



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 21-059

**Application of a STUDENT SUSPECTED OF HAVING A
DISABILITY, by her parent, for review of a determination of a
hearing officer relating to the provision of educational services
by the New York City Department of Education**

Appearances:

Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioner, by Vanessa Jachzel, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Christian Kinsella, Esq. and Brian Reimels, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for compensatory education, among other requested relief, arising from claims concerning her daughter's education during the 2017-18, 2018-19 and 2019-20 school years. The 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 parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. In November 2019 the parent, in conjunction with the charter school the student attended, referred the student to the CSE for evaluation and a determination as to whether the student was eligible for special education as a student with a disability (see Dist. Exs. 2-3). As part of its initial evaluation, the CSE conducted evaluations of the student including a social history, a classroom observation, and a psychoeducational evaluation, and obtained a report on the student's performance from his then-current classroom teacher (see Parent Ex. C; Dist. Exs. 8-11). Following the evaluations, the CSE met on January 14, 2020, reviewed the results with the parent and determined that the student was

not eligible for special education services because the student did "not have a disability as defined in Part 200 of the Regulations of the Commissioner of Education" (see Dist. Exs. 12-14).

In a due process complaint notice dated March 3, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18, 2018-19 and 2019-20 school years (see Parent Ex. A). The parent contended that "[d]uring all years at issue, the DOE and CSE failed to provide the [p]arent appropriate [p]rior [w]ritten [n]otices and [p]rocedural [s]afeguards [n]otices" (id. at p. 4). The parent asserted that the district failed in its child find obligation prior to the student's referral to the CSE and that the CSE incorrectly determined that the student did not qualify as a student with a disability, and its failure to classify her as a child with a disability denied her a FAPE (id. at pp. 3-5). The parent alleged that the district's testing was insufficient and that the student "requires a comprehensive neuropsychological evaluation so that her needs can be fully understood and appropriately addressed" (id. at pp.3-4). For relief, the parent sought 519 hours of 1:1 tutoring, without expiration, to be provided by Huntington Learning Center (HLC) at a rate of \$105 per hour; funding for HLC's diagnostic testing and registration; transportation for the parent and the student to and from HLC in the form of Metrocards; a district funded independent neuropsychological evaluation (IEE); and an IEP that incorporated the results of the requested IEE and provided appropriate supports and services (id. at p. 5).

An impartial hearing convened on August 20, 2020 and concluded on October 1, 2020 after two days of proceedings (Tr. pp. 1-73). In a decision dated January 9, 2021, the IHO first determined that the parent's child find claim for the period prior to March 3, 2018 was time-barred but that the child find claim for the remaining portion of the 2017-18 school year thereafter was timely and could be considered (IHO Decision at pp. 7-11). The IHO concluded that there was no evidence to demonstrate that the district "overlooked clear signs of the Student's disability and was negligent in failing to order testing for the Student, or that there was no rational justification for failing to evaluate the [s]tudent during the 2017-2018 and 2018-2019 school years (id. at p 12). The IHO also reasoned that during the 2019-20 school year there was no child find violation because the district did not unreasonably delay the initial evaluation of the student after the parent missed several appointments and meetings (id. at pp. 12-13). Next, the IHO determined that the district offered the student a FAPE because the district had conducted a comprehensively appropriate evaluation of the student after referral to the CSE, and that the CSE had correctly determined that the student was not eligible for special education as a student with a disability (IHO Decision at pp. 7-21).¹ After finding that the district offered the student a FAPE, the IHO declined to award the parent's requested relief in the form of 1:1 tutoring hours at HLC as compensatory education and transportation, and declined to order the district to provide a neuropsychological IEE (and resultant IEP) after finding that the district's evaluations were appropriate (id. at pp. 22-24).

¹ The IHO found that his determination that the district did not deny the student a FAPE under the IDEA was "equally dispositive" of the parent's ADA and section 504 violation claims (IHO Decision at pp. 21-22).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and will not be recited here. The parent alleges that the IHO erred by applying the IDEA's two-year statute of limitations to the parent's child find claims sua sponte and by improperly shifting the burden of proof to the parent. On the merits, the central issues of the parties' dispute on appeal are whether the IHO erred in finding that the district met its child find obligations, appropriately evaluated the student after referral and correctly determined that the student was ineligible for special education.

