendance at Shefa. The district does not appeal the IHO's finding that the student was ineligible for special education services under the IDEA.

In an answer with cross-appeal, the parents respond to the allegations contained in the request for review and cross-appeal from the IHO's reduction of tuition reimbursement by 25 percent and the IHO's determination that the student was ineligible for special education services. The parents assert that the IHO's decision should be affirmed in all other respects.

In an answer to the parents' cross-appeal, the district responds to the allegations contained in the parents' cross-appeal and asserts that the IHO correctly determined that the student did not have a disability. The district also argues that the parents' answer with cross appeal should be dismissed due to the parents' failure to sign the verification which was instead executed by the parents' attorney.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services

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

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

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. Preliminary Matters

1. Scope of Impartial Hearing

In their cross-appeal, the parents assert that the student's eligibility for special education was predetermined prior to the December 11, 2018 CSE meeting. The parents further allege that the IHO noted that it could be reasonably inferred that the district predetermined the student was not eligible. The parents contend that predetermination in this matter rose to the level of a substantive harm because the parents had not been permitted to participate in determining the student's eligibility prior to the start of the 2018-19 school year.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In this matter, the IHO noted that a July 30, 2018 entry on the SESIS log indicated "'Document: [I]neligible for Special Education Services' and 'deleted draft for [the student]'. It can be reasonably inferred that someone deemed [the student] 'ineligible' before the CSE had completed all the evaluations and the meeting had been held" (IHO Decision at p. 8; see Dist. Ex. 15 at p. 5). In their answer with cross-appeal, the parents have characterized this as a finding of

predetermination. However, the parents' due process complaint notice does not include an allegation of predetermination, nor did the parents' attorney raise predetermination as a claim at the prehearing conference or in his opening statement (Dist. Ex. 1; see Tr. pp. 1-16, 23-27). Upon review of the hearing record, the district did not subsequently agree to add the issue of predetermination and the parents did not attempt to amend the due process complaint notice to include this issue. Accordingly, although seemingly addressed by the IHO, this issue was raised for the first time on appeal and is outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]").

While I am not convinced that the IHO made a finding of predetermination, assuming for the sake of argument that the parents' interpretation of the note made by the IHO was correct, notwithstanding the fact that the parents' due process complaint notice did not include this claim, the next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of M.H. v. New York City Department of Education, (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

The issue of the July 30, 2018 SESIS entry, indicating that a notice of ineligibility was created for the student, first appeared during cross examination by the parents' attorney when he questioned the district's school psychologist (Tr. p. 71). The school psychologist was asked if she herself had drafted a notice of ineligibility, if she knew the person to whom the entry was attributed, and if she knew the notice had been generated (Tr. pp. 70-71). The district did not question or elicit testimony from the school psychologist relative to the July 30, 2018 SESIS entry or to a notice of ineligibility during direct examination (Tr. pp. 33-71). The information regarding the July 30, 2018 SESIS event log entry was not elicited by the district during direct examination and, therefore, the district did not "open the door" to a claim of predetermination (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9). In addition, the SESIS log also reflects that the district continued to evaluate the student and subsequently convened a CSE to determine the student's eligibility (Dist. Ex. 15 at pp. 1-5). Accordingly, the hearing record demonstrates that the issue of a notice of ineligibility generated on July 30, 2018 was elicited by the parents and, therefore, the district did not "open the door" to this issue under M.H. Accordingly, the claim of predetermination is an issue that was raised for the first time by the IHO in her decision and is outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]).

2. Compliance with Practice Requirements

In an answer to the cross-appeal and a reply, the district asserts that the parents' answer with cross-appeal was not properly verified in accordance with State regulations and requests that the parents' answer with cross-appeal be dismissed. In general, the failure to comply with the regulations governing practice before the Office of State Review may result in rejection of pleadings at the discretion of an SRO (8 NYCRR 279.8[a]). The verification accompanying the

parents' answer with cross-appeal was signed by the parents' attorney, instead of one or both of the parents. State regulation requires that "[a]n answer shall be verified by the oath of the respondent submitting such answer" and that "[i]f two or more respondents are united in interest, verification of the answer shall be made by at least one of them who is familiar with the facts underlying the appeal" (8 NYCRR 279.7[b]).

In the verification executed by the parents' attorney on March 17, 2020 and in a letter accompanying the parents' answer with cross-appeal, the parents' attorney stated that due to the current health and safety crisis, the parents were unable to travel to a notary due to health complications.⁶ The district alleges that the contents of the parents' attorney's letter should have been asserted in the answer with cross-appeal as good cause for the improper verification. The district further argues that the parents were granted four weeks of extensions to serve and file their pleadings in advance of the escalation of the COVID-19 pandemic.⁷ The district contends that the parents' attorney cited personal and professional commitments, rather than health and safety issues in his extension requests. For these reasons, the district argues that the parents' answer with cross-appeal should not be considered.⁸

As for the attorney's signing of the affidavit of verification, the district is correct that this aspect of the parents' filing was out of conformance with State regulations (8 NYCRR 279.7[b]); however, the district was able to respond to the allegations raised in the cross-appeal, and there is no indication that the district suffered any prejudice in its ability to respond to the parents' pleading. Considering the unusual and unprecedented circumstances surrounding the filing of the answer in this matter, I exercise my discretion and decline to dismiss the parents' answer with cross-appeal on this ground (Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058; see J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015] [noting that "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored"]).

B. CSE Process

1. Timeliness of Initial Evaluation

The district appeals from the IHO's determination that the student was denied a FAPE for the 2018-19 school year because it "failed to comply with the procedural requirement that the

⁶ On March 19, 2020, the governor addressed this very issue by executive order, which now permits a notary public to witness a signature via "audio-video technology" (see "Guidance to Notaries Concerning Executive Order 202.7" available at https://www.dos.ny.gov/licensing/notary/DOS_COVID19_RemoteNotaryGuidance.pdf).

⁷ Due to the COVID-19 pandemic, the Chief State Review Officer issued a temporary order permitting alternate forms of service of pleadings and prescribed that the COVID-19 pandemic may be permissibly asserted as good cause for an untimely pleading ("Revised General Order," Office of State Review [March 22, 2020], [available at https://www.sro.nysed.gov/common/sro/files/revised-general-order3.22.20_1.pdf](https://www.sro.nysed.gov/common/sro/files/revised-general-order3.22.20_1.pdf)). The order of the Chief State Review Officer does not address verification of pleadings; however, it does reference executive order 202.7 prescribing modifications to the procedures for notarial acts.

⁸ The district indicated that it would not object to a grant of reasonable time for the parents to file a proper verification.

student be evaluated and recommended for services within the required time frame" (IHO Decision at p. 15). The district alleges that in rendering her decision, the IHO misapplied Application of a Student Suspected of Having a Disability, Appeal No. 18-085, and argues that the IHO erred by finding that a procedural violation of the IDEA rose to the level of a denial of a FAPE for a student subsequently and correctly determined to be ineligible for special education services under the IDEA (*id.*).

As correctly asserted by the district, in Application of a Student Suspected of Having a Disability, Appeal No. 18-085, neither party appealed the IHO's determination that a student not eligible for IDEA services was denied a FAPE. In that case, the district challenged the IHO's determination in an answer, but failed to assert a cross-appeal. As such, the IHO's determination had become final and binding on the parties (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The SRO further explained that the parents in that matter made a reasonable choice to unilaterally enroll the student in a nonpublic school for the full school year and equitable considerations supported an award of full tuition reimbursement because the district had delayed commencing an initial evaluation of the student for more than a year and failed to convene a CSE to make an initial eligibility determination for 20 months (see Application of a Student Suspected of Having a Disability, Appeal No. 18-085).

State regulation requires that a student suspected of having a disability "shall be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an "individual evaluation and determination of eligibility for special education programs and services" (8 NYCRR 200.4[a]). If a "building administrator" or "any other employee" of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]-[a][5]; see also 34 CFR 300.300[a]). State regulation also provides that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services (AIS), and any other services designed to address the learning needs of the student (see 8 NYCRR 200.4[a][9]). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (see 8 NYCRR 200.4[a][9][iii][a]-[b]).

Once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). After parental consent has been obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).

In the instant matter, the parents referred the student for an initial evaluation by letter dated May 11, 2018 (Parent Ex. A). The district provided the parents with a prior written notice dated May 18, 2018, which indicated written consent was required to evaluate the student and identified the assessments to be conducted (Parent Ex. C).⁹ The district has conceded that the initial evaluation of the student was not completed within the 60-day regulatory timeframe (Tr. p. 225).¹⁰ The district obtained written consent to evaluate the student on July 19, 2018 (Dist. Ex. 9).¹¹ Accordingly, the district was required to complete the initial evaluation of the student by September 17, 2018—60 days from the district's receipt of the parents' written consent (see 8 NYCRR 200.4[b]). The district conducted a Level I Vocational Interview and social history on July 19, 2018 (Dist. Exs. 11; 12). By notice dated July 20, 2018, the district invited the parents to attend a July 30, 2018 initial CSE meeting (Dist. Ex. 2). A psychoeducational evaluation was completed by the district on July 25, 2018 (Dist. Ex. 10). According to the SESIS event log, the July 30, 2018 CSE meeting was rescheduled to allow for a speech-language evaluation (Dist. Ex. 15 at p. 5). The speech-language evaluation was completed on August 8, 2018 (Dist. Ex. 14). On August 20, 2018 and prior to the expiration of the 60-day timeframe, the parents provided the district with a notice indicating the parents' belief that the district denied their opportunity to participate in the student's education by not developing an IEP for the student and further indicated the parents' belief that this entitled them to have the student's placement at Shefa for the 2018-19 school year funded by the district (Parent Ex. E). By notice dated September 12, 2018, the district invited the parents to attend an October 4, 2018 initial CSE meeting (Dist. Ex. 3). On September 17, 2018—the last day to timely complete the student's initial evaluation—the district learned that the student had been enrolled at Shefa, which resulted in a transfer of the student's initial evaluation to a different CSE region (Dist. Ex. 15 at p. 3). The district referred the initial evaluation process to the CSE region where the nonpublic school was located on the same day (id.). In an email dated October 1, 2018, the parents provided written notice that the student had enrolled in Shefa and requested that an initial CSE meeting convene (id. at p. 2). A classroom observation was

⁹ The May 2018 prior written notice indicated that the district would conduct a social history, a psychological evaluation, a physical examination, and an observation (Parent Ex. C at p. 1).