V. Applicable Standards

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

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

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

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

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).

² 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).

VI. Discussion

A. Preliminary Matters – Burden of Proof

The parent assert that the IHO shifted the burden of proof to the parent in contravention of State law. Certain language in the IHO's decision taken in isolation, supports that inference such as when the IHO stated "[on balance, the [p]arent has not demonstrated that the [district] had sufficient reason to believe that the [s]tudent had a disability requiring special education services during the 2017-2018 and 2018-2019 school years. Accordingly, the [p]arent has not demonstrated that the [district] failed to fulfill its [c]hild [f]ind obligation to the [s]tudent for the 2017-2018 and 2018-2019 school years." (IHO Decision at p. 12)

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85;).

The parent is correct insofar as the IHO used a poor choice of words in stating that she had not "demonstrated" that the that the district had sufficient reason to believe that the student had a disability (IHO Decision at p. 12); however, elsewhere in the decision the IHO correctly stated that the burden of proof was on the district and cited the correct provision of State law (id. at p. 7) and, further, the decision when read in its entirety reveals that the IHO made his decision based on an assessment of the relative strengths and weaknesses in evidence presented by both the district and the parent rather than by solely allocating the burden of persuasion to one party or the other (see generally IHO Decision). Thus , even assuming the IHO misallocated the burden of proof to the parent, the error would not require reversal in this case insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H., 685 F.3d at 225 n.3). Furthermore, I have conducted an impartial and independent review of the entire hearing record and, as discussed below, I reach the same determination as the IHO with regard to the parent's FAPE challenges in the 2017-18, 2018-19 and 2019-20 school years (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

B. Child Find and Parent Referral

Initially, the parent contends that the IHO erred in finding that the district had not violated its child find obligation upon finding that the district had no reason to suspect a disability in the student. The parent also contends that the IHO shifted the burden of proof on this issue from the district to the parent. The parent asserts that because the student had struggled academically for some time prior to the student's November 2019 referral to the CSE, the district had reason to suspect a disability, and that the student's struggles in Fall 2019 when she began attending a new school also should have prompted a district referral of the student to the CSE. However, for the reasons set forth below, I find that the IHO did not err in his finding that the district had no

sufficient reason to suspect a disability in the student prior to the parent and the charter school referring the student to the CSE for evaluation in November 2019.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at *7 [S.D.N.Y. Oct. 28, 2019]; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., State of Hawaii v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have "overlooked clear signs of disability" and been "negligent in failing to order testing," or have "no rational justification for deciding not to evaluate" the student (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 750 [2d Cir. 2018], quoting Bd. of Educ. of Fayette County, Ky. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225.). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]), see also 8 NYCRR 100.2[ii]).

Related to child find is the referral process for evaluation. Upon written request by a student's parent, a district must initiate an individual evaluation of a student (see Educ. Law § 4401-a[1], [3]; 8 NYCRR 200.4[a][1][i]; [a][2][ii]-[iv]; [b]; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]).

Upon review of the impartial hearing record and the IHO decision, I find that the IHO carefully considered the evidence and the basis for the parent's assertion that the district failed to comply with its obligations under the child find provisions of the IDEA, and correctly determined that the district had met its burden to show that it had not denied the student a FAPE during the 2019-20 school year or earlier.

1. 2017-18 and 2018-19 School Years

The hearing record indicates that there was intrafamily conflict during the student's developmental milestone period and that during the 2017-18 or 2018-19 school years she attended a different charter school for second and third grades while residing with the student's father in a different household (Parent Ex. D at p. 2).³ It appears that sometime in 2018 the student was placed in the custody of the petitioning parent.