¹⁰ The social history and psychological evaluation were completed in July 2018 (Dist. Exs. 10, 12). A speech-language evaluation was completed in August 2018 (Dist. Ex. 14). In addition, although a classroom observation was not conducted by the district until October 2018, the educational update produced by the parents included a description of an April 2018 observation of the student in her classroom (see Parent Ex. D at pp. 1-2; Dist. Ex. 13).

¹¹ The parents' May 11, 2018 initial referral letter included a blanket consent for the district "to conduct any evaluation is [sic] assessment you deem necessary" (Parent Ex. A). However, this blanket consent does not meet the requirements of consent as defined by both State and federal regulations as the parents had not yet been provided prior written notice and the district had not yet notified the parents as to what evaluations would be conducted (see Application of a Student with a Disability, Appeal No. 17-104). Consent is defined in federal and State regulations as meaning that the parents have been informed of all relevant information in their native language or other mode of communication, that they understand and agree in writing to the activity for which consent is sought, that the written consent form fully describes the activity for which consent is sought, lists any records that will be released and the people to whom any records will be released, and further that the parents must be aware that the consent is voluntary, may be revoked at any time, and if revoked, that revocation is not retroactive (34 CFR 300.9; 8 NYCRR 200.1[l]).

completed at Shefa on October 1, 2018 (Dist. Ex. 13).¹² On October 3, 2018, the district advised the parents that the new CSE region had been notified and that the parents would be contacted by the CSE assigned to that region to schedule the student's initial CSE meeting (Dist. Ex. 15 at p. 2). By notice dated November 21, 2018, the district invited the parents to attend an initial CSE meeting on December 11, 2018 (Dist. Exs. 4 at p. 1; 15 at p. 2). A CSE convened on December 11, 2018 and found the student was not eligible for special education and related services under the IDEA (Dist. Ex. 6 at pp. 1, 4). In a notice dated January 9, 2019, the parents were notified of the CSE's determination with a summary of the student's present levels of performance (Dist. Exs. 5 at p. 1; 6 at pp. 1-5). The parents were notified of their due process rights in a prior written notice dated January 18, 2019 (Dist. Exs. 8; 15 at p. 1). The hearing record reflects that the district's time to complete the student's initial evaluation expired after the start of the 2018-19 academic school year, on September 17, 2018 (Dist. Ex. 9). The initial CSE meeting was held on December 11, 2018, over four months after the parents' initial referral and almost three months beyond the 60-day requirement. While the district has conceded that it failed to timely evaluate the student, the entitlement to relief for a procedural violation of the IDEA is warranted only if the violation affected the student's right to a FAPE (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see A.H. v. New York City Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 688 [E.D.N.Y. 2012], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]; Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 300 [S.D.N.Y. 2010]; M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 501; [S.D.N.Y. 2008]; Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d 261, 279 [D. Conn. 2002]).

In this matter, the IHO failed to consider whether the delayed completion of the student's initial evaluation and eligibility determination impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]).

Generally, when a CSE has appropriately determined that a student was not eligible for special education services under the IDEA, and the student's parents were able to participate in that determination, any alleged procedural violation by the district does not result in a denial of FAPE to the student (D.K. v. Abington Sch. Dist., 696 F.3d 233, 249-50 [3d Cir. 2012]; D.G. v. Flour Bluff Indep. Sch. Dist., 481 Fed. App'x 887, 891-93 [5th Cir. 2012] [holding that "IDEA does not penalize school districts for not timely evaluating students who do not need special education"]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225-26 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378, 384 [5th Cir. 2007] [finding consideration of alleged procedural errors of IDEA unnecessary when student was not eligible for special education services]; D.H.H. v. Kirbyville Consol. Ind. Sch. Dist., 2019 WL 5390125, at *6 [E.D. Tex. Jul. 12, 2019] [finding a school district does not violate the IDEA if it declines to provide special education to a student who does not need special

¹² The IHO's decision incorrectly states that the classroom observation was conducted on October 29, 2018 (compare IHO Decision at p. 8; with Dist. Exs. 13 at p. 1; 15 at p. 2).

education and does not qualify as a child with a disability under the IDEA]; see also Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 812 [5th Cir. 2003]).

The IHO erred by finding that the approximately three-month delay in this matter rose to the level of a denial of a FAPE. The district's procedural violation in this process stands in sharp contrast to the district's actions in Application of a Student Suspected of Having a Disability, Appeal No. 18-085. The student in that matter waited nearly two years for the district to complete the student's initial evaluation and, due to that extensive delay, the parent was left with little information to rely on in planning for the student's education. In this matter, the parents enrolled the student at Shefa on March 10, 2018 and did not refer the student for an initial evaluation until May 11, 2018 (Parent Exs. A; K at p. 4). In addition, as detailed above, the district moved expeditiously in conducting the student's initial evaluation, but failed to convene a CSE to make the initial eligibility determination in a timely manner (see Dist. Exs. 2-14). While this failure amounts to a procedural violation, it did not hinder the parents' ability to participate in the decision making process as the parents made the decision to place the student at Shefa for the 2018-19 school year before the district's time to hold a CSE meeting had expired.¹³ Under the circumstances, the IHO's finding that the district denied the student a FAPE based on not conducting the initial evaluation or CSE review within the applicable timeline must be overturned (see Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 751-52 [2d Cir. 2018] ["'mere procedural noncompliance' the school district exhibited by failing to evaluate the student within sixty days of receiving permission from the parents did not amount to an 'unwarranted delay'"]).

2. Educational Disability and Eligibility for Special Education

After finding that the student was denied a FAPE, and awarding tuition reimbursement, the IHO then determined that the December 2018 CSE correctly found the student ineligible for special education (IHO Decision at pp. 19-20). The parents cross-appeal the IHO's determination that the student was determined to be ineligible for special education services under the IDEA. In their due process complaint notice, the parents had alleged the December 2018 CSE failed to "conduct, secure, or rely on sufficient evaluative measures" to determine the student's present levels of performance and needs (Dist. Ex. 1 at p. 2). The parents further objected to the CSE's failure to classify the student and failure to find the student "qualif[ied] for special education services" (id.).

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). Pursuant to 8 NYCRR 200.4(b)(4), a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability and, in accordance with

¹³ The parents' agreement enrolling the student at Shefa for the 2018-19 school year did include a clause that allowed the parents to withdraw the student from Shefa prior to September 7, 2018 without incurring any expenses other than the nonrefundable \$5,000 tuition deposit, if the parents accepted a placement recommended by a CSE (Parent Ex. K at pp. 1, 2). However, as noted above, the district's time period for evaluating the student ran until September 17, 2018 and the time period for holding a CSE meeting to determine the student's eligibility and recommend a program would have been at least another two weeks after that (see 8 NYCRR 200.4[b]; NYCRR 200.4[e][1]).

8 NYCRR 200.4(b)(5), the reevaluation must be "sufficient to determine the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education." A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

The IDEA defines a "child with a disability" as a child with specific physical, mental, or emotional conditions, including a learning disability, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1]). A learning disability, according to State and federal regulations, means "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations" (8 NYCRR 200.1[zz][6]; see 34 CFR 300.8[c][10]). A learning disability "includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia" (8 NYCRR 200.1[zz][6]; see 34 CFR 300.8[c][10][i]). A learning disability "does not include learning problems that are primarily the result of visual, hearing or motor disabilities, of an intellectual disability, of emotional disturbance, or of environmental, cultural or economic disadvantage" (8 NYCRR 200.1[zz][6]; see 34 CFR 300.8[c][10][ii]).

While many of the eligibility classifications require a determination that a student's condition "adversely affects [the student's] educational performance" (34 CFR 300.8[c][1][i]; [3], [4][i]; [5]-[6], [8], [9][ii]; [11]-[13]; 8 NYCRR 200.1[zz][1]-[2], [4]-[5], [7], [9]-[13]), the learning disability classification does not contain a requirement expressed in such terms (34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]). Instead, consideration of whether a student has a specific learning disability must take into account whether the student achieves adequately for the student's age or meets State-approved grade-level standards when provided with learning experiences and instruction appropriate for the student's age (34 CFR 300.309[a][1]; 8 NYCRR 200.4[j][3]), and either the student does not make sufficient progress or meet age or State-approved grade-level standards when provided with an RtI process, or assessments identify a pattern of strengths and weaknesses determined by the CSE to be indicative of a learning disability (34 CFR 300.309[a][2]; 8 NYCRR 200.4[j][3][i]). Additionally, a CSE may consider whether the student exhibits "a severe discrepancy between achievement and intellectual ability" in certain areas, including reading fluency skills; however, the "severe discrepancy" criteria cannot be used by districts to

determine if a student in kindergarten through the fourth grade has a learning disability in the subject of reading (8 NYCRR 200.4[j][4]).

In addition to drawing on a variety of sources including "aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior" (8 NYCRR 200.4[c][1]), federal and State regulations prescribe additional procedures that a CSE must follow when conducting an initial evaluation of a student suspected of having a learning disability (see 34 CFR 300.307-300.311; 8 NYCRR 200.4[j]; see also 8 NYCRR 200.4[c][6]). As the student's achievement when provided with appropriate instruction is central to determining whether a student has a learning disability, State and federal regulations require that the evaluation of a student suspected of having a learning disability "include information from an observation of the student in routine classroom instruction and monitoring of the student's performance," and further require that the CSE include the student's regular education teacher (8 NYCRR 200.4[j][1][i]; [2]; see 34 CFR 300.308[a]; 300.310).¹⁴

Among the evaluations considered by the December 2018 CSE was a privately obtained educational update conducted during the 2017-18 school year, while the student was in fifth grade (Parent Ex. D). According to the December 2017 private educational update, the parents referred the student for evaluation to clarify the nature of the student's academic challenges and provide information for academic placement decisions (id. at p. 1).¹⁵ The evaluator noted that the parents had not observed sufficient educational progress in reading and writing skills, despite after school and in school remediation (id.).¹⁶ The educational update consisted of a review of relevant background information, observations of the student during testing and in her classroom, and assessments of the student's phonological awareness, memory functioning, reading skills, spelling and written expression, and mathematical skills (id. at pp. 1-6).