Although the hearing record is sparse for the 2017-18 and 2018-19 school years, the available objective evidence does not support the parent's claim that the district failed in its child find obligation. With regard to the 2018-19 school year, the student's ELA score of 3 and math score of 4 on the New York State Testing Program (NYSTP) assessment demonstrated that she was proficient (ELA) or exceeded (math) in standards for her grade prior to the 2019-20 school year (Dist. Ex. 1). Both scores indicated that the student demonstrated the knowledge, skills, and practices embodied by the New York State P-12 Common Core Learning Standards for her grade (id.). It is not reasonable to assume that the district would have had independent access to the student's grades at the former charter school that she attended during the 2017-18 and 2018-19 school year, and there is no indication that that charter school or the student's father expressed any concerns regarding the student's academics to the district during that period. Moreover, as the IHO pointed out, the fact that the student's mother later "informed the CSE during the 2019-2020 school year evaluation process that the Student's grades dropped dramatically after she began attending [the new charter school] also serve[d] to undermine her claim that the Student had a history of poor grades and consistently exhibited poor academic progress prior to her enrollment at [the new charter school]" (IHO Decision at p. 12). The IHO noted that objective data (NYSTP results) submitted as evidence by the district outweighed the parent's unspecific and conclusory testimony in her affidavit as to the student's "struggles" and that "[a]cademically, she [wa]s behind," and I agree (IHO Decision at pp. 9-12; Parent Ex. I at p. 1). Consequently it is difficult to conclude that the district had reason to suspect that the student may have had a disability during the first two school years in question.⁴ In this case there is not a sufficient evidentiary basis to overturn the

³ There are more detailed facts regarding both parents and the child that are alleged in the hearing record, some of which are reportedly being addressed in another forum and over which I do not have jurisdiction.

⁴ Assuming, without deciding that the IHO lacked the authority to rule on the statute of limitation, there is no indication that the IHO's analysis would have changed.

IHO's conclusion that the district did not violate child find requirement for the 2017-18 and 2018-19 school years.

2. 2019-20 School Year

The student's mother reported that during the 2019-20 school year she received a formal notice that the student was "failing/not meeting expectations" in various academic areas including math, spelling, and vocabulary (*id.* at p. 4). At the impartial hearing, the student's mother asserted that the student's learning problems had been evident for years and the student had consistently exhibited poor academic progress (Parent Ex. I at p. 3). In addition, she asserted that the student's teachers had repeatedly told her about the student's poor academics and struggles in school and that she had repeatedly requested additional help (*id.*).⁵ Consistent with the parent's report, the hearing record contains a letter from the school principal indicating that the student took a monthly mastery quiz (MMQ) exam on Friday October 11th and failed the assessment for math content, "NHM," spelling, and vocabulary (Parent Ex. D at p. 4). The letter stated that the student was not meeting grade 4 expectations in these areas, however, explained that MMQs were largely based on what students were expected to do at home (*id.*). However, the monthly quiz appears to be among the first objective indications that the student was performing poorly. At the time the social history was conducted in December 2019, the student's mother reported that the student's grades had dropped dramatically since she started at the new charter school (Parent Ex. I at p. 13).

With regard to the 2019-20 school year, the November 6, 2019 referral from the charter school to the CSE indicated that the student was new to the school and had been struggling academically in comparison with her peers (Dist. Ex. 3 at p. 2). The sprint specialist who completed the referral indicated that the student was performing below grade level in reading and math and was functioning at a third-grade level in all academic areas (Dist. Ex. 3 at pp. 2, 4). With regard to reading, the sprint specialist reported that the student read at a mid- third grade level (Fountas and Pinnell Level O) (Dist. Ex. 3 at p. 4). The sprint specialist also reported that the student was approaching grade level on her last monthly spelling/vocabulary/math content quiz (Dist. Ex. 3 at p. 4).⁶ She noted that the student was able to "unpack" grade level word problems and come up with a valid strategy (Dist. Ex. 3 at p. 4). The sprint specialist reported that when representing her work on the board the student got slightly distracted and misread a few numbers/flipped digits (Dist. Ex. 3 at p. 4). According to the sprint specialist, the student exceeded expectations on her science test in October 2019 (Dist. Ex. 3 at p. 4). The student was able to provide an accurate summary of a book she was reading but struggled to use the details to come up with a main idea (Dist. Ex. 3 at p. 4).

Based on teacher report, the sprint specialist indicated that the student often had a hard time sitting on the carpet during instructional times (Dist. Ex. 3 at p. 5). In addition, the student sometime struggled to follow teacher directions and have a safe body when lining up and she

⁵ It is not clear which school year(s) the parent was referring to.