The evaluator reported that, during testing, the student was fully cooperative with the examiner, sat quietly and appropriately in her seat, and was not fidgety or overactive (Parent Ex. D at p. 1). In addition, the student showed appropriate frustration tolerance and did not give up when tasks were challenging (id.). The evaluator opined that the student's scores reflected her best effort (id.). However, in her observation of the student in her classroom, the evaluator noted that the student was often off-task, got up from her seat and briefly left the classroom, and socialized with her classmates instead of working independently (id. at p. 2). The student appeared to be confused by teacher questions designed to help her elaborate on written work (id.).

¹⁴ More specifically, the CSE must consider data that demonstrates that the student was provided appropriate instruction by qualified personnel in a "regular education setting," and data-based documentation of "repeated assessments of achievement at reasonable intervals, reflecting formal assessments of student progress during instruction" (8 NYCRR 200.4[j][1][ii][a]-[b]).

¹⁵ According to the student's mother, the December 2017 educational update was conducted by a psychologist "working for Shefa," (Tr. p. 187).

¹⁶ The educational update report indicated that the student received twice weekly Orton-Gillingham based remediation after school (Parent Ex. D at pp. 1, 2).

With respect to phonological awareness, the evaluator indicated that the student was first identified as having weaknesses around the time she turned six-years old (Parent Ex. D at p. 2). Evaluation of the student using the Lindamood Auditory Conceptualization Test, Third Edition (LAC-3) yielded a standard score of 94 (35th percentile) (id. at pp. 2, 8). The evaluator opined that the "some of [the student's] errors were surprising in light of the level of support she ha[d] received" (id. at p. 2). The evaluator noted that with respect to memory functioning, the student reported that she did not remember the order of letters in words and did not recognize her errors when she proofread (id.). However, the student was able to attain a standard score of 97 (42nd percentile) on the Symbolic Imagery Test (SIT) due to her use of a verbal mediation strategy (id. at pp. 2, 8).¹⁷ Also with respect to memory functioning, the evaluator reported that the student retained information from texts she read aloud and from texts she read silently (id. at pp. 3, 8).

In terms of word recognition, the evaluator indicated that the student read familiar words accurately, without context, and also read words quickly and accurately under considerable time pressure (Parent Ex. D at pp. 3, 8, 10). In terms of phonetic decoding, the student scored in the average range on the Woodcock-Johnson Tests of Achievement-Fourth Edition (WJ-IV) word attack subtest, which was untimed, but in the below average range on the Test of Word Reading Efficiency-Second Edition (TOWRE-2) (id. at pp. 3, 8, 10). The evaluator commented that despite remediation the student had not developed automaticity or consistency (id. at p. 3). She noted that the student made long/short vowel errors; misread a digraph; and omitted, inserted, and transposed letters (id. at pp. 3-4). On the Gray Oral Reading Test, Fifth Edition (GORT-5), the student scored in the average range for accuracy and at the lower end of the average range for oral reading speed, which resulted in a score at the "bottom end of the average range" for reading fluency (id. at p. 4). The evaluator reported that the student scored in the average range on the WJ-IV oral reading fluency task which measured only accuracy (id. at pp. 4, 10). The evaluator administered numerous tests designed to assess both the student's oral and silent reading comprehension (id. at pp. 4-5). On the Test of Reading Comprehension, Fourth Edition (TORC-4) the student performed in the average range on the relational vocabulary and sentence completion subtests and demonstrated strong skills on the paragraph construction subtest (id. at pp. 4, 8). Although the student performed in the average range for the comprehension subtest on the GORT-5, the evaluator noted that the score was misleading because student was able to answer questions correctly even when she obtained a fluency score of zero, as she did on the last two passages of the subtest (id. at pp. 4-5, 8). The evaluator noted that the student exhibited "solid" reading comprehension when the passages were connected to previously acquired information or everyday events, but had difficulty identifying the main idea or making inferences based on the material (id. at p. 5). The evaluator further noted that the student's performance on the text comprehension subtest of the TORC-4 suggested that she required support for higher level reading comprehension skills (inferencing), despite her score in the average range (id.).

The evaluator also assessed the student's academic skills in written expression and mathematics (Parent Ex. D at pp. 5-6). On the WJ-IV and the Test of Written Language-Fourth Edition (TOWL-4) spelling subtests the student's scores were average, however according to the report her spelling did not "meet grade level expectations" (id.). The evaluator described the

¹⁷ The evaluator characterized the SIT as a test of visual sequential memory and noted that the student employed a verbal mediation strategy, whispering the letters aloud as she looked at them, while taking the test (Parent Ex. D at p. 2).

student's spelling accuracy as "quite variable" and opined that her overall spelling scores masked inconsistencies and errors that were unexpected for someone at the student's grade level (*id.*). In addition, the evaluator reported that the student's writing samples were average but masked inconsistent writing mechanics; she noted that the student used sentence fragments, omitted a verb ending and wrote a run-on sentence (*id.* at p. 6). However, the evaluator stated that the student was a "strong creative writer" (*id.* at p. 6). In the area of mathematics, the student's overall skills were on grade level (*id.*).

The evaluator indicated that although the student's overall scores placed her within the average range of functioning, "the pattern of her errors showed that she ha[d] not mastered early reading and writing rules," which the evaluator characterized as "unusual for a fifth grade student" (Parent Ex. D at p. 7). The evaluator opined that the student's scores on assessment instruments "overestimate[d]" the student's "real world" academic skills (*id.*). Although the student performed at her expected grade level or above average on many tasks during formal testing, the evaluator argued that she should have been outperforming her peers because the student had received "an unusual level of high quality, individual academic support" (*id.* at p. 3). The evaluator highlighted the fact that the student had received small group and individual in-school academic support, as well as individual remediation after school, yet continued to "struggle with academic skills that should be automatic and consistent" (*id.* at p. 7). According to the evaluator, the student's academic performance met the criteria for diagnoses of specific learning disorder with impairment in reading and specific learning disorder with impairment in written expression (*id.*). The evaluator opined that the student required full time special education placement in a small, self-contained classroom, with reading and written expression remediation integrated into every subject area of the curriculum (*id.*).

On July 19, 2018 the district conducted a social history evaluation with the student's parents serving as respondents (Dist. Ex 12 at p. 1). According to the resultant report, the parents expressed concern for the student's academic progress in all subject areas and opined that the student might benefit from special education services (*id.*). The parents reported that the student was "resistant to completing [] homework" and would "often procrastinate, make excuses or say that it [wa]s finished when it [wa]sn't" (*id.* at p. 2). The parents also reported that the student had been diagnosed as having dyslexia "by an outside agency" in December 2017 and that they had provided the CSE with a copy of that evaluation (*id.* at p. 3). According to the social history, the student struggled academically beginning in first grade with difficulty reading and keeping pace with her peers (*id.*). The student was provided academic intervention services (AIS) in first and second grade, which were discontinued at the end of second grade due to her progress (*id.*). During second grade, the parents provided home-based private tutoring two times per week, which was continued through the end of fifth grade (*id.*). The parents further reported that they brought concerns to the school on multiple occasions and asked if an evaluation was warranted; however, an evaluation was not pursued due to administrative changes at the charter school (*id.*). The parents asserted their belief that the student's grades in English language arts (ELA) and math on her most recent fifth grade report card may have been inflated, noting that the student had tested poorly on an aptitude exam for a private school (*id.*). The parents indicated that the student had difficulty with processing while reading, reading comprehension, spelling and grammar and that these difficulties also impacted the student's writing (*id.*). According to the parents, the student was social and made friends easily (*id.* at pp. 2, 3). She was seen by a community therapist to help her cope with stress and frustration caused by her academic struggles (*id.* at p. 2). The social history

indicated that due process rights were discussed with the parents and a copy of the procedural safeguards notice was provided (*id.*). A Level I Vocational Interview was conducted with the student on July 19, 2018 (Dist. Ex. 11 at p. 1). In a notice dated July 20, 2018, the parents were invited to participate in a CSE meeting scheduled for July 30, 2018 (Dist. Ex. 2 at p. 1).

On the same day that the social history took place, the district conducted a psychoeducational evaluation of the student and generated a report dated July 25, 2018 (Dist. Ex. 10). The July 25, 2018 report indicated that the student attempted all tasks presented, put forth appropriate effort, and was described as quiet and cooperative (*id.* at pp. 1-2). The district's evaluator assessed the student's cognitive and academic abilities using the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) and the WJ-IV (*id.* at p. 1). As measured by the WISC-V, the student's full-scale IQ of 108 fell in the upper average range with her skills varied between tasks (*id.* at p. 3).¹⁸ Results of the cognitive assessment yielded indices scores that fell within the average to very high average range of ability (*id.* at p.7). Specifically, the evaluator reported that the student demonstrated relative weaknesses on measures of visual spatial and working memory abilities while fluid reasoning was an area of "great strength" for the student (Tr. pp. 39-40; Dist. Ex. 10 at pp. 2-4).¹⁹

In the area of academics, the student's overall reading skills fell "solidly within the average range" with relative weakness when reading aloud as she was "observed to hesitate and repeat" at times (Tr. pp. 46-47; Dist. Ex. 10 at pp. 5-6). The student demonstrated relative strengths on measures of reading speed and reading accuracy (Dist. Ex. 10 at pp. 5-6). According to the psychoeducational evaluation report, the student scored in the average range on a word-attack subtest and demonstrated an age-appropriate ability to apply the rules of phonetic decoding in order to read the words (*id.* at p. 5). In addition, the student performed "solidly with the [a]verage range" on a passage comprehension subtest (*id.* at pp. 5-6). Results from assessment of the student's math skills indicated that the student placed within the upper limits of the average range, with great strength demonstrated in her ability to analyze and solve problems that were presented "in visual and auditory format" (*id.* at p. 7). Relative weakness was shown in the student's ability to compute simple arithmetic problems (*id.*). Although her calculations were accurate, she worked at a "cautious pace" (*id.* at p. 6). In the area of written language, the student performed within the lower limits of the average range (*id.* at p. 7). The student's results in the area of spelling placed her within the upper limits of the low average range (*id.* at pp. 6-7). The student was able to write complete sentences but sometimes struggled with including sufficient detail to fully meet task criteria (*id.*).