⁶ The terminology used by the charter to report on student performance is confusing. While the principal reported that the student received a failing grade on the October 2019 MMQ, the sprint specialist characterized the student's performance on the quiz as approaching grade level (compare Parent. Ex. D at p. 4, with Dist. Ex. 3 at p. 4; see Dist. Ex. 15 at pp. 1-2).

pushed other students to get a spot in line that was closer to the front (Dist. Ex. 3 at p. 5). The sprint specialist reported that the student often needed to be told where to stand in line and had trouble problem solving without the intervention of a teacher (Dist. Ex. 3 at p. 5). She noted that the student often talked back to teachers when she was redirected (Dist. Ex. 3 at p. 5). The sprint specialist reported that the main cause of the student's academic struggles at school appeared to be difficulty following directions and lack of focus (Dist. Ex. 3 at p. 6).

The student's first trimester report card for the 2019-20 school year indicated that she was approaching expectations in ELA and math and meeting expectations in science (Dist. Ex. 15). In ELA, the student's participation level was below expectation and she performed below expectation on one spelling quiz (Dist. Ex. 15 at p. 1). However, the student's homework completion exceeded expectations and for the remainder of the tasks measured, the student was approaching or meeting expectations (Dist. Ex. 15 at p. 1). In math, the student's participation and performance on a math quiz were below expectations; however, she exceeded expectations on an interim assessment (Dist. Ex. 15 at p. 1). In addition, the student's performance on other math assessments was approaching expectations (Dist. Ex. 15 at p.1). With respect to science, the first trimester report card indicated that the student's participation was below expectations but her performance on an interim assessment and homework exceeded expectations (Dist. Ex. 15 at p. 2). Here, the hearing record shows that the child find process was functioning when district was made aware of the student's educational difficulties in November 2019 insofar as she was evaluated in December 2019 and the beginning of January 2020 (see Parent Ex. C at p. 1, Dist. Exs. 7 at p. 1; 8 at p. 1; 9 at p. 1; 10 at p. 1; 11 at p. 1). The evidence does not lead to the conclusion that the district unreasonably delayed evaluation of the student or violated child find in the 2019-20 school year. I also note, that even if the district had reason to suspect a disability at a point earlier in the 2019-20 school year, prior to the student's referral, the remedy for such a child find violation would typically be an order for the student to be evaluated, which has already occurred in this matter.⁷

C. Educational Disability and Eligibility for Special Education

In addition, although the parent contended that the evaluation conducted by the CSE was inadequate and failed to include assessments of the student's attention, focusing and organization skills, the record demonstrates that the CSE's evaluation of the student as described below was substantively comprehensive as it considered all areas of suspected disability, used a variety of technically sound assessments and information from a variety of sources, included current classroom-based assessments and observations, and input from the student's parent and teacher.

⁷ Although I have found that the IHO correctly determined that the district complied with its obligations under the child find provisions, I note that in many instances, the appropriate remedy for a child find violation is referral to the CSE and/or compensatory education (see Application of a Student with a Disability, Appeal No. 20-053 [holding "Typically, relief awarded for a child find violation would be an order directing the district to evaluate the student and make a determination whether the student is eligible for special education" and finding therein "the IHO's award of a prospective placement of the parents' choice to remedy the district's child find violation where, as here, there have been intervening appropriate recommendations would not be appropriately related to redress the initial child find violation . . . the more appropriate relief to remedy a child find violation in this case would be compensatory education"]; see also Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]).

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 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]).

At the close of the impartial hearing, the parent contended that the student qualified as a child with a disability under the classification of an other health-impairment (see IHO Ex. VI at p. 8). A child with a disability having an other health-impairment, pursuant to federal regulations, means "a child evaluated . . . as having . . . an other health impairment . . . and who, by reason thereof, needs special education and related services" (34 CFR 300.8[a][1]). Other health-impairment, in turn, is defined as:

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that--

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.

(34 CFR 300.8[c][9]; see 8 NYCRR 200.1[zz][10]).

On appeal, the parent asserts that the IHO should have also considered the classification of a learning disability.