The district also conducted a speech-language evaluation, which took place on August 8, 2018 (Dist. Ex. 14). The results of the speech-language evaluation indicated that the student did not present with any needs in this area (*id.* at pp. 2-3). Specifically, the August 8, 2018 district speech-language evaluation report described the student as "cooperative and friendly" and noted

¹⁸ As a result of this variability, the evaluator advised that the student's FSIQ should be interpreted with caution (Dist. Ex. 12 at pp. 3, 7).

¹⁹ The student's scores on the fluid reasoning index subtests ranged from average to very high average (Dist. Ex. 10 at p. 2). In the evaluator's summary and conclusions, the student's fluid reasoning skills were reported to be within the superior range (*id.* at p. 7).

that she exhibited an appropriate ability to attend, as well as appropriate pragmatic skills of making requests, turn taking, and following directions (*id.* at p. 3). Based on the student's performance on the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5), the report indicated that the student demonstrated age appropriate receptive and expressive language abilities and proficiency when asked to express the relationship between two words, formulate sentences when provided with target words, recall and reproduce sentences, and identify semantic relationships between target words (*id.* at p. 1). According to the speech-language evaluation report, the student's performance on the understanding spoken paragraphs subtest of the CELF-5 indicated that her reading fluency was appropriate and she exhibited good comprehension of the presented passage (*id.* at p. 2). On the San Diego Quick Test, administered to assess the student's reading level, the student exhibited an increasing number of errors as the words increased in length and complexity, however, she demonstrated age-appropriate phoneme-grapheme correspondence and strategies for breaking down words (*id.*). In addition, the student produced a writing sample that reflected age-appropriate sentence structure and detail (*id.*). The evaluation report indicated that the student demonstrated a few spelling errors in her writing but noted that overall the student's encoding and decoding skills were judged to be age-appropriate (*id.*). The report concluded that overall, the student exhibited age appropriate receptive and expressive language skills, and "school-based speech and language services" were not recommended at the time (Tr. p. 79; Dist. Ex. 14 at p. 1).

On October 1, 2018 the district conducted a classroom observation of the student during a reading lesson in her sixth-grade classroom at Shefa (Dist. Ex. 13). The classroom was staffed by a head teacher and included six students (*id.* at p. 2). The resultant observation report indicated that the student presented as kind, quiet, and respectful during the observation (*id.*). The observation report noted that the student appropriately followed directions, sat at her desk, and answered comprehension questions (*id.*). The student followed along while another student read, and when she was called on to read, the student read fluently and with expression (*id.*). According to the observation report, the student appeared organized and her handwriting was legible (*id.*).

On December 11, 2018, a CSE convened to review the evaluative information obtained and to determine whether the student had an educational disability and, if so, whether she was eligible for special education services (Dist. Ex. 6; *see* Dist. Ex. 15 at p. 1). In a document entitled present levels of performance and individual needs (PLEPs document), the December 2018 CSE summarized the results of its evaluations that indicated the student exhibited cognitive abilities within the upper limitations of the average range, age appropriate speech and language skills, average academic abilities, appropriate attention and organization skills, and strengths in social/emotional development (Dist. Ex. 6 at pp. 2-4). According to CSE participants from Shefa, the student was estimated to be reading at the 4th grade/beginning 5th grade level (*id.* at p. 2). The student reportedly was hesitant to use word reading strategies, unable to divide words, had difficulty with short vowel sounds, and lacked expression when reading (*id.*). During classroom reading, the student was described as less able to answer comprehension questions and noted to exhibit slow and inaccurate decoding (*id.*). Overall, Shefa staff considered the student to be struggling in reading (*id.*). In the area of written language, Shefa staff estimated the student's writing to be at the 4th grade level, which was consistent with the student's score of level 4 on the 4th grade ELA exam (*id.* at pp. 1, 2). The student received a score of level 1 on the 5th grade ELA exam (*id.* at p. 1). According to the PLEPs document, the student's teachers at Shefa reported that the student showed "lower level vocabulary," wrote paragraphs using simple sentences, and

struggled with expressing what she wanted to say (*id.* at p. 2). The student was reportedly taught writing skills through direct instruction (*id.*). In the area of math, the student was receiving specialized instruction at Shefa (*id.*). The PLEPs document indicated that Shefa staff and the parents believed that the student's performance on standardized assessments did not match her performance in school (*id.* at p. 3). The parents expressed concern regarding the student's ability to read words in isolation and her "underdeveloped math facts" (*id.*). However, the December 2018 CSE found that the student did not have a disability that impaired her ability to function in the general education curriculum, and as such the student was not eligible for special education and related services (Dist. Exs. 6 at p. 4; 8 at p. 1).

With respect to Shefa's determination to accept the student, the assistant head of Shefa reported that Shefa looked at the student's performance in school, which was not commensurate with her ability (Tr. p. 141).²⁰ According to the assistant head of Shefa, the student struggled to acquire some skills in decoding, as well as writing, and despite all efforts the student started to "really fall behind her peers" and also to experience emotional frustration (Tr. p. 118). The language arts and writing coordinator (coordinator) for Shefa testified that the student came to Shefa with "gaps in her foundational decoding skills," more specifically difficulty with decoding multisyllabic words (Tr. p. 151). Shefa had to teach the student syllabication (Tr. pp. 151-52). The coordinator reported that when the student could read a word, she read it quickly, but for words she did not know she immediately gave up or did not attempt to use any strategies (Tr. p. 152). She reported that the student had a sight word vocabulary but no ability to decode unfamiliar words, a skill she should have developed by third grade (Tr. pp. 152-53). However, while the staff at Shefa indicated decoding was a weakness for the student, the student's scores on word attack subtest of the WJ-IV, which required the student to decode nonsense words, was in the average range (Dist. Ex. 10 at p. 4; *see* Parent Ex. D at p. 10).²¹

²⁰ The assistant reported that Shefa also looked at the educational testing of the student, which exposed particular areas of weakness and spoke to the school, which indicated staff were struggling to remediate and educate the student (Tr. pp. 141-42). He noted that Shefa obtained information from the student's tutor and in-house testing and that based on all of the data "it was clear to us that she was struggling beyond what could be explained in other ways" (Tr. p. 142). The assistant testified that Shefa had notes from its conversation with the student's teachers from the 2017-18 school year, but that he did not know if they were "in the record" (Tr. p. 143). He indicated that some information was not documented in formal ways and therefore was not available for him to provide (Tr. p. 143). He suggested that the "key kind of written information" would be testing and progress reports from prior years (Tr. p. 144).

²¹ The evaluator who conducted the December 2017 private educational update, noted that the student's scores on the TOWRE-2 measuring phonemic decoding efficiency were in the below average range, and further noted that because the student had "received intensive Orton-Gillingham remediation," she should be "highly familiar with phonetic decoding," and that given the length and intensity of the student's remediation her scores represented less progress than expected (Parent Ex. D at pp. 3, 7). The evaluator repeatedly referenced the after-school services that the student had received in her summary and recommendations (*id.* at p. 7). Generally, services that a student suspected of having a learning disability receives outside of school should be taken into consideration in determining whether the student needs special education (*see Letter to Lillie*, 23 IDELR 714 (OSEP 1995), in this instance, there is little information in the hearing record as to the specifics of those services. Additionally, on appeal the parent has not offered a reason to depart from the IHO's determination that the evaluator's recommendations were "strained" and should be given "little weight" (IHO Decision at p. 7).

Although the December 2018 CSE had before it information indicating that the student exhibited a small number of relative weaknesses, the student's overall academic functioning fell within the average range (Parent Ex. D at pp. 2, 3, 4, 5, 6, 7, 8-11; Dist. Ex. 10 at pp. 2-3, 4, 5, 6, 7). Considering the posture of the parties on appeal, and the overall information in front of the CSE, the hearing record supports the IHO's determination that the student was not eligible for special education. Additionally, even if the student's relative weaknesses in working memory, visual spatial skills, reading aloud, and speed and accuracy of computation of simple arithmetic problems (see Dist. Ex. 10 at p. 7) could be construed as potentially indicating the presence of a learning disability, this is insufficient to warrant a determination of eligibility for special education (see Letter to Prifitera, 48 IDELR 163 [OSEP 2007]). Assuming for the sake of argument that the student met the criteria for a learning disability on the basis of her reading difficulties, and thereby qualified under one of the enumerated conditions in the IDEA, the hearing record does not indicate that "by reason thereof" she needed special education and related services within the meaning of the IDEA (20 U.S.C. § 1401[3][A]; see Educ. Law § 4401[1], [2][k]; see also D.A. v. Meridian Joint Sch. Dist. No. 2, 618 Fed. App'x 891, 893 [9th Cir. July 6, 2015]; Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 639-40 [7th Cir. 2010]). As previously discussed, at the time of the December 2018 CSE meeting the student achieved scores on standardized testing within the average range of academic functioning (see Dist. Ex. 6 at pp. 1-4).²²

Accordingly, despite the indications of the student's relative weaknesses in several areas, these relative weaknesses did not impede the student's academic functioning. Therefore, the hearing record supports the IHO's decision finding that the December 2018 CSE correctly determined the student did not have an educational disability and was not eligible for special education services at the time of the CSE meeting. The student's needs could be addressed in a general education setting through the use of accommodations and strategies without the additional support of special education services (see A.P., 572 F. Supp. 2d at 225-26 [noting "the fact that a child may have a qualifying disability does not necessarily make him 'a child with a disability' eligible for special education services under the IDEA"]).

VII. Conclusion

In summary, a review of the evidence in the hearing record establishes that the student was not denied a FAPE for the 2018-19 school year as a result of the district's untimely initial evaluation. Additionally, the student was not eligible for special education services under the IDEA at the time of the December 2018 CSE meeting. The IHO erred by awarding the parents tuition reimbursement for the 2018-19 school year.

In light of the determinations made herein, I need not address the parents' remaining contentions.

THE APPEAL IS SUSTAINED.

²² In particular, the July 2018 psychoeducational evaluation report indicated that the student's cognitive functioning scores placed her within the average to high average range in all subtests (Dist. Ex. 10 at pp. 2-3). The student's scores in the area of academic functioning placed her within the average range in all subtests, with the exception of math fluency and spelling, which fell within the low average range (id. at p. 5).

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated January 8, 2020, is modified by reversing those parts which found the district failed to offer the student a FAPE for the 2018-19 school year and ordered the district to reimburse the parents for 75 percent of the costs of the student's attendance at the Shefa School.

Dated: **Albany, New York**
 April 17, 2020

STEVEN KROLAK
STATE REVIEW OFFICER