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).⁸

With regard to the issue of whether the ineligibility decision was appropriate, after careful review of all of the evidence in this case, I agree with the conclusion reached by the IHO and adopt the findings of fact and conclusions of law as my own.

The student began attending the current charter school in September 2019 (Dist. Exs. 8 at p. 2; 18). According to the charter school sprint specialist, on October 2, 2019 the parent approached her to express her concern that the student was having academic difficulties (Tr. pp. 27, 29-30).⁹ The parent told the sprint specialist that the student had received an attention deficit hyperactivity disorder (ADHD) diagnosis, requested bussing for the student and "mentioned an IEP" (id. at pp. 27, 30). The sprint specialist testified that she notified the parent that the student did not, in fact, currently have an IEP, and scheduled a meeting in two days to discuss her concerns (id. 27, 30-31). The parent "missed" the scheduled October 4, 2019 meeting "without notice" (Tr. p. 31; Parent Ex. 3 at p. 2). The parent contacted the school on October 18, 2019 to reschedule the meeting for October 22, 2019, which the parent also did not attend (Tr. p. 31; Parent Ex. 3 at p. 2). The parent scheduled, then "dismissed" another meeting for October 23, 2019 (Tr. p. 33; Parent Ex. 3 at p. 2). The sprint specialist reported that the parent eventually met with the charter school staff and submitted an initial referral dated November 4, 2019 which was directly forwarded to the CSE (Tr. pp. 34-35; Dist. Exs. 2; 3).

The sprint specialist testified that, at the time of the initial referral, the student was new to the charter school and performing below grade level in reading and math (Tr. p. 36-37; Dist. Ex. 3 at p. 2). However, she stated that the student "adjusted well" to the new school and by winter break, when assessed again, she was functioning at grade level in reading and math (Tr. pp. 36-37; Dist. Ex. 10 at pp. 1-2).

According to the charter school sprint specialist, the January 2020 CSE based the ineligibility determination on the student's "average scores for most components" of the initial psychoeducational evaluation and the belief that the student had "grown academically" (Tr. p. 38). The sprint specialist recalled that the CSE, the charter school, and the parent were in agreement that the student had made progress, and that she did not qualify for special education (Tr. p. 37). The sprint specialist opined that the charter school was an appropriate placement for the student because she had exhibited the ability to "adjust" to her new school and "perform on grade level...compared to her peers" (Tr. p. 38). The sprint specialist confirmed that when the student was new to the school, she was performing below grade level in reading and math (Tr. p. 43). However, it is notable that the student was absent or tardy ten times during the month of September 2019 and this likely contributed to her initially falling behind and receiving a poor grade on her

⁸ 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]).

⁹ At the time of the student's referral, the charter school witness was a "sprint associate" and later became the "sprint specialist" at the student's charter school, the later which she described as manager of the school's special education programs (Tr. pp. 24-26).

quiz the following month; however, the absences thereafter decreased significantly and the tardiness reduced in frequency (Dist. Ex. 18; Parent Ex. D at p. 4).

With respect to the student's educational needs, the hearing record includes a December 18, 2019 social history report, a December 18, 2019 psychoeducational evaluation report, a January 6, 2020 classroom observation report, and a January 6, 2020 teacher report completed as part of the initial evaluation of the student (Parent Ex. C at p. 1; Dist. Exs. 8 at p. 1; 9 at p. 1; 10; 14 at p. 1; see Parent Ex. B at pp. 3-5).

According to the December 2019 social history, the student's mother reported that the student had diagnoses of ADHD and anxiety (Parent Ex. D at p. 1). She further reported that the student had difficulty listening and would do what she wanted (id. at p. 2). The student's mother described the student as hyperactive and reported that she could become overly involved in others' activities and did not filter her perspective (id.). In addition, she noted that the student did not voluntarily share her belongings and due to a history of family-related struggles, she cried when being disciplined (id.). The student's mother reported that organization was a challenge for the student, yet she was very observant (id.). She noted that the student liked to debate and made good arguments (id.). The student's mother indicated that when the student was bored, she became very active (id.).

According to the social history, the student's mother believed that the student's grades dropped dramatically when she entered the new charter school (Parent Ex. D at p. 2). She opined that due to the student's ADHD diagnosis the student required support to remain focused in class (id.). The student's mother reported that the student experienced anxiety when she was in a space with a large group of people (id.). The social history noted that the student's mother was concerned that "she [wa]s not receiving sufficient input from the school since she [wa]s unable to be actively involved in school life as a parent" (id.).

The December 2019 psychoeducational evaluation conducted as part of the student's initial evaluation consisted of a student interview and observation of the student during testing, administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) and the Wechsler Individual Achievement Test-Third Edition (WIAT-III), and completion by the student's mother and teacher of the Behavior Assessment for Children-Third Edition (BASC-3) Parent and Teacher Rating Scales (Parent Ex. C at pp. 1-2; Dist. Ex. 11). Based on the results of the WISC-V, the evaluating psychologist reported that the student attained a full-scale IQ of 96, which fell in the average range of intellectual functioning (Parent Ex. C at pp. 2, 8). The psychologist reported that the student's fluid reasoning abilities fell in the high average range, while her verbal comprehension abilities, visual spatial skills and processing speed fell in the average range (id. at pp. 2-3, 8). The student's working memory fell in the very low range, and the psychologist noted that the student had some difficulty with tasks requiring recall (id. at pp. 3, 8).

With regard to the student's academic skills, as measured by the WIAT-III the student's performance fell in the average range for basic reading and written expression, while her mathematics skills (composite) fell in the below average range (Parent Ex. C at pp. 3, 8). According to the psychologist, the student's performance on the numerical operations subtest fell in the average range but her performance on the math problem solving subtest fell in the below average range (Parent Ex. C at pp. 3-4, 8). Specifically, the psychologist indicated that the student

was able to solve word problems involving quantity, calendar skills, money, and graphs, but had some difficulty with place value and probability (Parent Ex. C at p. 4). In addition, she was able to solve equations involving single and double-digit numbers, but had difficulty solving problems involving fractions and three-digit numbers (*id.*).

Turning to the student's behavior and emotional development, the psychoeducational evaluation indicated that according to the BASC-3 Parent Rating Scales the student fell in the clinically significant or at-risk range in most areas (Parent Ex. C at pp. 4-6). According to the psychologist, the parent's BASC-3 responses placed the student's externalizing behaviors such as impulsivity, aggression, and conduct problems in the clinically significant range (Parent Ex. C at p. 4). In addition, the parent's responses placed the student's internalizing behaviors such as anxiety and depression in the clinically significant range (Parent Exs. C at p. 5; I at p. 2). Further, the parent's responses yielded scores in the clinically significant range with respect to behavioral symptoms such as atypicality and attention and the at-risk range for withdrawal (Parent Ex. C at p. 5). The psychologist reported that on the adaptive skills composite the parent's responses suggested that the student's adaptability, social skills and functional communication were in the at-risk range while her activities of daily living were in the clinically significant range (Parent Ex. C at pp. 5-6). Lastly the psychologist reported that the parent's responses on the content scales indicated that the student's behavior was in the clinically significant range with respect to, anger control, bullying, emotional self-control, executive functioning, and negative emotionality (Parent Ex. C at pp. 6, 9). The student was also at risk with regard to developmental social disorders and resiliency (Parent Ex. C at pp. 6, 9). Contrary to the results of the parent rating scale, the student's teacher's responses on the BASC-3 Teacher Rating Scales revealed that in all areas the student was at a level similar to other children her age and did not exhibit any at-risk or clinically significant behaviors within the classroom setting, although the student sometimes had trouble focusing on her work in the afternoons (Parent Ex. B at p. 3; Dist. Ex. 11 at pp. 2, 3, 10).

In addition to the psychoeducational evaluation, the district conducted a classroom observation of the student in her fourth-grade class at the charter school on December 16, 2019 (Dist. Ex. 9). The student was observed in an ICT class of two teachers and 29 students during ELA (Dist. Ex. 9 at p. 1). The observer described the student's participation in the class including her willingness to respond to teacher questions during a group activity, ability to work with a partner and rejoin the group when directed, ability to apply annotation strategies when reading, and ability to stay on task (Dist. Ex. 9 at pp. 1-2). The evaluator concluded that the student demonstrated the ability to meet grade level expectations in academics and behavior (Dist. Ex. 9 at p. 2). He described the student as an eager participant in the ELA class and noted that the student demonstrated a positive understanding of class expectations (Dist. Ex. 9 at p. 2). The observer noted that the student was called upon for answers, and volunteered as well, and received praise for her direct efforts and indirectly for completing appropriate tasks (Dist. Ex. 9 at p. 2).

In addition to the psychoeducational evaluation and classroom observation conducted by the district, the CSE reviewed a January 2020 teacher report, completed by the student's fourth grade charter school teacher (Parent Ex. B at p. 4; Dist. Ex. 10 at p. 2). According to the teacher, the student was new to the charter school and had "quickly established relationships with her peers" (Dist. Ex. 10 at p. 2). In addition, she was able to share ideas and interact appropriately in group settings (*id.*). The teacher described the student as "very outgoing," and reported that she liked having conversations with others, exhibited friendly interactions, and was "generally kind to her

peers" (id. at pp. 2-3). The student occasionally needed reminders to be aware of personal space and to settle personal disagreements independently (id. at p. 3). According to the teacher, the student enjoyed having classroom jobs and was an eager participant in class activities (id.). She needed "some reminders throughout the day to stay focused on her work" but was curious, and "generally very interested in learning" (id.). The teacher did not indicate that the student exhibited behaviors which impeded her ability to learn in the classroom environment (see generally Dist. Ex. 10). As described above, testing did not indicate a significant elevation in her attention problems in school, suggesting that if she had a disability associated with attention it did not impaired her ability to learn in the classroom setting at the time of her evaluation by the CSE (see Dist. Ex. 11 at pp. 13-14).

With respect to the student's academic skills, the teacher reported that the student was "meeting expectations" in reading (Dist. Ex. 10 at p. 1). The teacher indicated that the student was able to decode grade level vocabulary words but sometimes rushed as she read and made substitutions for familiar words which might change her understanding of the text (id.). According to the teacher, the student showed a "strong understanding of grade level texts," could provide an accurate summary of the most important parts of the text in chronological order, and use the summary to identify a deeper meaning from the text (id.) The teacher noted that the student had shown "a lot of growth" in her reading skills since the start of the school year and she performed at Level R on a December 2019 Fountas and Pinnell reading assessment, which was on grade level (id.). However, the teacher indicated that the student struggled to come up with a precise idea to answer a question about a text when doing multiple choice questions, because she lacked understanding of the deeper meaning of longer texts (id.) With regard to writing, the teacher reported that the student was approaching expectations (id.). The student was "able to find evidence to support an idea to answer a question in response to literature" but struggled to be "precise in her language when expressing her ideas" (id.). The teacher explained that the student often struggled to find the "right vocabulary to express her ideas" but benefitted from rereading the question, reminders to "look back in the text," and checking her work (id.). With regard to math, the teacher indicated that the student was exceeding expectations (Dist. Ex. 10 at p. 2). Specifically, the student had "shown mastery of concepts such as multiplication and division of double and triple digit numbers" as well as mastery of the use of the standard algorithm for addition and subtraction, and often checked her work with a second strategy for precision (id.). The teacher reported that the student struggled with practicing her "minute math" facts and needed "to practice more at home to increase her speed and accuracy" for basic operations (id.). The student was consistently able to determine what operations were needed to solve word problems (id.).

The district's "Ineligible for Special Education Services" document reflected the results of the CSE evaluation and the report from the student's teacher (compare Dist. Ex. 12 at pp. 1-2, with Parent Ex. C and Dist. Exs. 8-11). In addition, the ineligibility determination indicated that the student had grown a lot in math and was able to apply the strategies she had learned in small group settings to her independent work (Dist. Ex. 12 at p. 2). The document further indicated that the student was able to push through challenges without getting frustrated or giving up which was something the student had worked on since the beginning of the school year (Dist. Ex. 12 at p. 2). The ineligibility document indicated that the student had absorbed many of the strategies that the class worked on in small groups such as picturing what was happening in a problem to show understanding of the action, making a labeled plan to show understanding of the numbers in a word

problem, and going back to the text to find an idea before answering questions about a piece of literature (Dist. Ex. 12 at p. 3).

The information before the January 2020 CSE showed that the student's overall cognitive abilities were within the average range; she was meeting expectations in reading and exceeding expectations in math; and by teacher report, did not have significant problems with attending or anxiety at school (Parent Ex. C; Dist. Exs. 10 at pp. 1-3; 11 at pp. 2-3, 7, 12, 13-15, 18-19, 23). Teacher responses on the BASC-3 indicated that the student sometimes had a short attention span, was easily distracted, and had trouble concentrating but also indicated that she maintained a level of attention similar to others her age and did not have any unusual difficulty comprehending or completing schoolwork (Dist. Ex. 11 at pp. 7, 23). In addition, the teacher's responses suggested that the student displayed relatively few anxiety-based behaviors compared to others her age (id. at p. 7).

In their closing brief, parent's counsel suggested that the student would qualify as a child with a disability under the classification of other health impaired, because she had reportedly been diagnosed with ADHD (IHO Ex. VI at p. 8). The parent first informed the charter school that the student was diagnosed with ADHD and anxiety in October 2019, however there is no documentation in the hearing record which confirms this diagnosis (Tr. pp. 27, 30, 44; Dist. Ex. 8 at p. 1). Although the results of the BASC-3 Parent Rating Scales yielded at-risk or clinically significant scores in most areas assessed (Parent Ex. C at pp. 4-6, 9), the results of the BASC-3 Teacher Rating Scales yielded average scores in all areas assessed, and indicated that the responses suggested the absence of a clinical syndrome associated with attention problems (Dist. Ex. 11 at pp. 3, 10, 12-14). In addition, the January 2020 teacher report and classroom observation also indicated that the student generally exhibited age appropriate social/emotional development and behavior in the classroom setting (Dist. Exs. 9; 10).

Considering the overall information before 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, 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 learning disability on the basis of her ADHD diagnosis or weakness in working memory, 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]). At the time of the January 2020 CSE meeting, the student achieved scores on standardized testing that were primarily within the average range of academic functioning.

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 January 2020 CSE correctly determined that the student did not have an educational disability and was not eligible for special education services at the time of the CSE meeting. At the time of the CSE's determination, the evidence did not show that the student required 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"]).

When examining the evidence, the IHO was required to examine the CSE's determination based upon a prospective analysis, and based upon the evidence before the CSE, the IHO did not err in confirming the CSE's determination in January 2020 and, as a result that the district did not deny the student a FAPE. While the parent put forth additional evidence that post-dated the CSE meeting (*i.e.* the Huntington Learning Center reports or third trimester performance in the new charter school), the CSE was not chargeable with reviewing that information. If she wishes, the parent remains free to provide that information for the CSE's consideration in the first instance.

D. Independent Educational Evaluation

The IHO denied the parent's request for a neuropsychological IEE upon a finding that the district's evaluations were appropriate.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (*see* 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; *see* 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; *see* K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; *see* Letter to Carroll, 68 IDELR 279 [OSEP 2016]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

Additionally, it is within an IHO's authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Roberts, 2016 WL 6831122, at *7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO "is permitted, and in some cases

required, to order an [IEE] at public expense"], on reconsideration in part, Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11, 2018]; Lyons v. Lower Merriion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010] [noting that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *9 n.9 [D.R.I. Jan. 14, 2014] [acknowledging opinion that the regulation empowers hearing officers to solicit independent expert opinions but disagreeing that the regulation gives an IHO "the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1st Cir. 2014]).

Since the adequacy of the CSE's evaluation was first raised in the parent's due process complaint that initiated this proceeding, there was no need for the district to commence a separate impartial hearing to establish that its evaluation was appropriate (IHO Decision at p. 23). Having determined in this proceeding that the CSE's evaluation of the student was adequate to support its determination that the student was not eligible for special education at the time of the January 2020 meeting, the parent is not entitled to an independent neuropsychological evaluation at public expense (IHO Decision at p. 23).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district did not violate child find and did not deny the student a FAPE during the school years at issue, the necessary inquiry is at an end.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
April 12, 2021**

**JUSTYN P. BATES
STATE REVIEW OFFICER**